

Spain, Constitutional Court, nº 177/2015, 22 July 2015

Deciding bodies and decisions

Spain, Constitutional Court, nº 177/2015, 22 July 2015

Area of law

Freedom of expression - hate speech

Subject matter

Which is the balance between freedom of expression and the protection of the honour and integrity of public institutions?

Can a insult to public institutions be qualified as hate speech? Under which conditions?

Summary Facts Of The Case

In September 2007, while the King was on an official visit to Girona, the applicants set fire, during a public demonstration, to a large photograph of the royal couple which they had placed upside-down.

As a result, they were sentenced to 15 months' imprisonment for insult to the Crown. The judge subsequently replaced that penalty with a fine of 2,700 euros each but ruled that, in the event of failure to pay the fine in whole or in part, the applicants would have to serve the prison term. That judgment was upheld by the Audiencia Nacional on 5 December 2008. When the judgment became final the applicants paid the fine.

However, they lodged an individual appeal ("recurso de amparo") with the Constitutional Court.

The Spanish Constitutional Court upheld the interpretation of inferior courts regarding the qualification of the facts as a criminal offence –injury or insult to the Crown- in application of article 490.3 of the Spanish Criminal Code. The conduct of the applicants consisting of setting fire to a large photograph of the King, which also was placed upside-down, was not a legitimate form of freedom of expression according to the Spanish Constitutional Court.

The Court reiterates that freedom of expression should be balance with other rights, especially the right to honour and, in this case, the protection of the integrity of public institutions. In this balancing, freedom of expression is paramount because of its relevance for a democratic society. However, freedom of expression is not absolute. Setting fire to a photograph of the King may qualify as a symbolic speech which express political ideas and, therefore, in principle, freedom of expression is applicable. However, the circumstances of the case led the Spanish Constitutional Court to determine that the conduct of the applicants incorporated violence, intolerance and hate. The Spanish Constitutional Court qualified the acts of the applicants as an example of a hate speech/crime, calling for violence and disturbs. Thus, freedom of expression does not cover the acts of the applicants.

After the decision of the Constitutional Court, the applicants presented a complaint for a violation

of their freedom of expression right before the ECtHR.

In the case *Stern Taulats and Roura Capellera*, judgment of the European Court of Human Rights of 13 March 2018, the Strasbourg Court condemned Spain for a violation of article 10 of the ECHR. The ECtHR specially rejected the use of the hate speech/crime argument by the Spanish Constitutional Court.

In analysing the context in which the facts occurred, the ECtHR determined that the setting fire of the photograph placed upside-down was a political critique to the institution of the monarchy, as well as its symbolic representation of the Spanish state as an oppressor of the independence movement of Catalonia. This political critique should be protected by the freedom of expression. From the context, the acts occurred after a public demonstration, cannot be inferred the incitement to hatred or violence. The conduct of the applicants can be qualified as a “performance” expressing political ideas in a debate of a public interest, i.e. the role of the monarchy and the independence movement in Catalonia.

For all of these, national authorities interfered in the right to freedom of expression of the applicants and this interference was not necessary in a democratic society.

Relation to the scope of the Charter

The Charter was not invoked in national proceedings and was not taken into account by the Spanish Constitutional Court. Council Framework Decision 2008/913/JHA of 28 November 2008 was not mentioned in national proceedings and, therefore, the Charter was not conceived as an applicable instrument.

It seems difficult to find a link between the facts of the case and the Council Framework Decision. The case is not related to the discriminatory grounds which is based the Decision: race, colour, religion, descent or national or ethnic origin. The facts of the case are related to a speech or conducts connected to a political ideology or beliefs –critique to the Crown and the Spanish State-, without this xenophobic or racism connections. Therefore, the Charter is not applicable as well.

Despite the criticism of the ECtHR in *Stern Taulats*, the Spanish Constitutional Court expressly qualified the facts of the case as a hate speech or hate crime. The own Constitutional Court brings to the case the hate speech/crime discourse. In this context, the Court did not refer to the Council Framework Decision or the Charter for justifying its decision. EU law and the Charter, with the importance of the Council Framework Decision in this matter, were ignored by the Spanish Constitutional Court.
