Free speech and its limits

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This article reviews the regulatory status of the freedom of expression or free speech in the constitutional, legal and jurisprudential sphere in comparative law, sufficiently describing the doctrine of the European Court of Human Rights and of the Spanish Constitutional Court regarding this freedom. Within this doctrine, emphasis is placed on the fundamental connection between free speech and democratic society and the need to interpret the limits to this freedom in a restrictive manner. Based on this, the article analyses some specific areas of possible clashes between the freedom of expression and other rights. To begin with, it studies where the limit lies to ensure that opinions of a political nature cannot be considered harmful or slanderous and, in this area, the article also refers to playing with the freedom of artistic creation in cases of political criticism. To end, it studies how we should proceed in the event of exercising freedom of expression (artistic or not) when thoughts, ideas or opinions are disseminated that contain a direct or indirect criticism of non-political themes of general interest, analysing the limit supposed by prohibiting any socalled "discourse of hate" and insisting on the importance of the need for there to be incitement to hate on the part of the person expressing his or herself.

Keywords

Free speech, freedom of expression, freedom of artistic creation, essential content of laws, limit to law, right to honour, public figure, United States Supreme Court, Spanish Constitutional Court, European Court of Human Rights, United States Federal Constitution, European treaty on human rights, 1978 Spanish Constitution

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The recognition of freedom of expression or free speech was one of the first victories of the declarations of rights. A paradigm of this distant recognition was the incorporation in the First Amendment of the United States Federal Constitution, in 1791, specifically containing the protection of free speech and of the press.

A long time has passed since then but two of the most outstanding characteristics of this freedom have remained almost intact: its social relevance and the complexity of delimiting this. On the other hand, transformations in social and cultural contexts have led to its limits being formed. All these circumstances, early recognition, relevance and complex delimitation, as well as the arrival of modern societies, have meant that we are now faced with one of the freedoms most frequently tackled in the doctrinal and jurisprudential sphere and perhaps also one of the most debated in society. And, at the same time, we might say that we are facing one of the most shifting and adaptable freedoms recognised today in our catalogues of rights.

One of the most significant times in this evolution has been the recognition of the right to information as an separate right from free speech. This separation, not always recognised explicitly in constitutional texts, became inevitable with the appearance of the democratic state, when the creation of free public opinion was vital to enable participation in democratic debate. The addressee of expression-information became a relevant subject around which the right to information had to be conformed.

It's true that, very often, the concepts of expression and information are difficult to separate, given that the fundamental distinction between both lies in whether opinions or facts are being transmitted. It is evident that opinions and facts are sometimes related, so that an evaluation has to be made as to which of the two prevail, taking into account the context and purpose of the message.[1] However, in spite of the difficulty of distinguishing sometimes between ex-

pression and information, the more or less autonomous conception of the right to information means that, currently, we must consider that free speech concentrates its specific and differentiated sphere on the freedom of all individuals to express their thoughts, ideas and opinions freely without any outside interference. Moreover, neither does free speech have to comply with the requirement of truth, which is required by the right to information, so that the protected sphere of free speech is broader than that of information.[2]

The First Amendment of the Federal Constitution of the United States expresses itself in these terms[3] and, along the same lines, so does article 10 of the European Treaty to protect human rights and fundamental public freedoms (passed in 1950),[4] and section *a* of article 20.1 of the current Spanish Constitution (from 1978).[5]

Without doubt, and due to its relative youth, this last constitutional precept is the one that contains the most modern version of freedom of expression or free speech, to the point that not only does it recognise the right to information as separate but also creates an autonomous space for the freedom of literary, artistic, scientific and technical production and creation in section *b* of the same article 20.1. The specific aim of this section is to protect these freedoms from outside interference in the creative process itself and, although they are closely related to the freedom of expression, it should be noted that this constitutional precept intended to express this specifically and wished to recognise it explicitly.[6]

And these are the reference regulations available to us regarding the content of free speech or freedom of expression. Certainly, there is no regulatory development of these provisions in constitutions and treaties that details the specific place that must be given to this freedom or, in other words, which thoughts, ideas or opinions are sheltered under the umbrella of the protection of free speech via constitution or treaty.

What is the reason for this lack of regulatory development, this absence of legal or statutory regulation? To begin with, the difficulty involved in regulating freedom of expression beyond the description already given in the aforementioned regulatory texts is obvious, these texts fundamentally recognising the right. But, above all, the fact that we do not have regulations that legally specify these precepts is due to the fact that, traditionally, it has been considered counterproductive to pass regulatory laws for this freedom because, in practice, this would mean limiting it. The only exception lies in penal laws (of minimal intervention) which, as a general rule, are limited to preventing any offence or slander from being incurred with regard to third parties.

Beyond these arguments, there's another we must also bear in mind. We have already mentioned the necessary adaptation of free speech to existing social and cultural circumstances, in short, to the context in which it is exercised. Certainly, it is not the same to express certain opinions, thoughts or ideas in one geographical place or

1 An explanation of the distinction between freedom of expression and a right to information can be found in BASTIDA, F. *El régimen jurídico de la comunicación social*. Madrid: Institute of Economic Studies, 1994, page 7 and sub. On Spanish and European jurisprudence that insists on the difference between opinion and fact, see the Lingens case, 8 July 1986, and the rulings of the Spanish Constitutional Court (STCs) 6/1988, 4/1996 and 192/1999. On the difficulty in distinguishing between freedom of expression and the right to information and the consequences of this difficulty, see VILLAVERDE, I. *Estado democrático e información: el derecho a ser informado*. Oviedo: General Government of the Principality of Asturias, 1994, page 225 and sub.

2 Along these lines, see STC 107/1988.

3 The wording of the First Amendment is as follows: “Congress shall make no law […] abridging the freedom of speech, or of the press”.

4 Article 10.1 of the Treaty says: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions […] without interference by public authority”.

5 According to this precept, the Constitution recognises and protects the right "to freely express and disseminate thoughts, ideas and opinions by means of words, writing or any other means of reproduction”.

6 In spite of the fact that article 10 of the ECHR does not independently contain this freedom, there are sentences by the ECHR that do recognise a separate place for it. See, for example, the case of Müller and others v. Switzerland, 24 May 1988.

another, in a society with certain customs or in another, regarding one specific group of people or another. This sort of 'flexibility' with which the specific content of expressions that may be covered by free speech must be interpreted does not go well with detailed legal regulations concerning its limits. Quite the opposite, free speech seems destined to necessary interpretation by jurisprudence that, case by case, can take into account the context in which the specific thought, idea or opinion has been expressed. That is why we find this freedom broadly configured in many sentences by the highest jurisdictional bodies.[7] And, in these very sentences, the need is explained to take into account the context in which such expressions are emitted.[8]

For this reason, we should review the jurisprudence that has directly tackled the juridical configuration of free speech based on specific cases that, throughout the decades, have been presented before the courts. This jurisdictional doctrine should provide us with the measure of the configuration of free speech. As we have seen, both the regulations of the Council of Europe and Spanish law have drunk from spring of the North American Constitution, as has the jurisprudence of the European Court of Human Rights and that of the Spanish Constitutional Court. For this reason, below we will refer to the jurisprudence of these last two courts, always bearing in mind that, in the case of European Court jurisprudence, only minimal common protection has been established for the rights that must be in force in all countries signing the European Treaty on human rights and public freedoms.

One of the main threads in the jurisprudential doctrine of these courts has been that of always starting with the close relationship between free speech and the democratic state. It is difficult to find a sentence by these courts on this specific freedom that does not start by insisting on this connection, according to which free speech constitutes one of the essential elements for democratic society and one of the primordial conditions for it to progress.[9] We may therefore deduce that free speech is not only a right to freedom, as initially configured, i.e. a freedom that allows us to claim the non-interference of others when it is exercised, but that it also has a significant institutional dimension: beyond the importance it may have for the person expressing the thought, idea or opinion, and the guarantee of non-interference that may be claimed, the exercising of the freedom of expression or free speech is valuable in itself for democratic society as a whole.

And, when we speak of free speech as an essential freedom for a democratic society to exist, we are not only referring to expressions of a political nature but also to another kind of content. This freedom guarantees the existence of a democratic society where literature, art, science and technology, in the terms of section *b* of article 20.1 of the Spanish Constitution, must be able to be developed without impediment. Along the same lines as our Constitution, the European Court of Human Rights has maintained that those who believe, interpret, propagate or display their works of art contribute to the exchange of ideas and opinions that is essential in a democratic society.[10] This is of prime importance because the explicit recognition of these expressions in constitutional and jurisprudential terms means that they are given a degree of protection similar to opinions of a political nature, helping to shape a democratic society.[11]

7 A good selection of this jurisprudential configuration in the area of free speech in the United States, the Council of Europe and Spain can be found, respectively, in NIMMER, M. *Freedom of speech. A treatise on the theory of the first amendment.* New York: Matthew Bender, 1987; FERNÁNDEZ SEGADO, F. "La libertad de expresión en la doctrina del Tribunal Europeo de Derechos Humanos". In: *Revista de Estudios Políticos*, no. 70, 1990, pages 93-124; BASTIDA, F.; VILLAVERDE, I. *Libertades de expresión e información y medios de comunicación. Prontuario de jurisprudencia constitucional 1981-1998*. Pamplona: Cuader-nos Aranzadi del Tribunal Constitucional 1, Aranzadi, 1998.

8 See the case Verein Alternatives Lokalradio Bern and others v. Switzerland, 16 October 1986, and STC 20/1990, FJ 1.

9 Apart from the many sentences containing this idea, the reference sentences are Handyside v. United Kingdom, 7 December 1976, and STC 6/1981, 16 March, FJ 3.

10 The case of Müller v. Switzerland, 24 May 1988.

11 In this respect, we can consult DÍEZ PICAZO, L. M. *Sistema de derechos fundamentales*. Civitas, 2nd edition, 2005, page 323.

This essential function of free speech in the democratic system involves an even more relevant consequence: this freedom's prevalence in terms of preference. Both the European Court and the Spanish Constitutional Court have derived this fundamental repercussion from the position of free speech in treaties and constitutions.[12] It should be noted that this position of prevalence particularly occurs in cases where the thought, opinion or idea contributes, directly or indirectly, to shaping democratic society. However, at this point it's important to note that both courts tend to consider that there is a very broad range of themes that have this same purpose. Obviously, we have already seen that themes related to political life and artistic expression are included within this range.

When does this position of prevalence and preference of free speech come about? When this freedom enters into conflict with other legal rights or values.[13] Because, in effect, free speech can harm other legally protected areas and, as we know, there may be prevalent rights but there are no absolute rights and, therefore, free speech also has its limits.

Although clashes can occur between this freedom in many areas, both the European Treaty and the Spanish Constitution establish a series of possible limitations to free speech; i.e. they specify those areas that may most easily be harmed by expressing a thought, idea or opinion. Specifically, article 10.2 of the Treaty refers to public safety and order, health, moral or reputation, while the Constitution mentions, in article 20.4, the rights to honour, intimacy and self image, as well as protecting children and young people. Although it's true that not all the possible areas of clashes are cited, it's also true that these may be considered to be particularly susceptible to conflict with free speech.

There is a large number of sentences that refer to cases of clashes between this freedom and the different limiting areas mentioned specifically in the regulations of the treaty and constitution. Each of these areas supposes a different limit to free speech, to a greater or lesser degree. Notwithstanding this, European and Spanish jurisprudence have always insisted that these limits must be interpreted restrictively, precisely because of the prevalent position of the free speech.[14] But this does not suggest an absolute prevalence over other legal rights or values but means that, in the event of a clash, we must weigh up which of the two prevails, taking into account the fact that free speech starts off with a certain advantage due to its social function. In short, we must attempt to maintain the right balance between this freedom and the other legal rights or values, always bearing in mind that free speech is a cornerstone in the system of rights due to its direct connection with the democratic process.[15]

Moreover, the restrictions that may be applied to free speech must not only aim to safeguard the legal rights contained in article 10.2 of the Treaty or article 20.4 of the Spanish Constitution but, according to the European Court of Human Rights and the Constitutional Court, must be necessary restrictive measures in a democratic society. The fact that democratic society itself varies according to circumstances means that it is not possible to standardise clashes between free speech and other legal rights or values. This

12 In the case of the Constitutional Court, this doctrine is made explicit in the sentences, as has been explained. In this respect, see STCs 20/1992 and 240/1992. In the case of the ECHR, this prevalence of expressions that contribute to the existence of a democratic society is not formulated specifically but results from the various specific cases settled by the European Court in its sentences. In this respect, see the cases of Worm, in 1997; Karatas, in 1990; Sunday Times, in 1979; Handyside, in 1976, and Casado Coca, in 1994, where the greater or lesser relevance of the subject with regard to shaping a democratic state leads to greater or lesser protection of free speech.

13 Among many others, STC 214/1991, FJ 6.

14 This necessarily restrictive interpretation, given the prevalent position of free speech, is contained, among others, in the case of *The Sunday Times*, 26 April 1979.

15 The expression “cornerstone/essential foundation” has been used on several occasions by the ECHR, as in the case of Lingens, 8 July 1986, where it was sustained that free speech is the veritable “cornerstone of the principles of democracy and of the human rights protected by the Treaty”).

means we must always weigh up the situation and, in short, leads to a judgement of proportionality that must take into account all the circumstances surrounding the case.[16]

If we look at the deliberations of both courts in their sentences over the years we can draw some conclusions that more clearly delimit the area of free speech. This is the case of opinions concerning public figures regarding their profession, especially when these are politicians exercising their public function. As has been made clear in many sentences,[17] the individual rights of people with a public persona have less resistance to free speech and cede more easily. This can be applied in all its intensity when they are people who occupy public positions precisely because of their connection with the democratic principle: they must accept opinions, even when these are adverse.

In this last sense, both European and Spanish jurisprudence has decided that the requirements of a democratic society mean that free speech protects not only thoughts, ideas or opinions that are favourable or considered inoffensive but also those that oppose, shock or disturb a state or sector of the population.[18] Free speech includes the freedom to criticise, even when this might upset, distress or disgust,[19] so it also protects wrong or dangerous opinions, even those that attack the democratic system itself.[20]

Obviously, and also as reminded by European and constitutional jurisprudence,[21] this does not mean that, given their public office, these people are deprived of their right to honour. And here those offences enter into play that are typified in the Penal Code as “slanderous or offensive”, with very specific profiles defined in penal law, which also takes into account the nature of the public office of the subject to which the opinion is referring.[22] What determines the existence or not of penal liability? Fundamentally, expressions that do are not directly related to the political criticism being made and insulting expressions that add nothing to the key idea one is trying to express.[23]

Based on this doctrine regarding the expression of thoughts, ideas or opinions related to public offices while exercising their function, courts need to decide *ad hoc* whether specific expressions, in the context in which they are emitted, may have a place within public discourse or must be considered as slanderous or offensive. The nature of political criticism of opinion reinforces the position of free speech. However, expressions not directly related to this political criticism or specific insults that are unrelated must be considered as clearly outside free speech's area of protection.

Having reached this point, and still within the so-called political criticism that is protected within the framework of free speech, something should be noted. The importance of the regulatory and jurisprudential recognition that must be given to the freedom of artistic creation has already been emphasised on several occasions. As can be seen, both the Spanish Constitution and the jurisprudence of the European Court of Human Rights have created an area particularly for this manifestation of free speech. This is particularly rele-

16 There are many sentences by the ECHR and the Spanish Constitutional Court that have developed this doctrine. The most outstanding are contained in the bibliographical citations mentioned in the above footnotes regarding the jurisprudential configuration of the freedom of expression in the Council of Europe and in Spain.

17 See the Lingens case, 8 July 1986, and the clarifying STC 134/1999.

18 This constant doctrine can be found in sentences as in the case of De Haes and Gijsels v. Belgium, 24 February 1997.

19 STC 174/2006, 5 June, FJ 4.

20 STC 176/1995, 11 December, FJ 2.

21 See STC 336/1993, FJ 5.

22 This last important point is contained in STC 78/1995.

23 See STC78/1995, FJ 4.

vant for artistic expressions of all kinds that criticise in political terms, such as TV and radio programmes, comedians, comics, etc. Although it's true that they are also subject to the limits of penal laws under the terms described above, they are protected not only explicitly but also especially protected by European and Spanish law and jurisprudence on free speech.

What happens when these artistic expressions do not involve political criticism but criticise other areas of public interest? In this case, these expressions are also fully protected in terms of free speech, specifically by the freedom of artistic creation. However, in spite of its prevalence over other legal rights or values, it will not be as powerful as in the case of political criticism and these expressions also have a limit. How has European and Spanish jurisprudence specified this limit? Stating that free speech does not protect any so-called "discourse of hate", in other words, that developed under terms that suppose a direct incitement of violence against citizens or against specific races or beliefs.[24]

The term *incitement* is of prime importance in this point and this is ratified by other regulatory texts, such as article 22 of the international treaty on civil and political rights, which prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Along these same lines, the recent Decision by the Council of Europe regarding the fight against racism and xenophobia determines that all member countries must punish the public incitement of violence or hatred exercised by means of distributing or disseminating pamphlets, drawings or other material aimed against a group of people or against a member of a group defined by its race, colour, religion, descent or ethnic or national origin.[25] In short, free speech will protect those artistic creations that criticise, even openly, things or people that have public relevance, provided they do not incite hatred. Any restriction to these creations violates free speech.

24 The case of Gündüz v. Turkey, 4 December 2003, and Erbajan v. Turkey, 6 July 2006.

25 It should be noted that article 607.1 of the current Penal Code has been contested before the Constitutional Court because it is felt that it violates the freedom of expression or free speech, since it sanctions that any medium may disseminate ideas or doctrines that deny or justify the crimes of genocide. This objection claims the need for incitation to violence to exist, so that expression is not covered by section *a* of article 20.1 of the Constitution.

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