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EL LENGUAJE SIMBÓLICO Y LA LIBERTAD DE EXPRESIÓN. ESTUDIO COMPARADO DE ESPAÑA, ALEMANIA Y EL TRIBUNAL EUROPEO DE DERECHOS HUMANOS

THE SYMBOLIC SPEECH AND THE FREEDOM OF EXPRESSION. COMPARATIVE STUDY OF SPAIN, GERMANY AND THE EUROPEAN COURT OF HUMAN RIGHTS

Alexander Espinoza¹

Jhenny Rivas²

RESUMEN: El Tribunal Europeo de Derechos Humanos se pronunció recientemente acerca de la sentencia del Tribunal Constitucional en el caso Stern Taulats, declarando que el Estado había infringido el derecho a la libertad de expresión de los demandantes. Haremos uso del esquema del análisis empleado en la sentencia del TEDH, para desarrollar un estudio comparativo de diversos aspectos determinantes del juicio de ponderación entre la libertad de expresión y los bienes jurídicos protegidos por la actuación del estado. Desde el punto de vista del derecho comparado, nos referiremos a la doctrina del Tribunal Europeo de Derechos Humanos y del Tribunal Constitucional español. Finalmente acudiremos al estudio de la jurisprudencia del Tribunal Federal Constitucional de Alemania.

PALABRAS CLAVE: Libertad de expresión, lenguaje simbólico, interés público

ABSTRACT: *The European Court of Human Rights spoke recently about the Constitutional Court's ruling in the Stern Taulats case, stating that the State had violated the right to freedom of expression. We will use the analysis scheme used in the judgement of the ECHR, to develop a study of different aspects determinants of the judgement of weighting between freedom of expression and legal assets protected by the performance of the state. From the point of view of comparative law, we will refer to the doctrine line of the European Court of Human Rights and the Spanish Constitutional Court. Finally we will go to the study of the jurisprudence of the Federal Constitutional Court of Germany.*

KEYWORDS: *Freedom of expression, symbolic speech, public interest*

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¹ Doctor iuris Universität Passau, Germany. Professor at the Autonomous University of Chile, Chile. Talca headquarters. Postal address: Autonomous University of Chile. Talca headquarters. Law School. Floor 5. 5 Poniente 1670, Talca, Chile. Email address: alexander.espinoza@uautonoma.cl

² PhD in Law from the University of Zaragoza, Spain. Professor at the Autonomous University of Chile, Chile. Talca headquarters. Postal address: Autonomous University of Chile. Talca headquarters. Law School. Floor 5. 5 Poniente 1670, Talca, Chile. Email address: jhenny.rivas@uautonoma.cl

1. INTRODUCTION

In the Stern Taulats case, the Spanish Constitutional Court and then the European Court of Human Rights³ ruled on the sentence imposed by the National Court on Messrs. Jaume and Enric, as perpetrators of a crime of insults against the Crown. On the occasion of the institutional visit of S.M. the King to the city of Gerona, Jaume and Enric burned after placing upside down a large photograph of SS. MM. the Kings of Spain in a demonstration that was headed by a banner that said "300 years of Bourbons, 300 years fighting the Spanish occupation", held in protest of the royal visit to the city of Girona, while they were hailed with different shouts by the several dozen people who had gathered in the aforementioned square.

While the Spanish Constitutional Court decided to dismiss the appeal for amparo⁴, the European Court of Human Rights⁵ valued the special importance of expressing an opinion through a symbolic act, characterized by the reduced seriousness of the act itself, compared to its high impact on public opinion. We will also go to the treatment of the subject on the symbolic language in German law.

In this work we will analyze the value of the right to freedom of expression in the democratic state, especially based on the criterion of public interest, even when the fidelity of the citizen to the Constitution is at stake. Another aspect that deserves attention is the one referred to the so-called symbolic language, which is frequently used in the context of public meetings.

We must mention that the ECHR decided not to declare the application inadmissible, by applying art. 17 ECHR, as in other cases, in which the existence of a hate speech was denounced⁶. On the contrary, the Court chose to approach the abuse of

³ STEDH march3, 1 2018 STERN TAULATS Y ROURA CAPELLERA C. ESPAÑA § 25

⁴ STC 177/2015, de 22 of july

⁵ STEDH march 13, 2018 Stern Taulats y Roura Capellera c. España

⁶ The ECHR has declared the application inadmissible, by the application of art. 17 ECHR, in the following cases: SSTEDH of January 11, 1995 UDO WALENDY C GERMANY; of October 18, 1995 HONSIK C AUSTRIA; of June 24, 1996, MARAIS C. FRANCE; September 9, 1998 NACHTMANN C. AUSTRIA; of June 24, 2003 GARAUDY C. FRANCE; December 13, 2005 WITZSCH C. GERMANY

rights test was carried out as part of the substantive considerations⁷. However, we will not develop in this opportunity the issue of abuse of law, which requires specific treatment of the weighting method.

2. THE JURISPRUDENCE OF THE ECHR

2.1. FREEDOM OF OPINION

In the narrated case, the ECHR made a broad interpretation of the scope of protection of the law. He warned that freedom of expression is applicable not only to information or ideas that are received favorably or considered harmless, but also to those that offend, are shocking or disturbing⁸. This criterion has been upheld by the ECtHR⁹, under the argument that only allowing favorable, innocuous, or politically correct opinions would be characteristic of a dictatorial system¹⁰.

The assessment of the right to freedom of expression in the ECHR jurisprudence is carried out based on criteria such as its impact on the democratic state, the dimension of freedom of expression as a political right and the public interest of what is expressed.

For the European Court of Human Rights, freedom of expression constitutes one of the essential foundations of a democratic society, one of the fundamental conditions for its progress and for the fullness of each person¹¹. Based on the principles of pluralism, tolerance and the spirit of openness, the ECHR recognizes an essential role of freedom of expression, warning that without them there is no "democratic society"¹². The Court has shown that one of the main characteristics of democracy lies in the possibility that it offers to solve, through dialogue and without resorting to violence, the problems that a country has to face, even when they annoy them. Democracy is in fact nourished by freedom of

⁷ This scheme has been applied in the following cases: STEDH of September 23, 1998 LEHIDEUX AND ISORNI AGAINST FRANCE; 02 October 2008 LEROY C. FRANCE; January 15, 2009 ORBAN AND OTHERS C. FRANCE

⁸ SSTEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 30; of April 23, 1992 CASTELLS C ESPAÑA § 42

⁹ SSTEDH of December 7, 1976 HANDYSIDE C UNITED KINGDOM § 49; of July 8, 1986, LINGENS C AUSTRIA § 41; of April 26, 1995 PRAGER AND OBERSCHLICK C AUSTRIA § 38; of April 23, 1992 CASTELLS C ESPAÑA § 42

¹⁰ STEDH of July 25, 2001 PERNA AGAINST ITALY § 42

¹¹ SSTEDH of December 7, 1976 HANDYSIDE C. UNITED KINGDOM § 49; of April 23, 1992 CASTELLS C ESPAÑA § 42; June 14, 2016 JIMÉNEZ LOSANTOS C. SPAIN

¹² STEDH of April 23, 1992 CASTELLS C ESPAÑA § 42

expression¹³. The Court has established that Article 10.2 of the Convention does not allow restrictions on freedom of expression in the sphere of political speeches and debates - an area in which freedom of expression is of utmost importance - or in matters of general interest¹⁴.

The ECHR recognizes freedom of expression as the connotation of guaranteeing the circulation of the information that constitutes the basis of political action in a democratic society and provides citizens with the information necessary to create free public opinion¹⁵. The Court has reiterated that, in a democratic society based on the preeminence of Law, political ideas that challenge the established order and whose materialization is defended by peaceful means, must have an appropriate possibility of expressing themselves through the exercise of freedom of association. This is what the values intrinsic to a democratic system such as pluralism, tolerance and social cohesion want¹⁶.

In the narrated case, the ECtHR established that the controversial staging was part of a debate on issues of public interest, namely, the independence of Catalonia, the monarchical form of the State and the criticism of the King as a symbol of the Spanish Nation¹⁷. In this way, the staging orchestrated by the plaintiffs in this case, although it has resulted in the burning of an image, is a form of expression of an opinion in the context of a debate on a matter of public interest, namely, the institution of the monarchy¹⁸.

On previous occasions, the European Court has made it clear that the limits of criticism are broader when they refer to a politician than when it comes to a mere individual. The politician, by the mere fact of launching himself into public life, submits himself to risks that the simple citizen does not have to suffer or bear. This does not mean that his honor can be attacked with impunity: what is said is that the political struggle is harsh and that severe judgments and comments are allowed that, in relation to other media and people, could easily affect the criminal field, which does not happen, or is more difficult to happen, in public life¹⁹.

¹³ STEDH of January 30, 1998 UNIFIED COMMUNIST PARTY OF TURKEY AND OTHER CTURQUIA

¹⁴ STEDH of September 25, 2012 EĞİTİM VE BİLİM EMEKÇİLERİ SENDİKASI C. TURKEY § 69

¹⁵ SSTEDH of April 23, 1992 CASTELLS C ESPAÑA; of April 27, 1995 PIERMONT C FRANCE; of 27 March 1996 GOODWIN C UNITED KINGDOM; February 19, 1998 BOWMAN C UNITED KINGDOM

¹⁶ STEDH of September 25, 2012 EĞİTİM VE BİLİM EMEKÇİLERİ SENDİKASI C. TURKEY § 59

¹⁷ STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 36

¹⁸ STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 39

¹⁹ STEDH of July 8, 1986 LINGENS C AUSTRIA § 5

The politician inevitably and deliberately exposes himself to a careful control of his acts and gestures, both by journalists and by the multitude of citizens, and therefore he has to be more tolerant. Certainly, article 10.2 allows the protection of the fame of others, that is, of everyone. The politician also enjoys this protection, even when he does not act within the framework of his private life, but in this case the demands of this protection must be balanced with the interests of the free discussion of political questions²⁰.

2.2. THE SYMBOLIC LANGUAGE

The narrated acts were interpreted by the ECHR as a form of symbolic language. To justify such an interpretation, the Court took into account the (reduced) seriousness of the event. He observed that the narrated acts did not exceed a degree of provocation allowed for the transmission of a message, in the area protected by freedom of expression. On the contrary, they were part of those provocative behaviors that are used to attract the attention of the media and that in their opinion²¹.

2.2.1. THE INTERPRETATION OF WHAT IS EXPRESSED

In the ECHR's judgment, the events narrated were to be interpreted as the symbolic expression of dissatisfaction and protest²². It is a debate on issues of public interest, namely, the independence of Catalonia, the monarchical form of the State and criticism of the King as a symbol of the Spanish Nation²³.

Regarding these three elements, the Court considered that they are symbolic elements, that they have a clear and obvious relationship with the specific political criticism expressed by the applicants, which concerns the Spanish State and its monarchical form: The effigy of the King of Spain is the symbol of the King as head of the state apparatus, as evidenced by the fact that it is reproduced on coins and stamps, or placed in the emblematic places of public institutions; the use of fire and the reverse positioning of photography express radical rejection or rejection, and both are used as a

²⁰ STEDH of July 8, 1986 LINGENS C AUSTRIA § 42

²¹ STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 38

²² STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 39

²³ STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 36

manifestation of political or other criticism; the size of the photograph seemed destined to guarantee the visibility of the act in question, which took place in a public square²⁴.

Nor could it be considered that the intention of the petitioners was to incite the commission of acts of violence against the person of the King, although the staging would have led to the burning of the image of the State representative²⁵.

On previous occasions, the ECHR has considered that symbolic acts constitute the expression of opinions, within the meaning of Article 10 ECHR. In this way, it has considered that the following acts are protected by freedom of expression: Physically obstructing the hunters who were going to carry out a white partridge hunt, or demonstrating against the prolongation of a highway²⁶; demonstrate against fox hunting, preventing the development of a hunt²⁷. The ECHR has considered that the burning of a flag, as well as the photo of a political representative, is protected under ideological freedom (art. 11 ECHR), as an external manifestation of it²⁸.

The ECHR has also had an opportunity to rule on symbolic clothing, understanding that wearing them would be covered, in principle, by Article 10 ECHR. Such was the case where the Vice President of the Workers' Party acted as a spokesperson for a legal demonstration in Budapest wearing a five-pointed red star on his jacket as a symbol of the international workers' movement. For this reason, he was prosecuted on the grounds that he wore a totalitarian symbol in public. The ECtHR is aware of the fact that the well-known massive human rights violations committed under communism discredited the symbolic value of the red star. However, in the opinion of the Court, it cannot be understood only as the representation of a totalitarian communist regime, as the Government itself has implicitly recognized. It is clear that this star also still symbolizes the international labor movement, fighting for a fairer society, as well as certain legal political parties active in different Member States²⁹.

Hanging dirty clothes on a rope tied to the fence of Parliament has also been seen as a form of expression, of political criticism. The artists indicated that they wanted to "hang the dirty laundry of the nation." The ECtHR recognized that his right to freedom

²⁴ STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 38

²⁵ STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 39

²⁶ STEDH 23 September 1998 STEEL AND OTHERS UNITED KINGDOM

²⁷ STEDH 25 November 1999 HASHMAN AND HARRUP C UNITED KINGDOM

²⁸ STEDH of February 2, 2010 CHRISTIAN DEMOCRAT PARTY OF THE PEOPLE C MOLDAVIA

²⁹ STEDH of July 8, 2008 VAJNAI C HUNGARY § 52

of expression had been violated, given that performance was a form of political expression³⁰.

2.2.2. THE SPEECH OF HATE

Finally, the ECtHR considered that, considered as a whole, the aforementioned act could not be reasonably classified as an incitement to hatred or violence. The incitement to violence cannot be inferred from a joint examination of the elements used for the organization and the context in which the act took place, nor can it be established on the basis of the consequences of the act that, according to the declared facts proven by the Judge, was not accompanied by violent conduct or disturbances to public order³¹.

On other occasions, the ECtHR has taken on the task of delimiting between conduct protected by freedom of expression, on the one hand, and conduct excluded from such protection, due to its classification as hate speech. Among the criteria used, he has referred to the potential impact, that is, the circumstance of whether what is expressed constitutes an exhortation to the use of violence, armed resistance or uprising, or whether it induces hatred, an essential element to take into account, in the opinion of the Court. It is also relevant if what is expressed can favor violence by instilling a deep and irrational hatred towards specific people³².

2.3. PARTIAL CONCLUSIONS

As can be seen, the analysis of the conduct that gave rise to the Stern Taulats case was resolved by the ECHR through a weighting method, in which freedom of expression, broadly interpreted in principle, receives a favorable evaluation, due its importance in a democratic society, as it is a political controversy of general interest. The expression of an opinion through a symbolic act is characterized in these cases by the reduced seriousness of the fact itself, compared to its high impact on public opinion.

Finally, it is noteworthy that a symbolic act can receive different interpretations. Instead of a hate speech, the interpretation made by the ECHR referred to a symbolic

³⁰ STEDH of June 12, 2012 TATÁR Y FÁBER C HUNGARY

³¹ STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 40

³² STEDH of September 25, 2012 EĞİTİM VE BİLİM EMEKÇİLERİ SENDİKASI C. TURKEY § 75; SOTTIAUX (2011) p. 41

expression of dissatisfaction and protest³³. In this sense, too, the general context is taken into account, as well as the assessment derived from the role of expression in democratic society, in political affairs and in the public interest.

3. THE SYMBOLIC LANGUAGE IN SPAIN

In the *Stern Taulats* case, the Constitutional Court decided to dismiss the appeal for *amparo*³⁴. The ruling of the Constitutional Court reiterated its criteria, with respect to the special assessment of the rights to freedom of expression and information and to ideological freedom. However, the aspects that differ from the decision of the ECHR are related to the scope of freedom of expression in political affairs, to the classification of the matter as being in the public interest and to the way of interpreting the content expressed through symbolic language³⁵.

3.1. WIDE INTERPRETATION OF FREEDOM EXPRESSION

In the *Stern Taulats* case, the Constitutional Court reiterated the criterion of broad interpretation of the right to freedom of expression. He recalled that freedom of expression includes freedom of criticism, even when it is unkind and can annoy, disquiet or displease whoever is addressing it, as pluralism, tolerance and the spirit of openness require it, without which there is no democratic society. Thus, freedom of expression is valid not only for the dissemination of ideas or opinions welcomed with favor or considered harmless or indifferent, but also for those that contradict, clash or concern the State or any part of the population³⁶. With this, the Court reiterated the criterion that it had traditionally upheld, echoing the ECtHR judgment of December 7, 1976 ("*Handyside*" case)³⁷.

An example of this is the recognition that the claims, doubts and opinions about the Nazi action regarding the Jews and the concentration camps, however reprehensible or misrepresented - and certainly they are when denying the evidence of history -, are

³³ STEDH March 13, 2018 STERN TAULATS AND ROURA CAPELLERA C. SPAIN § 39

³⁴ STC 177/2015, of July 22

³⁵ STC 177/2015, of July 22 Fj 4

³⁶ STC 177/2015, of July 22, Fj 2

³⁷ SSTC 62/1982, FJ 5, case "A Ver"; 174/2006, of June 5, FJ 4; 235/2007, of November 7, FJ 4; 77/2009, of March 23, FJ 4; 177/2015, of July 22 Fj 2

protected by the right to freedom of expression (art. 20.1 CE), in relation to the right to ideological freedom (art. 16 CE), therefore, regardless of the assessment made of them, only they can be understood for what they are: subjective and interested opinions about historical events³⁸.

Despite the initially described trend, which allowed us to affirm that, under freedom of expression, all kinds of opinions can be expressed, even the most repugnant and execrable,³⁹ however, we must note that the Constitutional Court has taken an important turn in its scheme of control. The Court has made express reference to the controversial doctrine of the ECHR, regarding the abuse of the right, to declare that, a conduct, for being a manifestation of hate speech, which incited violence, through the exaltation of the author of terrorist activities, which cannot be protected within the constitutionally protected content of the right to freedom of expression [art. 20.1 a) CE]⁴⁰. However, as we initially clarified, we will leave this aspect of the controversy aside, to dedicate ourselves especially to the treatment of what is expressed through symbolic language.

3.2. ELEMENTS FOR ASSESSMENT

3.2.1. FREEDOM OF EXPRESSION IN THE DEMOCRATIC STATE

In the *Stern Taulats* case, the Constitutional Court insisted on highlighting the importance of the right to freedom of expression with respect to democracy, which allows us to make a brief reference to the doctrine it has established in this regard. Freedom of expression favors citizens to access the information necessary for their decisions to be free and well-founded, allows the public powers to be controlled, to propose social, economic or political changes, to express dissent and, ultimately, guarantee the pluralism of opinions⁴¹.

The art. 20 of the Constitution taken as a whole and in its different sections, constitutes a guarantee of free public communication, without which other rights enshrined in the Constitution would be void of real content, representative institutions

³⁸ SSTC 214/1991, of November 11 Fj 8; 235/2007, of November 7 Fj 4

³⁹ CATORA (2015) p. 217

⁴⁰ STC 112/2016, of June 20 Fj 6

⁴¹ LAPORTA SAN MIGUEL (1997) p. 14; VALLDECABRES (2004) p. 331

reduced to hollow forms and the principle completely false. of democratic freedom that art. 1. Section 2 of the Constitution and which is the basis of our legal-political organization⁴².

The guarantee of free public opinion is of special importance since, being a precondition and necessary for the exercise of other rights inherent in the operation of a democratic system, it, in turn, becomes one of the pillars of a society free and democratic. In order for citizens to freely form their opinions and participate responsibly in public affairs, they must also be widely informed so that they can weigh diverse and even conflicting opinions⁴³.

The right to freedom of expression has a transcendent or objective dimension, since through its exercise the formation of both public opinion and an active citizenship is fostered, without whose critical vitality neither democracy nor democracy is possible. nor political pluralism⁴⁴.

3.2.2. FREEDOM OF EXPRESSION AS A POLITICAL RIGHT

The Constitutional Court has warned that, from the perspective of the right to freedom of expression, the criticism of the representatives of an institution or holders of public office, as unpleasant, acrid or disturbing as they may be, are only a reflection of the political participation of citizens⁴⁵. The democratic rule of law is also carried out through the guarantee of an open, free and plural public communication process in which those who are attributed the administration of public power are subject to scrutiny by all citizens.⁴⁶

From another point of view, the Constitutional Court has made reference to the doctrine of the European Court of Human Rights, regarding the central meaning of political discourse, particularly protected when exercised by a political representative. Freedom of expression acquires particularly valuable margins when it is exercised by a person chosen by the people, who represents their constituents, points out their concerns and defends their interests, being "allowed to resort to a certain dose of exaggeration, or

⁴² STC 12/1982, of March 31 Fj 3

⁴³ SSTC 12/1982, of March 31 Fj 3; 104/1986, of July 17 Fj 5; 159/1986, of December 16 Fj 6; of July 22, 2015, recourse of amparo no. 956-2009 Fj 2

⁴⁴ STC 65/2015, of April 13, 2015 Fj 3

⁴⁵ STC of July 22, 2015, recourse of amparo no. 956-2009 Fj 3

⁴⁶ STC 101/2003, of June 2 Fj 3

even provocation, that is to say, of being somewhat immoderate in their observations ”, so in that context the control should be stricter. Notwithstanding which, the subject intervening in the public debate of general interest must take into consideration certain limits and, singularly, respect the dignity, reputation and rights of third parties⁴⁷.

3.2.3. CRITICISMS AGAINST PUBLIC OFFICIALS

In the interpretation of art. 490.3 of the Penal Code (CP), carried out by the Constitutional Court in the Stern Taulats case, stated that it does not imply that the King, as the highest representative of the State and symbol of his unity, is excluded from criticism, especially by those who They legitimately reject the constitutional structures of the State, including the monarchical regime. And this despite the neutrality position that the monarch occupies in the political debate and the fact that he is not subject to responsibility, since such circumstances cannot pose an obstacle to free debate on his possible institutional or even symbolic responsibility within the limits of respect for your reputation⁴⁸.

With this, the Court reiterates its doctrine, according to which public officials have the burden of tolerating criticism of their conduct regarding the activity in the exercise of public office⁴⁹. This is so because at the base of any democratic society is the formation of a free and plural public opinion that, in principle and except for exceptional limitations, can have access to information that affects the operation of public institutions⁵⁰.

To determine whether the exercise of freedom of information and expression operates or not as an exclusive cause of criminality or illegality, it depends on whether its purpose tends to a better functioning of the public powers and to avoid irregularities or dysfunctions whose knowledge may prevent harmful conduct. for society⁵¹.

3.2.4. THE ELECTED REPRESENTATIVES

⁴⁷ With more references, STC 177/2015, of July 22, Fj 2

⁴⁸ STC 177/2015, of July 22 Fj 3, with more references

⁴⁹ STC 101/2003, of June 2 Fj 3; STC 19/1996, of February 12, Fj 3; STC 65/2015, of April 13 Fj 4

⁵⁰ STC 19/1996, of February 12 Fj 3

⁵¹ STC 19/1996, of February 12 Fj 2

A determining aspect of the assessment made by the Constitutional Court in the Stern Taulats case is the reference to the judgment of the European Court of Human Rights of March 15, 2011 (*Otegui v. Spain* case). Let us remember that on that occasion the ECtHR warned that freedom of expression, precious to anyone, is very particularly so for a chosen one of the people: it represents its voters, exposes its concerns and defends its interests. Consequently, in the case of interference with the freedom of expression of an opposition parliamentarian, the strictest control is required⁵².

However, the Constitutional Court made an exclusive interpretation of such criteria. It noted that the appellants in the Stern Taulats case were not elected representatives, nor were they part of any parliamentary group. We do not share this position. The special value of freedom of expression in the political sphere would be void of content, if it were an exclusive privilege of an elected representative or a parliamentarian. With this, the minimum protection standard established by the ECHR would be reverted into an instrument of political exclusion of citizens, which is precisely opposed to the fundamentals of freedom of expression.

3.3. PUBLIC INTEREST AND FREEDOM OF EXPRESSION

The Constitutional Court has recognized freedom of expression a preferential position, due to its constitutional dimension, when it is exercised in connection with matters that are of general interest and contribute to the formation of a free and plural public opinion⁵³.

By argument to the contrary, the phrases that are formally insulting or those that lack public interest and, therefore, are unnecessary to the essence of the thought, idea or opinion that is expressed, will be devoid of the justification value of the freedom of expression⁵⁴.

The preponderant value of public liberties of art. 20 of the Constitution, insofar as it is based on the function that they have of guaranteeing a free public opinion indispensable for the effective realization of political pluralism, can only be protected when freedoms are exercised in connection with matters that are of general interest by the matters to which they refer and by the people who intervene in them and contribute,

⁵² STEDH of April 23, 1992 CASTELLS C ESPAÑA § 42

⁵³ STC 185/2002, of October 14 Fj 3

⁵⁴ STC 107/1988, of June 8 FJ 2

consequently, to the formation of public opinion, thus reaching their highest level of justifying effectiveness against the right to honor, which is weakened, proportionally, as external limit of the freedoms of expression and information, insofar as their holders are public persons, exercise public functions or are involved in matters of public relevance, thereby obliged to bear a certain risk that their subjective personality rights are affected by opinions or information of general interest, as required by political pluralism, tolerance and the spirit of openness, without which there is no democratic society⁵⁵.

In the *Stern Taulats* case, the Constitutional Court rejected the conduct demonstrated by burning the SS photograph. MM. The Kings of Spain were referring to a matter of public interest, which was able to redirect the burning of the portraits to the context of political criticism that the plaintiffs invoked⁵⁶. We do not share this position.

All the exposed elements, used by the doctrine of the Constitutional Court for the valuation of the freedom of expression, based on the criterion of the public interest, can be appreciated in the *Stern Taulats* case. Indeed, as we will see later, in the content expressed with symbolic behavior, the message that serves the essence of thought, idea or opinion cannot be excluded. According to the subject, the matter debated constitutes a topic of general interest. Additionally, those affected are public persons, because they exercise public functions.

3.4. FREEDOM OF EXPRESSION AND THE DEFENSE OF THE CONSTITUTION

In the *Stern Taulats* case, the Constitutional Court reiterated that there is no place in the Spanish constitutional system for a model of militant democracy, that is, a model in which not only respect but positive adherence to the law is imposed and, in first, to the Constitution. The value of pluralism and the need for the free exchange of ideas as a substratum of the representative democratic system impede any activity of the public powers tending to control, select, or seriously determine the mere public circulation of ideas or doctrines⁵⁷.

Let us remember that article 16 of the Spanish Constitution guarantees the ideological, religious and cult freedom of individuals and communities without more

⁵⁵ STC 107/1988, of June 8 Fj 2

⁵⁶ STC 177/2015, of July 22 Fj 4

⁵⁷ STC 177/2015, of July 22, Fj 2

limitation, in their manifestations, than that necessary for the maintenance of public order protected by law. According to the Constitutional Court, ideological freedom includes both the internal dimension of the right to adopt a certain intellectual position before life and what concerns it and to represent or judge reality according to personal convictions, as well as an external dimension of *agere licere*, with According to their own ideas without suffering sanction or demerit or suffering the compulsion or interference of the public powers⁵⁸.

Without the ideological freedom enshrined in art. 16.1 of the Constitution, the higher values of the legal system that are advocated in art. 1.1 of the same to constitute the social and democratic State of law that is established in said precept. In order for freedom, justice, equality and political pluralism to be an effective reality and not the theoretical statement of ideal principles, it is necessary that when regulating behaviors and, therefore, prosecuting them, those higher values are respected without which the democratic regime established in the 1978 Constitution cannot be developed⁵⁹.

3.5. FREEDOM OF EXPRESSION AND THE RIGHT OF REUNION

3.5.1. THE INSTRUMENTAL NATURE

In Spanish judicial practice, the instrumental nature of the right of assembly has been established repeatedly, with respect to freedom of expression. The right of assembly is a collective manifestation of freedom of expression exercised through a transitory association, which operates as an instrumental technique put at the service of the exchange or exhibition of ideas, the defense of interests or the publicity of problems or claims, constituting, therefore, a channel of the participatory democratic principle, insofar as it operates as an instrumental technique at the service of the exchange or exhibition of ideas, the defense of interests or the publicity of problems or claims⁶⁰. In fact, for many social groups this right is, in practice, one of the few means available to them to publicly express their ideas and demands⁶¹. Also in Spanish doctrine the political content of

⁵⁸ SSTC 120/1992, of June 27, FJ 8; 177/2015, of July 22 FJ 5

⁵⁹ STC 20/1990, of February 15 FJ 3

⁶⁰ STC 85/1988, of April 28 FJ 2; STC 42/2000, of February 14, FJ 2; STC 38/2009, of February 9, FJ 2; STC 170/2008, of December 15 FJ 3

⁶¹ STC 66/1995 FJ 3; STC 38/2009, of February 9, FJ 2; STC 170/2008, of December 15 FJ 3 LÓPEZ (1995) p. 99

freedom of assembly is affirmed, as well as its character as a right to democratic participation⁶².

The principle of political pluralism is strongly linked to the right of freedom of expression, of which the right of assembly is a collective manifestation, this being, like the aforementioned freedom, a right that contributes to the formation and existence of public opinion, in such a way that it becomes a precondition and necessary for the exercise of other rights inherent to the functioning of a democratic system, such as precisely the rights of political participation of citizens⁶³.

The relationship between the rights to assembly and freedom of expression may have an internal character, insofar as the collective manifestation of freedom of expression is an integral element of the right of assembly⁶⁴.

3.5.2. WHAT IS EXPRESSED DURING A MEETING

The Constitutional Court has emphasized that the content expressed during a meeting cannot justify a limitation of this right. The concept of public order with danger for people and goods of art. 21 CE must be interpreted as a “factual situation”, that is, order in the material sense in places of public transit and not as an order synonymous with respect for legal and meta-legal principles and values, since the content of the ideas on the claims that are intended to be expressed and defended through the exercise of this right, it cannot be subject to controls of political opportunity⁶⁵, or to trials in which the system of values that underpin and give cohesion to the social order at a certain historical moment is used as a canon, controls on the content of the protest speech proscribed by the Constitution⁶⁶.

Indeed, when weighing the application of the limit of art. 21.2, public authorities must guarantee the exercise of the right of assembly by everyone in conditions of equality and without any discrimination due to the content of the messages that the promoters of the concentrations intend to transmit, unless that content infringes the law⁶⁷.

⁶² STC 170/2008, of December 15 Fj 3

⁶³ STC 85/1988, of April 28

⁶⁴ STC 66/1995, of May 8, Fj 3; STC 301/2006, of October 23 Fj 2

⁶⁵ STC 193/2011, of December 12 FJ. 3

⁶⁶ STC 66/1995, of May 8, Fj 3; STC 193/2011, of December 12 FJ. 3

⁶⁷ STC 66/1995, of May 8, Fj 3; STC 193/2011, of December 12 FJ. 3

The Supreme Court has interpreted the motto of the call to the concentration: "autrem el Parlament, no deixarem que aprovin retallades (let's stop the Parliament, we will not allow them to approve cuts)", expresses its grammatical meaning, "to stop" is "to stop", "impede" the normal development of the parliamentary function, and also to do so on the occasion of the debate planned for budgetary reforms that, in the opinion of the accused, were going to imply a cut in social rights and public services. This purpose is not obscured by the fact that in a press conference held days before "... two spokesmen for the social movements (declared) that they did not intend to impede the operation of the Parliament but to stop the attack against social rights and public services that meant the budgetary measures to be approved. " No interference causes that factual proclamation for the subsumption judgment. On the one hand, because that statement about the purpose that animated the call is put in the mouth of two unidentified spokesmen, whose participation in the events says nothing the historical judgment. On the other hand, because there is an insurmountable contradiction to affirm that it is not intended to impede the functioning of the Parliament and to add immediately afterwards that what is truly pursued is "... to stop the attack against social rights and public services (...) that they were going to be approved. " And the fact is that it is not possible to avoid the approval of some legislative measures without preventing or hindering the functioning of the parliamentary body in which they are going to be approved⁶⁸.

3.6. THE SYMBOLIC LANGUAGE

The Constitutional Court has recognized that art. 10 The ECHR protects not only the ideas and information that are the object of expression, but also the way in which they are expressed, so that its jurisprudence in relation to such a precept covers the usual forms of expression (oral and written discourse), but also other less obvious expressions, such as the display of symbols or the conduct of behaviors suitable for transmitting opinions, ideas or information⁶⁹.

The Court has established that, although the most genuine forms of expression consist of oral or written manifestations, people can also communicate or express their ideas and opinions through non-verbal conducts, facts or behaviors, which, in such

⁶⁸ STS 812/2015 of March 17 Fj 5G

⁶⁹ STC 177/2015, of July 22 Fj 3

consideration, are also manifestations of the freedom of expression. For this reason, people can also express their ideas and opinions through symbolic speech, or through other expressive behaviors. The significant or expressively innocuous component of certain symbols, attitudes or behaviors will depend, therefore, on the context that integrates the circumstances of the case⁷⁰.

It is not entirely clear whether the analysis of the behaviors described as symbolic language should be framed exclusively in the area of protection of freedom of expression, of ideological freedom⁷¹, or if the right of assembly also applies.

The delimitation between freedom of expression and ideological freedom, guaranteed in art. 16 CE, is carried out in the doctrine, according to the form of its externalization. The manifestations protected by ideological freedom would be those that are not expressed through verbal or written language, but through symbolic language, alluded to by North American jurisprudence⁷².

However, the doctrine of the Constitutional Court seems to reject that possibility. Ideological liberty has been applied by the Constitutional Court in the case of the demanding hunger strike by inmates⁷³; but also in the case of newspaper articles⁷⁴; while in the case of abusive verbal opinions, freedom of expression has been applied⁷⁵. As observed, the Constitutional Court does not delimit the rights to ideological and expression freedom, based on the principle of specialty, but rather applies both rights concurrently, as expressly stated in the case of the statements about the Nazi performance regarding the Jews and the concentration camps⁷⁶.

The concurrent application of both rights has not been used, however, in the sense of the application of a lesser degree of limitation, taking into account that freedom of expression has its limit in respect for the rights recognized in the Constitution, in the precepts of the laws that develop it and, especially, on the right to honor, privacy, self-image and protection of youth and children (art. 20 IV), while ideological freedom can only be limited, when necessary for the maintenance of public order (art. 16 I). The Court has indicated that ideological freedom cannot be used to evade the limits of freedom of expression, but the globalized vision of both rights would compel from that fundamental

⁷⁰ STC STC 177/2015, of July 22 Fj 3

⁷¹ Dissenting private opinion of Judge Doña Encarnación Roca Trías, in STC 177/2015, of July 22

⁷² JIMÉNEZ (2004) p. 145

⁷³ STC 120/1990, of June 27 Fj 10

⁷⁴ STC 20/1990, of February 15

⁷⁵ STC 232/2002, of December 9

⁷⁶ STC 235/2007, of November 7 Fj 4 and 9

right and not understand it simply absorbed by the freedoms of expression and information⁷⁷.

The concurrent application of ideological and expression freedom has been more relevant from the point of view of assessing behavior. Ideological freedom also participates in the preferential value that has been recognized for freedom of expression, based on the conception of fundamental rights as an objective order of values. According to the Constitutional Court, ideological freedom inextricably linked to political pluralism which, as an essential value of the legal system advocated by the Constitution, requires the maximum extent in the exercise of that and, naturally, not only in coincidence with the Constitution and with the rest of the legal system, but also in what is opposed to the values and assets that are enshrined in them⁷⁸. Attendance produces an extension of the scope of the exercise of freedom of expression⁷⁹.

A different interpretation has been upheld by Judge Doña Encarnación Roca Trías, who maintains the exclusive application of the parameters of article 16, according to which ideological freedom can only be limited, when necessary for the maintenance of public order⁸⁰.

3.7. THE INTERPRETATION OF THE EXPRESSED CONTENT

Finally, another aspect in which the ECHR's decision differs from the Constitutional Court ruling lies in the way of interpreting the content expressed through symbolic language⁸¹. In the opinion of the Constitutional Court, the staging of the symbolic act, according to the proven facts, transfers the idea that the Monarchs deserve to be executed, without forgetting also that the gloomy act causes a greater impact in a democratic society, such as the Spanish, which expressly excludes in its Constitution the death penalty (art. 15 CE). He pointed out that, burning in public, in the circumstances described, the photograph or image of a person incites incitement to violence against the

⁷⁷ STC 20/1990, of February 15, Fj 3; Dissenting private opinion of Judge Doña Encarnación Roca Trías, in STC 177/2015, of July 22

⁷⁸ STC 20/1990, of February 15, Fj 5; JIMÉNEZ (2004) p. 144. The doctrine is not uniform regarding the content of ideological freedom. A sector of the doctrine affirms that ideological freedom is not separable from religious freedom: POLO (2005) p. 139. While PERALTA (2012) p. 253, affirms that ideological freedom as freedom of thought is essentially identified with the concept of freedom of conscience that also demands the right to acquire, develop and express one's own convictions in freedom

⁷⁹ STC 105/1990, of June 6 Fj 4

⁸⁰ Dissenting private opinion of Judge Doña Encarnación Roca Trías, in STC 177/2015, of July 22

⁸¹ STC 177/2015, of July 22 Fj 4

person and the institution they represent, fosters feelings of aggressiveness against them and expresses a threat. In short, publicly burning the portrait of the Monarchs is an act not only offensive but also inciting hatred, to the extent that the cremation of their physical image expresses, in a way that is difficult to overcome, that they are deserving of exclusion and hatred. The Court reiterated that the appellants acted at the end of the previous manifestation in a premeditated way. This indicates that the plaintiffs took advantage of the previous meeting to, once concluded, carry out the action described. The absence of spontaneity in the behavior of the plaintiffs is evident, since the burning of the photograph does not arise instantaneously in the context of the demonstration and in line with the criticism of the constitutional model of the State or as an expression of antimonarchical ideology and independentista of the appellants. On the contrary, this act was the result of an activity designed beforehand and aimed at showing the greatest degree of hostility towards the institution of the Crown.

The facts thus exposed categorically endorse the clearly inciting meaning of hatred, since in the historical account of the Judgment relapsed in the instance, expressly accepted by the Court of Appeal, there is no data to support the thesis that the plaintiffs use for the legitimate exercise of the right of criticism towards the monarchical institution. And this is because, apart from the burning of the photograph, they did not utter any expression, discourse, message or opinion from which one can infer a politically articulated censorship or opposition against the Monarchy or the Kings; Plain and simple they acted with the purpose of inciting exclusion using a gloomy staging and with violent connotations.

Finally, the Court deemed it appropriate to address two other important aspects. Firstly, he considered it necessary to warn of the evident risk that the public present would perceive the behavior of the appellants as an incitement to violence and hatred towards the Monarchy and those who represent it. Although there are no public order incidents, the destructive connotation that the burning of the Kings' photograph entails is undeniable and, therefore, such action could provoke among the present violent reactions and “incompatible with a serene social climate and undermine trust in democratic institutions” (STEDH of July 16, 2009, case Feret v. Belgium § 77), or, finally, stoke the feeling of contempt or even hatred towards the Kings and the institution they represent, exposing SS.MM. “At a possible risk of violence” (STEDH of July 8, 1999, case Sürök v. Turkey § 62), since, as the European Court of Human Rights has warned, “hate speech does not

necessarily require a call to such or which act of violence or other criminal act”(STEDH of July 16, 2009, case *Feret v. Belgium* § 73).

3.8. PARTIAL CONCLUSIONS

In the *Stern Taulats* case, the Constitutional Court reiterated its doctrine regarding the broad interpretation of freedom of expression, as well as the criteria for evaluating freedom of expression in the democratic state. However, the Constitutional Court made an exclusive interpretation of the criterion established by the European Court of Human Rights, according to which, freedom of expression, precious to anyone, is very particularly so for a chosen one of the people⁸². According to the Constitutional Court, the fact that the appellants in the *Stern Taulats* case were not elected representatives, nor were they part of any parliamentary group, would be decisive in assessing the exercise of their freedom of expression. We do not share this position. The special value of freedom of expression in the political sphere would be void of content, if it were an exclusive privilege of an elected representative or a parliamentarian. With this, the minimum protection standard established by the ECHR would be reverted into an instrument of political exclusion of citizens, which is precisely opposed to the fundamentals of freedom of expression.

Regarding the criterion of public interest, the Constitutional Court rejected that the conduct demonstrated with the burning of the photograph of SS. MM. The Kings of Spain were referring to a matter of public interest, which turned out to be able to redirect the burning of the portraits to the context of political criticism that the plaintiffs invoke⁸³.

We consider that, on the contrary, all the elements used by the doctrine of the Constitutional Court for the valuation of freedom of expression, based on the criterion of public interest, could be appreciated in the *Stern Taulats* case. Indeed, in the content expressed with symbolic behavior, the message that serves the essence of thought, idea or opinion cannot be excluded. According to the subject, the matter debated constitutes a topic of general interest. Additionally, those affected are public persons, because they exercise public functions.

⁸² STEDH of April 23, 1992 *CASTELLS C ESPAÑA* § 42

⁸³ STC 177/2015, of July 22 Fj 4

Finally, the ECtHR decision differs from the Constitutional Court ruling in the way of interpreting the content expressed through symbolic language⁸⁴.

In the opinion of the Constitutional Court, the staging of the symbolic act, according to the proven facts, transfers the idea that the Monarchs deserve to be executed. To develop this topic, which is decisive in the application of the criminal sanction, we will study the treatment that the German jurisprudence has developed.

4. THE SYMBOLIC LANGUAGE GERMANY

4.1. WIDE INTERPRETATION OF THE RIGHT TO FREEDOM OF OPINION

The notion of opinion is subject to broad interpretation. Precisely, the meaning of freedom of opinion is that it is not subject to a content reservation: Freedom of opinion is applicable to content of all kinds and quality⁸⁵. The opinion includes the points of view, conceptions, convictions, evaluations, judgments, forecasts, and positions in front of any thing or person, including evaluations on other value judgments⁸⁶.

Protection is directed not only at the content of the expression, but also at its form, even controversial or offensive⁸⁷, sharp or hurtful⁸⁸: Regardless of its value, even worthless, dangerous or harmless⁸⁹. Neither are commercial expressions, or simple commercial advertising, insofar as it serves to form opinion⁹⁰. Not only is what is expressed protected, but also the effect it causes or that it pursues on others⁹¹. It also includes emotional expressions⁹², risque expressions, which is exposed in a critical, even biting or controversial way⁹³. The medium used is not relevant, either through “words, writings and images”, or by any other similar form of expression, such as, for example, through a melody with a symbolic meaning, or through the “new media”⁹⁴, provided it is

⁸⁴ STC 177/2015, of July 22 Fj 4

⁸⁵ LOTHAR (2010) p. 155

⁸⁶ WENDT (2000) p. 8

⁸⁷ BVerfGE 93, 266/289 – Soldaten sind Mörder

⁸⁸ BVerfGE 90, 241/247 – Auschwitzlüge

⁸⁹ BVerfGE 124, 300/320 – Homenaje a Rudolf Heß; GRIMM (1995) p. 1698; WENDT, 2000 p. 8

⁹⁰ BVerfGE 102, 347/359 – Schockwerbung I; BVerfGE 107, 275/280 – Schockwerbung II; BVerfG Beschluss vom 05. März 2015 – 1 BvR 3362/14, Abs. 16. Critic of the exclusive public utility of opinion, WENDT (2000) p. 11

⁹¹ BVerfGE 7, 198/210 – Lüth

⁹² BVerfG, 10.03.2016 – 1 BvR 2844/13, Abs. 24

⁹³ Beschluss vom 08. Februar 2017 – 1 BvR 2973/14, Abs. 14

⁹⁴ MAUNZ Y ZIPPELIUS (1998) p. 241

not a form of coercion, in order to print more impact on the position of the subject⁹⁵. Expressions hostile to the Constitution are not excluded from protection, as in the case of the ideas of extreme right supporters⁹⁶.

4.2. ELEMENTS FOR ASSESSMENT

4.2.1. FREEDOM OF OPINION IN THE DEMOCRATIC STATE

The Federal Constitutional Court has established that the fundamental right to freedom of opinion is, as a direct expression of human personality in society, one of the most supreme rights (*un des droits les plus précieux de l'homme*, according to article 11 of the Declaration of Rights of Man and of the Citizen of 1789). It is a constitutive element of the democratic and liberal state order, which enables permanent ideological controversy, the opposition of opinions, which are its natural environment⁹⁷.

Freedom of opinion constitutes an indispensable and fundamental part of the functional elements of a democratic community. For its part, freedom of assembly is understood as the freedom to express a collective opinion, so the same considerations must be transferred to it⁹⁸.

Without freedom of opinion, public opinion could not be generated and the development of plural initiatives and alternatives would not be possible, as well as the “prior formation of political will”; political life would not be public; minority equality of opportunity could not be ensured and the political process would not take place in a free and transparent environment⁹⁹.

4.2.2. FREEDOM OF OPINION AS A POLITICAL RIGHT

The right to freedom of opinion is directly related to the legitimacy of the decisions of the organs of the Public Power, in a democratic State. In Habermas's theory, deliberative democracy presupposes that government officials and bureaucracy are

⁹⁵ MAUNZ Y ZIPPELIUS (1998) p. 241

⁹⁶ VerfG · Beschluss vom 1. Juni 2006 · Az. 1 BvR 150/03, Abs. 21. A different position, MAUNZ AND ZIPPELIUS (1998) p. 246

⁹⁷ BVerfGE 7, 198/208 – Lüth

⁹⁸ BVerfGE 69, 315/344 – Brokdorf; KUNIG, PHILIP (2000) párr. 37

⁹⁹ HESSE (1990) párr. 387, GRIMM (1995) p. 1698

subject to the process of forming opinion and public will¹⁰⁰. Communication and participation rights are conditions not only necessary for electoral processes, but for the existence of a permanent democratic political process, based on fluid communication between civil society and the State¹⁰¹.

The condition of participatory procedure goes back to Kant's legal philosophy: the idea of the general will constitutes the budget that distinguishes a republican government from a despotic one. "Every legislator is obliged to dictate the laws, in such a way that it would have derived from the united will of all the people." A law would be unfair if the people "had no chance to grant their approval."¹⁰²

4.3. FREEDOM OF OPINION AND THE RIGHT OF ASSEMBLY

Freedom of opinion is closely related to the right of assembly¹⁰³. In certain cases, the right to freedom of opinion constitutes the control parameter of the constitutionality of measures of the Public Power, dictated on the occasion of meetings. The right of assembly is applicable as a control parameter, in cases where an action of the Public Power has affected the freedom to meet in a place, with other people, in order to carry out a debate or a collective declaration, aimed at participating in the formation of public opinion. But, in cases where the limitation is related to the content and form of the expression of opinion, it is controversial whether the measure should be revised based on the right to freedom of opinion, even when the opinion is expressed in a manifestation or through it¹⁰⁴.

In order to solve the problem posed, the scope of protection of the rights to freedom of opinion and assembly must first be distinguished. Unlike freedom of opinion, the right to freedom of assembly refers to the specific conflict in a spatial sense, which derives from the fact that meetings demand the use of space and are a potential cause of impediments to third parties¹⁰⁵.

The situation presented constitutes a case of competition for fundamental rights, since the conduct is included in several fundamental rights. To solve it, the specialty

¹⁰⁰ GÜNTHER (2007) p. 54

¹⁰¹ NAVAS (2010) p. 2

¹⁰² LIEBER (2007) p. 61

¹⁰³ HESSE (1990) p. 404

¹⁰⁴ BVerfGE 104, 92/103 - Seated Locks III; BVerfGE 111, 147/154 - Ban on the meeting due to the content expressed

¹⁰⁵ LOTHAR (2010) p. 156

principle is applicable first. In the event that a specialty relationship does not arise between them, then protection is determined in accordance with both rights. If the protective effect is of a different degree, a double protection would be produced, in the sense that the affectation must be justified according to the strictest degree of protection¹⁰⁶.

Another element to determine the applicable right of liberty is the nature of the protected legal asset. If the affectation of the right of freedom is based on the protection of personality rights (honor, reputation, own image, private life, etc.) or other similar legal assets, then the application of freedom of opinion is useful, while the right manifestation is a valid parameter in the case of damages to public order. In more complex cases, it is possible to find mixed elements, making it possible to carry out a double analysis.

For this reason, in the event of the concurrence of both rights, the regulation referring to the legitimate limits of freedom of opinion is applicable, since article 5 apart 2 of the Basic Law establishes stricter limits¹⁰⁷. The limitations to the freedom of opinion established in the general laws and, especially, in the penal laws (for example in §§ 86, 86 a, 130 of the Penal Code), establish clear and precise elements, while the notion "public order", which serves as a limit to the freedom of assembly, is characterized by the reference to unwritten rules, which are considered essential conditions of an orderly life, in accordance with the prevailing social and ethical convictions. For its part, freedom of opinion, in a pluralistic society, is a right that also protects minorities, so it cannot be subject to the dominant social and ethical convictions¹⁰⁸.

4.4. PEACE AS A LEGITIMATE LIMITATION

The limits of freedom of opinion cannot undermine its substantial content. Therefore, the purpose of limiting the right to freedom of opinion cannot be related to protective measures against the simple psychological effects of certain opinions. The intention to prevent expressions with harmful or dangerous effects would nullify freedom of opinion and would therefore be illegitimate. The simple lack of value or the dangerousness of the opinion is not in itself a sufficient reason for the limitation¹⁰⁹.

¹⁰⁶ PIEROTH Y SCHLINK (2006) párr. 337 y sig.; BETHGE (1999) párr. 48; KUNIG (2000) párr. 37; ESPINOZA (2006) párr. 507

¹⁰⁷ LOTHAR (2010) p. 156; VG Saarlouis Urteil vom 14.7.2014, 1 K 507/13

¹⁰⁸ BVerfGE 111, 147/155 – Inhaltsbezogenes Versammlungsverbot

¹⁰⁹ BVerfGE 124, 300/331 – Homenaje a Rudolf Heß

On the contrary, it may be legitimate to prevent damage to legal assets. To the extent that the legislator tries to limit the expression of opinions that would have exceeded the level of an individualizable, concrete and palpable danger, then a legitimate aim is pursued. Therefore, the legislator can regulate the issuance of expressions that, beyond the formation of a conviction, are aimed at producing real effects and that, in the form of calls and exhortations to unlawful behavior, aggressive emotions or the overcoming of moral inhibitions, can immediately produce dangerous effects for the protected legal assets¹¹⁰.

In these cases, the purpose of the norm is protection against expressions, which according to its content, are aimed at causing behaviors that endanger legal assets, that is, that determine the transition to aggression or transgression of the right. The protection of public peace refers in such a case to the external effects of expressions that, in the form of exhortations or agitations that can generate in the addressees the disposition to action or the overcoming of moral inhibitions, or that can terrify immediately to third parties¹¹¹.

To resolve, if the expression of an opinion remains only on the plane of the ideal or exceeds the threshold towards an incipient danger of legal goods, it is decisive, if the dangers derived from the expression of the opinion, only constitute a remote effect that threatens to deepen the free formation of convictions, or if its realization begins to start from the expression of opinion. Insofar as the effects of the propagation of an ideology are only an abstract consequence of an intellectual construction, then it will be clearer that they remain in the sphere of ideas, which is fundamentally protected. To the extent that, on the contrary, the dangers derived from the form of the expression are concrete and immediate, insofar as the threat refers to specific people, groups of people or real situations, then they can be assigned to the sphere of the real. A merely symbolic presentation of convictions, doctrines, or projects must be considered as part of the intellectual sphere, unlike the affectation of legal assets, as in the case of the concrete and immediate presentation of historical facts that are indicated as desirable¹¹².

4.5. INTERPRETATION OF THE EXPRESSED CONTENT

¹¹⁰ BVerfGE 124, 300/332 – Homenaje a Rudolf Heß

¹¹¹ BVerfGE 124, 300/335 – Homenaje a Rudolf Heß

¹¹² BVerfGE 124, 300/342 – Homenaje a Rudolf Heß

A requirement for any legal evaluation of an opinion is that its meaning is properly interpreted. The error in the interpretation of what is expressed in a conviction for an offense of opinion, can lead to the oppression of a legitimate opinion. In addition, there is a danger that such a conviction may produce unfavorable effects in the exercise of freedom of opinion, insofar as those who are willing to express themselves could be at risk of penalization, even for a remote or unsustainable meaning of what is expressed¹¹³.

Starting point is always the literal meaning of what is expressed. But with this the meaning is not definitively determined. It is also determined by the context, in which the expression is found; of the circumstances that surround it, insofar as they are recognizable. The isolated appreciation of a part of what is expressed does not generally meet the requirements of a reliable interpretation¹¹⁴.

The interpretation of the content of the declaration must take into account the general context in which it is found and the background of the social and political situation in which it has been issued. A freedom of opinion-oriented interpretation of a statement that may constitute a punishable act cannot be based exclusively on the literal sense, but must determine the specific intentional content of the statement. Given that the meaning and purpose of any public expression, aimed at forming opinion, is to attract attention, in view of the current excess of information, the formulation of expressions that are easy to retain and even provocative should be tolerated, especially when He who expresses himself does not pursue a selfish end, but his contribution serves the formation of public opinion¹¹⁵.

The purpose of interpretation is to elucidate the objective meaning of an expression. The determination of whether an expression constitutes a crime depends on the way in which it is foreseeable that the expression will be understood by the addressees, and not by the internal position of the person expressing himself, nor what he wanted to express, nor the subjective conception of the affected¹¹⁶. For this, the author's intention is not relevant, but the panorama of understanding of recipients of average, objective and prejudice-free knowledge¹¹⁷.

¹¹³ BVerfGE 93, 266/295 - Soldaten sind Mörder; BVerfG · Beschluss vom 4. Februar 2010 · Az. 1 BvR 369/04, Abs. 29

¹¹⁴ BVerfGE 93, 266/295 – Soldaten sind Mörder; BVerfG · Beschluss vom 4. Februar 2010 · Az. 1 BvR 369/04, Abs. 29

¹¹⁵ OLG Stuttgart · Beschluss vom 26. Februar 2007 · Az. 4 Ss 42/07; 4 Ss 42/2007, Abs. 33

¹¹⁶ OLG Karlsruhe Beschuß vom 11.5.2017, 2 Rv 9 Ss 177/17, Abs. 15

¹¹⁷ BVerfGE 93, 266/295 – Soldaten sind Mörder; BVerfG · Beschluss vom 4. Februar 2010 · Az. 1 BvR 369/04, Abs. 29; VG Köln · Urteil vom 28. November 2014 · Az. 19 K 5130/13, Abs. 55; BGH · Beschluss

The interpreter must discard the least likely meanings. If, under the consideration of these principles, the meaning of what is expressed is clear, it must serve as the basis for the rest of the constitutional analysis. But if it is appreciated by an impartial and understood audience in a diverse way, then the existence of several possible meanings should be taken as a starting point¹¹⁸.

In the case of the revision of criminal or civil sanctions, due to the expression of opinions made in the past, the Federal Constitutional Court takes as its starting point the principle, according to which freedom of opinion is infringed when faced with various possible interpretations of As stated, a court uses the meaning that leads to the sanction, without first having excluded the non-punishable meaning, through reasonable arguments¹¹⁹.

5. CONCLUSIONS

German jurisprudence constitutes an excellent point of reference for comparative law in the field of fundamental rights. The adaptation of the staggered method, based on the broad interpretation of the scope of protection, is especially productive, and then the valuation and weighing of the conflicting interests is carried out.

Regarding the assessment of the rights of assembly and freedom of opinion, regarding their role in democratic society, German doctrine fully coincides with the criteria established by the ECHR, as well as with the criteria held by the Constitutional Court Spanish. The difference, however, lies in the effect of such an assessment with respect to other relevant aspects of the analysis.

The precision of the legal asset protected in cases related to hate speech is public peace, it is useful to establish a clear parameter of the limits of legitimate limitation. The limits of freedom of opinion cannot be referred to simple psychological effects of certain opinions, but to the intention of preventing the affectation of legal assets, in the sense of opinions, that would have exceeded the level of an individualizable, concrete and palpable danger .

vom 14. April 2015 · Az. 3 StR 602/14, Abs. 9; OVG Nordrhein-Westfalen · Urteil vom 18. September 2012 · Az. 5 A 1701/11, Abs. 72

¹¹⁸ BVerfGE 114, 339/348 – Mehrdeutige Meinungsäusserungen

¹¹⁹ BVerfGE 114, 339/349 – Mehrdeutige Meinungsäusserungen

To resolve, if the expression of an opinion remains only on the plane of the ideal or exceeds the threshold towards an incipient danger of legal goods, it is decisive, if the dangers derived from the expression of the opinion, only constitute a remote effect that threatens to deepen the free formation of convictions, or if its realization begins to start from the expression of opinion.

Finally, regarding the interpretation of the content expressed, the objective meaning of an expression must be established. The determination of whether an expression constitutes a crime depends on the way in which it is foreseeable that the expression will be understood by the addressees, and not by the internal position of the person expressing himself, nor what he wanted to express, nor the subjective conception of the affected.

In accordance with the aforementioned, we estimate, with the dissenting individual vote of the Magistrate Doña Encarnación Roca Trías, that the act had the objective of showing the rejection of the visit of the Monarch to Catalonia, for which it constitutes a contribution to the formation of the public opinion, in a matter subject to political debate. For this reason, the conduct does not deserve criminal reproach, from the point of view of freedom of expression and ideology. Neither can the affectation of public order, in the sense of danger or the affectation of specific legal assets, be affirmed.

6. ABBREVIATIONS

ECHR	European Court of Human Rights
ECHR	European Convention on Human Rights
S. M.	His Majesty
STEDH	Judgment of the European Court of Human Rights
STC	Constitutional Court Judgment
CE	Spanish Constitution
Fj	Legal basis
BVerfGE	Decisions of the Federal Constitutional Court
Paragraph	Paragraph
VG	Administrative Court
OLG	Superior State Court
Az	File number

StR

Criminal law

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