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Freedom Of Speech In American & Spanish Law: A Comparative Perspective

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Freedom of speech in the United States: The necessity of a judicial determination as to what constitutes the character of expression and a note on juries

The US Supreme Court has handed down a series of sentences, mainly in the area of obscenity, which have determined a series of very strict requirements with regard to the procedure that governments may take to control the exercise of rights guaranteed by the First Amendment.

“The history of American liberty,” wrote Judge Frankfurter, “is in many ways a procedural history.” Although this statement was made in the context of a criminal justice procedure, the courts have realized in recent years that due process guarantees play an equally important role when it comes to freedom of speech. Moreover, these guarantees “assume an equally important role as the validity of substantive applications of law.” In responding to this reflection, the courts have begun to construct a body of due process law that define the manner in which the courts and other state organs must evaluate petitions for First Amendment protection. In other words, “due process.”

It is precisely in the area of obscenity that the courts have shown significant preoccupation about due process. The Supreme Court has created a series of specific rules designed to prevent that certain non-sensical procedural measures don’t end up strangling the interests that underline the First Amendment. The objective is to avoid the dangers of censorship. By doing this, the Supreme Court has decided to almost completely ignore the due process clause of the Fifth and Fourteenth Amendments and has instead decided to go directly to the First Amendment as a source for due process rules. This way, instead of trying to apply the traditional due process requirements to evaluate whether obscenity is expression, the Court asks itself if the process demonstrates sufficient sensibility that is necessary for First Amendment protections.

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The government can regulate certain activities, but it must be sure, after following clear procedures, that the free speech protected under the First Amendment does not lose adequate strength.

The heart of due process in cases involving the First Amendment is the notion that we need a judicial determination, not administrative, to determine the nature of the questionable expression. Manual Enterprises v. Day\textsuperscript{4} is the first case which states that under the First Amendment in itself, only the courts have jurisdiction to determine whether a particular form of expression is constitutionally protected. In that case, the US Post Office excluded as “non-enviable” certain allegedly obscene magazines.\textsuperscript{5} In a six to one decision, the Supreme Court blocked the Post Office's decision. The decision is based on the determination that the post office had no authority to exclude those materials. Otherwise, the judges concluded that there could be a much more complicated constitutional issue: “If the Congress can authorize the exclusion of mail, it can decide outside of court what is and is not obscene,”\textsuperscript{6} without violating the First Amendment.

The institutional characteristics of the American judicial system, then, are indispensable in order to guarantee constitutional protections.\textsuperscript{8} The wide range of cases falling within the jurisdiction of the courts, together with the existence of life-term judges and the relative isolation with which they live, means, as Professor Hart noted that “the structure of American institutions” predestined the courts to “be a voice of reason in charge of developing impersonal and durable principles...”\textsuperscript{9}

Professor Bickel added: “Judges have, or should have, leisure, training, and isolation to follow the path of the scholar to pursue the objectives of government. This

\textsuperscript{4} 70 U.S. 478 (1962)
\textsuperscript{5} 370 U.S. at 497-98.
\textsuperscript{6} Mr. Justice Brennan’s suggestion that the first amendment itself demanded a judicial determination of whether speech was protected avoided the problems that have plagued earlier judicial efforts to establish a doctrine. Mr. Justice Brennan wisely avoided any reliance upon this line of authority. Moreover, the First Amendment basis for the position of Mr. Justice Brennan means that procedural rules growing out of the doctrine will be directly responsive to the First Amendment interests which the rule is designed to protect. It is, however, interesting to note that in Jacobellis v. Ohio, 378 U.S. 184, 190 n.6 (1964), Mr. Justice Brennan referred to Crowell as supporting broad appellate review.
\textsuperscript{7} “[T]he constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built.” JAFFE, supra note 13, at 589-90.
is necessary to solve the enduring values of society and is not something that institutions can easily do, so long as they operate from different parameters.”

These kinds of considerations are essential when First Amendment interests are endangered. The courts —and only the courts— have the capacity to determine what liberty to protect and what constitutes protected speech according to the US Constitution.

In *Freedman v. Maryland*\(^\text{11}\), the Supreme Court had to determine the constitutionality of a Maryland state law that required a film company to exhibit its films before an administrative body prior to its exhibition. If the commission disapproved of the film, the burden of proof for free speech laid on the exhibitor. The Supreme Court ruled for Freedman, although it did not affirm a right to exhibit obscenity. Simply put, the court established the due process guarantees to determine what is permissible and when to censor.\(^\text{12}\)

The preference made patent in Freedman for judicial evaluation rests on more fundamental considerations —the inherent and institutional difference between courts and public administrative agencies..

First, life-term judges and, in the majority of cases, free of direct political pressures, as opposed to what happens in Spain in its Constitutional Court. Second, the relative isolation of judges allows judges to be more impartial in their sentencing. In contrast, administrative bodies are generally political arms. Moreover, the role of an administrator is not that of an impartial judge but rather, an expert —a role that, logically, supposes narrower views and restricted criteria. This could be very dangerous in cases of obscenity: those who are constantly exposed to the perverse and obscene in literature quickly find obscenity in all that they see.\(^\text{13}\)

But this institutional tunnel vision is not limited to censors. A committee, for example, when dealing with a free speech question, with all probability will tend to,


\(^{11}\) 380 U.S. 51 (1965); accord, *Teitel Film Corp. v. Cusak*, 390 U.S. 139 (1968) (*per curiam*) (holding invalid on its face a Chicago ordinance which did not provide for a speedy judicial determination of whether a film was protected).

\(^{12}\) 380 U.S. at 57.

\(^{13}\) One may well question what type of person will put himself forward as a judge of morality. See text and sources cited in Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 48, 658 & n.34. “It has been observed, in the broader context of general censorship, that [i]f he be of such worth as behooves him, there cannot be a more tedious and unpleasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets [...] we may easily foresee what kind of licensers we are to expect here-after, either ignorant, imperious, and remiss, or basely pecuniary.” J. MILTON, AREOPAGITICA 20-21 (Everyman ed. 1927).
problems in exclusively corporate terms and not within the terms of the Constitution. The courts do not suffer from this myopia because their general jurisdiction gives them a wide perspective that no agency can have. By dealing with many varied questions on a daily basis, it is not likely that they will suffer from the deficiencies of an excessively narrow approach.

Following what has been said, there are further implications in other areas of law. There is nothing in the logic of Freedman and his background to suggest that the principles put forth in this decision is limited to obscenity. In fact, when it comes to political expression, the need for a disinterested judicial process is even greater. It can then develop a hypothesis as a general principle of the First Amendment: no valid procedure is to protect freedom of expression in the hands of an administrative agency, regardless of the “justice” of the process. For example, in Freedman it seems clearly inadequate for state employees to fire or expel students outside a timely court order to take into account the interests of the First Amendment. When it comes to constitutional interests on freedom of expression under the First Amendment, it is doubtful that Congress could regain its former power to punish contempt of authority without a court order.14

Already in the field of restrictions on freedom of expression, some considerations are appropriate with regard to the institution of the jury in American law. For a long time, it is true that this institution has been hailed as a major guarantor of individual freedom, including freedom of expression.15 English history and its relevance in colonial British America contain outstanding examples of the refusal of the jury at the time to punish speech critical of the government. But, it must be remembered that freedom of expression in the original concept reflected conflicts between a fairly homogeneous citizenry against the weight of an undemocratic and unrepresentative government and, as such, freedom of speech was conceived of as a way of giving power to “the voice of the people” and their right to be heard so that the representative government would be

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14 Congress has an implied power to imprison, for the session of Congress, non-members who refuse to respond to its summons and give testimony. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). Since 1857, however, the general procedure of the Congress has been to prosecute recalcitrant witnesses for misdemeanors under 2 U.S.C. 192, 194 (1964). This may be the only constitutionally permissible procedure for the Congress to follow after Freedman. It is clear that Congress is bound by the first amendment, see, e.g., *Watkins v. United States*, 354 U.S. 178, 196-97 (1957), and it is only considerations of separation of power that might restrain a court from putting this limitation on the contempt power. Recently, however, the Court has shown an increased willingness to probe the internal affairs of Congress. See *Powell v. McCormack*, 395 U.S. 486 (1969).
forced to address grievances. In that sense, the jury was an efficient and powerful vehicle to prevent government repression against popular clamor.\textsuperscript{16}

However, with the United States victory in the War for Independence, the Government had ceased to be undemocratic, especially after the extension of suffrage. Much of today’s First Amendment cases deal with protecting the radical speeches of Jehovah’s Witnesses, Communists and Fascists, among others.\textsuperscript{17} Perhaps a reevaluation as to the importance of the jury is now necessary, because mainstream consciousness has never been very tolerant of dissent and, perhaps, when dealing with cases involving freedom of expression, it might do well to do away with the jury completely.

In short, the Supreme Court must address these problems and consider the jurisdictional limitations with the same sensitivity as demonstrated in opinions like Freedman. The cases dealing with due process under the First Amendment have shown that the rights to freedom of expression are delicate, and can be destroyed by insensitive procedures. The courts should thoroughly evaluate all aspects of the procedural system in order to protect them.

\textbf{Freedom of speech in Spanish law: Constitutional regulation, protection and limits}

The Spanish Constitution of 1978, born of a wide political agreement during Spain’s transition to democracy, has been praised for its generous Bill of Rights and for the strong mechanisms included to protect them.

\textsuperscript{16} See, e.g., LEVY, \textit{supra} note 42, at 131-32.

\textsuperscript{17} The express articulation of these goals has, however, been of very recent origin. The First Amendment is today generally understood to protect and encourage criticism of government policy, “[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government.” \textit{Garrison v. Louisiana}, 379 U.S. 64, 74-75 (1964). This protection makes possible “the distinctive contribution of a minority group to the ideas and beliefs of our society.” \textit{NAACP v. Button}, 371 U.S. 415, 431 (1963). For the view that the Court’s “role” in our constitutional scheme is to protect “under-represented” minority groups through a vigorous application of the First Amendment, see M. SHAPIRO, \textit{FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW} 34-39 (1966). See generally, Brennan, \textit{supra} note 39, at 14-18. But the intention of the framers of the Constitution on the scope of the First Amendment is by no means clear.
Freedom of speech is one of the most classic and cherished rights within the Spanish Constitution. To that end, the rather extensive and complex Article 20, found in First Section, Title I, Chapter 2 of Spain’s Constitution, recognizes the “right to express and freely disseminate thoughts, ideas and opinions through spoken word, text or any other means of communication,” it also recognizes the “literary, artistic, scientific and technical production,” as well as “academic freedom,” and to “communicate or freely receive verifiable information from the press.” Following that, the constitution states that “the exercise of these rights cannot be restricted by any previous form of censorship.”

Freedom of expression can be classified as a civil right, since it ensures a level of freedom of action of the person, as well as the right to physical integrity or liberty of asociación. Under Article 20, according to doctrine, two issues are resolved: ensuring freedom of expression and information on the one hand and the design the constitutional framework of the media on the other. All other rights under this article would be “special cases” of a general fundamental right.

It is worth noting that the legal benefit of this dual liberty-free expression and freedom of information is not only in the interests of a particular, but is also necessary for the existence of public opinion, essential in a democratic society, and at the same time, the right is linked in a special way to the dignity of the person (art. 10.1 SC), by which the right is for all people against the government and against individuals, “especially when it collides with other fundamental rights (honor, privacy, freedom of enterprise, etc.).”

According to the most authoritative doctrine “this right pertains to individuals, groups or institutions. It is clear that the right protected here is not the freedom of personal opinion, whether religious or ideological, as recognized in Article 16, but private or public communication of those ideas or value judgments.” It guarantees free communication without interference in the communication process, without previous

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18 In Spanish constitutional History, this liberty was especially associated with the press. See, for example, Article 371 of the 1812 Spanish Constitution.
20 Ibid., p. 281.
21 STC 6/1981, of 16th March, Fundamento Jurídico (Judicial Foundation) 3 y STC 159/1986, of 16th December, Fundamento Jurídico 6. (STC is the abbreviation for Sentence of the Constitutional Court.)
censorship and without possible administrative repressions in the event criminal acts may arise, because its power is reserved to the Judicial Power.  

The content of Article 20, as already seen, is quite broad, and includes freedom of expression and right to information. The present work is geared to freedom of expression, although the differentiation is neither easy nor peaceful. Freedom of speech “would be the right to make judgments and opinions, without attempting to lay factual claims or objective data [...]”, while, “when what is sought is to provide information on events that are to be true, we would be dealing with freedom of information, then, the constitutional protection is extended only to truthful information.” Indeed, “[...] when it comes to information, the Constitution of Spain imposes the requirement of truthfulness via Art. 20.1.d).” A requirement that is obviously not absolute, otherwise free speech could hardly be exercised. Therefore, “constitutional jurisprudence understands the requirement of truthfulness and a duty of good faith and diligence by the reporter: even after a news item is revealed as false, the requirement of truthfulness is satisfied if the reporter believed that the information was true on the basis of reliable sources and, where appropriate, contrasted.”

In any case, we must reiterate that it is not easy to differentiate both freedoms, to the point that the Constitutional Court in various judgments has provoked confusion and inconsistencies when trying to separate them. The solution is to consider it a single right that encompasses two interdependent concepts.

The Spanish Constitutional Court has never defined exactly what is and is not freedom of expression, which suggests that the wording of Article 20 defines the concept with sufficient eloquence. This lack of review by the CC allows broader interpretations of free speech and prevents narrow constrictions.

In its fourth paragraph, Article 20 imposes limits on the exercise of this freedom, limits based “on respect for the rights recognized in this Part, by the precepts of the Law for its implementation and, especially, the right to honor, to privacy, to self-image and the protection of youth and childhood.” It will be noted below that these estimates must be qualified and have been subject to criminal and civil development.

24 Ibid., p. 163.
27 Ibid., pgs. 283-284.
Recently, the Spanish CC, outlining its doctrine, has issued a statement worth noticing as a corollary of what has been said. The CC has declared that “the free exercise of the right to freedom of expression, like that of information, is relevant for protection because it guarantees the existence of a free public opinion, which is a necessary precondition for the exercise of other rights connected with the functioning of a democratic system, which finds a limit [...] in the right to individual honor, but this does not preclude criticism of the conduct of another, even if it is bland and can annoy, disturb or annoy the affected party or individual [...]. Likewise, certain circumstances have been taken into account when assessing the limits of freedom of expression, public opinion about the relevance of the case, the type of intervention and [...] or whether, in fact, they contribute or not to the formation of public opinion, stressing that this limit is weakened when it comes to public personalities. In these cases further room is given for criticism, because these people are exposed to more rigorous controls on their activities and demonstrations in comparison to private individuals without any visibility. Finally, it has also shown that [...] the Constitution does not recognize the right to insult, which means that the constitutional protection afforded by Art. 20.1.a) SC, excludes absolutely humiliating expressions, ie, in the specific circumstances of the case, and regardless of their veracity, are outrageous and offensive or are abusive to express the opinions or information in question (for all STC 9/2007, of 15th January, FJ 4).”  

The recognition of freedom of expression carries a guarantee of its effective exercise and enjoyment through numerous protective mechanisms, characteristic of the rights enshrined in the Constitution. These guarantees are divided into judicial and legal systems.  

As regards the former, public authorities are subject to the Constitution (art. 9.1 SC) and must not only respect but also “promote the conditions for freedom and equality of individuals and the groups to which they belong so that they are real and effective, to remove obstacles which prevent or hinder their application and facilitate the participation of all citizens in political, cultural and economic life.” (art. 9.2 SC). In consequence, and since the Constitution is the supreme law --hierarchically superior to

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28 For an extensive discussion, see F. SANTAOLALLA LÓPEZ, “Jurisprudencia del Tribunal Constitucional sobre la libertad de expresión: una valoración”. _Revista de administración publica_, núm. 128, 1992, pgs. 185-224.

all others—these rights have an immediate legal effect (art. 53.1 SC), so there is no need for subsequent legislation and public authorities must avoid harming them.

Special safeguards must also be mentioned. These include, the reinforced law, under Article 81.1, “for the development of fundamental rights and public freedoms,” the figure of the Ombudsman, appointed by Parliament “to defend the rights contained in Title [I], for which purpose he may supervise the activity of the administration, informing the Congress” (art. 54 SC), and finally, the performance of the Attorney General, which “has as its task the course of justice in defense of legality, the rights of citizens and public interest protected by Law [...]” (art. 124.1 SC). In addition, it is clear that the separation of powers, constitutional rigidity and independence of the judiciary, are equally important for the defense of rights against any abuse of power.

For its part, the jurisdictional guarantees are requested in court. First, by resorting to the ordinary judicial process (art. 24.2 SC). Or, if one prefers, going to a specific agency, the ordinary procedure: it can be used by “any citizen” (art. 53.2 SC) and, insofar as concerns the protection of one of the fundamental rights, has special characteristics, being a constitutional procedure. This gives rise to constitutional protection whether it be in criminal, civil or administrative matters.

A more important category is the protection before the Constitutional Court (art. 53.2 SC in fine), an extraordinary and subsidiary recourse which protects both the subjective dimension of the fundamental right infringed such as an objective defense of the Constitution as directly applicable. It is important to note that this process is not legally common, given that the CC is not part of the judiciary, but is a constitutional body in charge of correcting state power.

31 The reinforced law is articulated by the organic laws for regulating the content of Section I, Chapter I, Title I of the Spanish Constitution, from hereon SC. The specialty of this type of law is that any adoption, amendment or repeal must be approved by an absolute congressional majority as stipulated in Article 81.2 SC.
32 The Constitution establishes here an special procedural mechanism for reform in Article 168. Due to its complexity, this has never been carried out.
34 J. DE ESTEBAN and P. J. GONZÁLEZ TREVIJANO, op. cit., pgs. 422-429.
35 Organic Law 2/1979, of 3rd October, of the Constitutional Court defines certiorari in Article 41.2: Certiorari protects, in legally established terms, the various violations of rights and liberties mentioned in the previous sections [rights recognized in Articles 14-29 of the Spanish Constitution & conscientious objection recognized in Article 30]. Article 162.1.a) SC applies it to “all natural persons.”
36 For an excellent discussion, see E. GARCÍA DE ENTERRÍA, La Constitución como norma jurídica y el Tribunal Constitucional, Civitas, Madrid, 2006.
Beyond the Spanish Law, the International Law also protects freedom of expression: Article 10.2 of the Constitution provides that the rules “relating to fundamental rights and freedoms recognized by the Constitution shall be construed in accordance with the Universal Declaration of Human Rights Treaties and international agreements thereon ratified by Spain.” Both in the Universal Declaration of Human Rights in 1948 as the International Covenant on Civil and Political Rights of 19 December 1966, this freedom appears in Article 19.

However, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, section 10 includes the freedom of expression and serves as a stronger protection. Any violation of this right may be heard before the European Court of Human Rights in Strasbour, meeting strict requirements for admission of the claim. This mechanism of protection is considered one of the most efficient in the world.

Finally, Article 11 of the Charter of Fundamental Rights of the European Union, incorporated into the Treaty of Lisbon of 13 December 2007, in force since 1 December 2009, is responsible for protecting freedom of expression.

Like all rights, this freedom is not unlimited or absolute. There are some general limits, namely the restriction of rights because of the special relations of certain communities subject to government (public servants, prisoners and soldiers), the suspension of individual rights (art. 55.2 SC) and the possibility of general suspension of rights when there are declared states of emergency or siege, which can have an effect on freedom of speech.

The specific limits, as has been indicated, are derived from section four of Article 20 and are the followings: respect for the rights recognized in Title I of the Spanish Constitution and in the limits of the rights to privacy, youth and childhood.

Naturally, these limitations must be interpreted restrictively. Otherwise, we risk giving endangering freedom of expression without further consideration. The constitutional jurisprudence, in order to prevent it, has relied on Article 10.2 of the said European Convention on Human Rights, “according to which freedom of expression and information can be limited provided that all three conditions: A) That the purpose is

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37 This article, section 2, states that the exercise of these liberties may submit to certain formalities, conditions, restrictions or sanctions within the law, that may constitute necessary measures due to national security reasons.

38 In cases of national emergency with Congressional approval, Article 116 SC. Never used.

to safeguard certain legal rights [...]. B) The establishment by law. C) That question, according to the known clause in the European Convention of 'necessary in a democratic society.'\textsuperscript{41} In this way, criterion is established so as to weigh and balance the various interests at stake.

In the field of Civil Law, the Organic Law 1/1982, of 5 May, of Civil Protection of the Right to Honor, and to Personal and Family Privacy and Reputation is concerned with the defense of those rights (art. 18.1 SC), which are heightened in the constitutional text of Article 20.4, “which stipulates that respect for those rights is a limit to the exercise of freedom of expression that the provision recognizes and protects itself with the same fundamental character,” while “cannot be considered absolutely limitless.”\textsuperscript{42} According to Article 1, the “criminal nature of the interference does not prevent recourse to judicial proceedings under Article 9 of this Act,” ie, the citizen who uses it may reserve, if he so desires, a criminal prosecution.

Finally, expression that is slanderous or defamatory may be criminal, as individual honor has been upheld under criminal law and is not to be confused with the crimes of opinion, typical in undemocratic regimes. The Penal Code in Title XI called honor crimes: libel and slander. Article 206 punishes slander\textsuperscript{43} “with imprisonment from six months to two years or a fine of twelve to 24 months if advertising is used, and in another case, a fine of six to 12 months.” As for injuries,\textsuperscript{44} only serious defamation is considered a crime in the Spanish Criminal Code. If done through advertisements, they are punished “with a fine of six to fourteen months and, in another case, with three to seven months.” (art. 209 CC).

Perhaps one could think that such protections serve as an ideal medium in which to prosecute journalists who reveal damaging information to political powers. However, this potential abuse is avoided by the concept of exceptio veritatis while not excluding the consideration of individual honor. Article 207 of the Penal Code reads as follows: “The defendant for slander shall be relieved of any criminal penalty by proving his/her accusation.” A similar provision is contained in Article 210: “The defendant accused of libel shall be relieved of responsibility by proving the truth of the allegations when they

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\textsuperscript{40}Ibid., pgs. 198-199.
\textsuperscript{41}L. M. DÍEZ-PICAZO, op. cit., pgs. 289-290.
\textsuperscript{42}Explanatory Memorandum of the Law.
\textsuperscript{43}Article 205 CC: “Libel is attribution of a crime with prior knowledge knowing of its falsehood.”
\textsuperscript{44}Article 208 CC, first paragraph: “Libel is also action or expression that damages the dignity of a person.”
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are directed against public officials about facts concerning the exercise of their office or referred to the commission of criminal offenses or administrative violations.”

For example, incitement to discrimination and discriminatory abuse also carry criminal penalties (art. 812 CC), insult and slander the King and Royal Family (art. 491 CC) and the glorification of terrorism (art. 578 CC).

But what are the conflicts that arise when typically conflicting interests collide when applying the limits on the rights referred to in Article 20? Following a very solid statement on this issue, it is possible to detect these conflicts, and with established jurisprudence by the Constitutional Court. With respect to news and opinions about public figures, freedom of expression prevails in response to the fact that public officials must endure greater exposure to criticism in general. To put it in another way, their right to honor and privacy is reduced. The same goes for characters of public importance --such as media personalities-- in relation to aspects of their activity that has gained them notoriety. No freedom of speech is granted when it comes to revealing data considered irrelevant to the public, although in some cases it is difficult to make that distinction. Also protected by law is the revelation of secrets, so long as they have been made known through legal means and have public relevancy.

In matters pertaining to the administration of justice, considerable freedom of information is permitted while protecting the truth and the presumption of innocence, so that restrictions should be exceptional and above all, justified in the protection of legal interests other than the Administration itself. Likewise, criticism against judicial decisions is protected, as well as the freedom of speech of lawyers and witnesses in a trial.

The problem of the concept of hate speech has arisen in Spain. It raises the dilemma that repressing hate speech can lead to silence politically incorrect views. The Spanish jurisprudence is not entirely clear on this matter. Finally, in response to freedom of expression of workers and officials as such, the collision occurs with matters of loyalty, but basically this must yield to freedom of expression while respecting good contractual faith.

A look at the Spanish and American jurisprudence on the subject

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45 For an extensive study of these crimes and its different aspects, see F. MUÑOZ CONDE, Derecho Penal. Parte Especial, Tirant lo Blanch, Valencia, 2007, pgs. 281-296.
46 L. M. DIEZ-PICAZO, op. cit., pgs. 291-300.
47 See, infra, the analysis of STC 235/2007, of 7th November, on hate speech cases.
Moving on to a more direct comparison between the two systems, a discussion of some relevant Spanish Constitutional Court and US Supreme Court sentences is pertinent.

The factual circumstances of the STC 104/1986, of 17th July, state that the author of a newspaper article in *Soria Semanal* --in which he criticized the mayor’s urban management-- was convicted as illicit speech due to a lack of respect and regard for authority.

The Spanish Constitutional Court granted certiorari for the journalist in order to determine, among other important questions, whether the petitioner’s “right to free speech and opinions [art. 20.1 *a*] Spanish Constitution], uniquely related to his right to communicate truthful information [art. 20.1 *d*] SC] through a newspaper.”

The court determined that since the right to honor is, beside being limited by Article 20, is “a fundamental right [Art.18.1, SC],” there is a “conflict of rights, each of a fundamental importance,” and in consequence, these “must be balanced against the other.” The CC recognizes that Article 20 guarantees freedom of opinion, vital in democracy and so it has an added value.

The highest court in the land affirms that this balancing between two fundamental rights had not been determined by the lower court judge. In this way, it notes that the judge did not appreciate the concurrence in *animus injuriandi* that the journalist has, nor did the judge take into account the irrelevancy of the role of political criticism in the article against possibly humiliating or disrespectful ends..., all of which would had justified the earlier sentence of culpability. But he did not take into consideration the fundamental right allegedly infringed by the defendant. The CC states that it is not sufficient to apply and interpret the Criminal Code by itself, “without taking into account the constitutional protection of free speech found in Article 20, which was completely ignored.” As a result of this omission, the CC concluded that the judge, by circumventing Article 20, damaged it. It thereby annuls his decision and grants free speech protection to the appellant journalist.

In the US, the case *Manual Enterprises v. Day*, mentioned above, is instructive with regard to the interests and actors involved in the freedom of expression. In April 1960,
postal officials determined that three magazines, Manual, Grecian Guild Pictorial and Trim, were not “shippable” in the mail, according to federal law 18 USC 1461, because the magazines were “obscene” and because they conveyed information about where and how to get the obscene material. Accordingly, copies of the journals were kept by the post. Soon after, the owners of the journals held an administrative process between the post and those affected. Finally, the Supreme Court gave them the protections offered by the First Amendment declaring that homosexual and pornographic magazines are not “obscene.”

The Supreme Court decided that even if these images strike a prurient interest among homosexuals, that they were not obscene as defined obscenity was defined in Roth v. United States, 354 U.S. 476 (1957). What is known as the test of “the average citizen of a community.”

There has been debate on whether or not there exists a right to insult. In Spain, the CC has ended the debate by denying the existence of that right. The case of journalist Jose Maria Garcia is a good example of this. This well-known sports journalist filed for relief because, after a radio broadcast information about a member of the Parliament of Aragon, in his version, he received illicit funds for food, was convicted of a crime of contempt.

The CC clarifies that this is a case concerning the limits of the right to report truthfully and review its doctrine on the subject. The High Court declares that the rights enshrined in the Spanish Constitution are not absolute, “but that the limits imposed are also not absolute [...]” Thus, the court establishes criteria to be able to make an appropriate determination: the wide range of freedoms of expression and information, even greater if the exercise thereof “relates to substances that contribute to the formation of a free public opinion, as a guarantee of democratic pluralism,” with a protection that is highest when freedom is exercised by professional journalists.

In line with its gloss on the right to information, it determined that truthful information is “verified information by the standards of journalistic professionalism, excluding snares or mere rumors.” The error is acceptable within the accuracy requirement.

In this case, there is a discussion about facts that are surely to arouse public interest.

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53 Ibid., Fundamento Jurídico 3.
54 Ibid., Fundamento Jurídico 4.
55 Ibid., Fundamento Jurídico 5.
This information, according to the Spanish CC, is consistent with the nature of truth, as the reporter made the necessary verifications.\textsuperscript{56}

In this state of affairs, the penalty would have meant “unlawful deprivation” of rights. But the journalist did not stop there, and instead expressed some opinions that for the CC, go beyond the bounds of the right to information, since “the issue was offensive in any context, and is an unwarranted harm to the dignity or prestige of the institutions, taking into account that the Constitution does not recognize an alleged right to insult [...].” Actually, there were claims made by the journalist that were connected with the conduct of the politician he was covering. “Criticism of conduct deemed proven a public figure,” says the High Court, “can be painful --and sometimes extremely painful-- but in a system based on democratic values, being subject to that criticism is part and parcel of any office of public importance.” What does not fit in any case is abusing the image and dignity of persons, ie, detached descriptions of information, without justification. To the extent that the journalist taunted the person's physical defects, intellectual ability and moral courage, he stood outside the scope of constitutionally protected free speech. Therefore, the CC denied Jose María García the free speech protection that he sought.\textsuperscript{57}

One of the problems studied earlier was of the concept of hate speech. A recent case in the Spanish Constitutional Court has addressed this issue with particular intensity.\textsuperscript{58} This was the resolution of an issue of unconstitutionality (a system of constitutional review of laws similar to American judicial review of legislation) with regard to Article 607.2 of Spain’s Criminal Code and its possible incompatibility with the right to free speech. The facts of the case deal with holocaust denial and the distribution of books and propaganda against Jews by the Librería Europa, a neo-nazi bookstore in Barcelona.

The article criminalized conduct of any means that included disseminating ideas or doctrines that refuse to recognize the Holocaust or justify the crimes of genocide or the defense of regimes or institutions that protect those practices. The judicial organ that raised the question stated that those the Criminal Code article intended to protect did not merit criminal protection, both for its diverse nature as well as the obvious limitation on the right to freedom of expression.

The Attorney General’s argument was that denial or justification of genocide carries
a potential danger against very important legal principles, while the CC determined that fundamental rights “cannot be restricted just because they are wielded with an unconstitutional purpose.” Put another way, that the Spanish system is not a militant democracy. In this case, “the constitutionally protected sphere of freedom of expression cannot be constrained by the fact that it is used for the dissemination of ideas or opinions contrary to the essence of the Constitution unless [...] they damage relevant constitutional rights.”

There would be no constitutional protection for advocating executions or inciting violence against Jews, however. This, in short, is hate speech in Spain.

The High Court determined that “the conduct described in the precept in question are mere transmission of opinions, however despicable they may be from the point of view of the values underlying our Constitution.” There is no mention in Article 607.2 of incitement, humiliation of the victims or glorification of genocide. Such dissemination of ideas, claims the CC, is somewhat neutral. The criminal legislation finds its absolute limit on the substance of the right to freedom of expression. Therefore, “our Constitution does not allow the criminalization of the mere transmission of ideas, even in cases in question to be execrable ideas contrary to human dignity which is the foundation of all rights specified by [...] our Constitution and political system.”

The CC advised that it may be possible to make an interpretation consistent with the construction of Article 607.2 of the Penal Code, under the principle of conserving the law. That would mean that a law would not be unconstitutional when understood in the specific way established by the CC.

The provision could be challenged under the Constitution if it is determined that Holocaust denial or its justification constitutes an incitement to it, already a crime under Article 615 of the Criminal Code.

It should be considered whether, if the above is dismissed, a form of hate speech is punished. The CC’s answer is negative if it is the mere denial of genocide: it is not hate speech because the mere denial of the crime is inane. This behavior is not a potential danger to protected legal rights.

Instead, the court particularly objects to justification of the Holocaust: in it a
particularly dangerous value judgment is expressed. In that case, it is acceptable to punish the public justification of genocide, without disrupting the constitutional rights, so long as the justification to act as is an “indirect incitement to the commission” or provokes hatred towards certain groups. If the justification is interpreted as indirect incitement, it is hate speech and there is no constitutional protection under Article 20.1. It is “legitimate to punish criminal conduct, even if they are clearly unsuitable for direct incitement to commit offenses against people such as genocide, it does involve indirect incitement to it, and causes discrimination, hatred or violence [...].”\textsuperscript{64}

The CC decided to declare unconstitutional and void the inclusion of the phrase “deny or” in the first paragraph of Article 607.2 of the Penal Code and otherwise leaves the rest of the exceptions, interpreted in terms of Legal Basis or Judicial Foundation.\textsuperscript{9}

In the U.S., the problem of hate speech has been resolved with more tolerance and without so many limitations. The only thing not permitted is what is known as “fighting words” or words that threaten a specific person.\textsuperscript{65}

Conclusions

The first and most rapid conclusion to be drawn from this analysis is that both in Spanish and American law, the degree of protection that is linked to freedom of expression is really wide.

However, it is logical that in Spain, free speech jurisprudence has had a shorter run, because during the dictatorship of General Franco it was restricted and there was a significant and active censorship. Only since 1978, Spain, ruled by a democratic Constitution, began to recover or even fully recognize civil liberties. So, there has been less development of this freedom in the Spanish case comparable to the US Supreme Court.

That said, both systems recognize certain barriers to freedom of expression. Such barriers can be sharp, as in cases of abuse, or both, as in cases of hate speech. Either way, the courts have to draw the limits very carefully, balancing the interests at stake and without losing sight of the Constitution. Neither rights nor limits to them are, of course, absolute.

Nor is there anything that is static and immutable, hence the importance of the role of

\textsuperscript{64} Ibid., Fundamento Jurídico 9.
the courts and that they be consistent in adapting to the new ways in which free speech is exercised (e.g., the Internet) or respond to collisions and new challenges that appear next to the changing social environment.

Freedom of expression is a key right in the correct development of a democracy. Deprived of it, our system would not be possible. “Freedom of expression is what people do not want to hear,” said George Orwell, and certainly governments do not easily accept criticism and try sometimes to enforce silence, if not by force, by invoking prudence, discretion, and weighing issues of state or general interests. Be careful with these trends: Citizens have a duty to monitor the power and politics, something that the glass dome in Berlin’s Reichstag reminds all visitors.

“Until we write about government, religion, politics, and other institutions, I am free to write anything,” said the French poet and playwright Pierre Augustin Beaumarchais. Well, not anymore. Party political control is inseparable from criticism of powers.

In the U.S., case law will continue the constructions as outlined here and face cross-border cases. All of this suggests cases well worth studying. In Spain, the challenge will be to counter the winds of censorship, especially the collisions with religious feelings. It is important to remember what happened with the publication in 2005 in a Danish newspaper of anti-Mohammed cartoons.

It is vital that ordinary citizens, journalists and political level remain alert and vigilant in their care of freedom of expression with the objective of protecting it and bearing in mind what Potter Stewart advised us, that the lack of freedom of expression shows that a society has no confidence in itself.