

The Honor of the Spanish Flag

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In a controversial [decision](#) dated 15 December 2020 and published one month later, the Spanish Constitutional Court has rejected the appeal of a member of an independentist trade union condemned for desecrating the Spanish flag during a labor protest.

The facts of the case are simple. In the context of a labor conflict, the complainant – a representative of the trade union [Confederación Intersindical Galega](#) – made public comments disparaging the Spanish flag. The conflict was incited by the workers in charge of the cleaning services at a military base who were protesting for better labor conditions. They were organizing daily protests during the solemn act of raising the Spanish national flag in the mornings. One day while soldiers were listening to the national anthem, the complainant shouted, “here you have the silence of the fucking flag” and “we have to set fire to the fucking flag”. During the previous days, other workers had expressed comments against the flag such as “the flag does not pay our bills” but they were never prosecuted for it.

The ruling denies constitutional protection to such expressions even in the context of political activism. Therefore, it challenges the case law of the ECHR and reduces the space for freely expressing political opinions in Spain. The analysis of the ruling’s arguments shows that freedom of speech is increasingly at risk in Spain.

The ruling

The complainant was denounced by the Admiral-chief of the military base and he was condemned by the criminal court of Ferrol to pay a fine of 1260 Euros for desecrating the national flag, according to [article 543 of the Spanish Criminal Code](#). When the case arrived at the Constitutional Court, it caused a strong division among its judges, as half of them considered the incident an exercise of free speech. However, the decision was taken after one of the magistrates resigned from office, so that there was a slight majority of one vote in favor of the final version of the sentence, accepting the constitutionality of the criminal sanction imposed.

The Court considers that the expressions were *unnecessary* for the wage claims defended in the act and were *not related to it*. These considerations are likely the cornerstone of the decision. Regarding the necessity, it is not up to the Court to decide about which are the most appropriate expressions to disseminate an opinion, so that the speech protected by the Constitution does not include only the words strictly necessary to express an opinion. The main debate in the case is about the relationship between the contested sentences and the demands of the trade unionists. The majority of the court does not see any relation and understands the shouting just as an act of contempt for the flag.

By contrast, the prosecutor at the Constitutional Court supported the case as a legitimate exercise of freedom of expression. In his conclusions, he considered that there was a clear connection between the expressions shouted against the flag and the labor conflict at the military base, understanding it as a reproach against the military administration for taking care of the flag, but not of solving the situation of the cleaning staff. The four dissenting opinions agree on this point. In one of them it is also highlighted that the workers' demonstrations during the daily ceremony for the flag was the final reason of the agreement reached between them and the military administration. At the same time, the fact that the trade union has a clear Galician independentist ideology reinforces the idea of his rejection of the Spanish flag being a political position.

The implications of the ruling

The case has further significance. The Constitutional Court insists on the constitutionality of the crime of desecrating the flag. The judgment includes several declarations about the value of symbols and its representative and identifying purpose, "which must be exercised with the greatest purity and virtue". Therefore, it takes into consideration the fact that the expressions constituted contempt for the flag and a message of belligerence that the appellant expressed towards the principles and values that it represents. At the same time the court highlights the "intense feeling of humiliation" suffered by the soldiers and affirms that the desire of the flag being burned implies the diffusion of a feeling of intolerance and exclusion towards "all those citizens who feel the flag as one of their symbols of national and own identity".

In consequence, even if the Constitutional Court apparently focuses its decision on the lack of connection between the contested sentences and the labor claims, it also closes the door to the free dissemination of political ideas contemning Spanish national symbols in the future. As the dissenting opinions argue, this contradicts the traditional declaration of the Constitutional Court that Spain is not a militant democracy.

The Spanish ruling and the ECHR

The decision also raises relevant questions regarding the respect for the ECHR's judgements by the Spanish court. Dissenting opinions refer, as does the Court, to the [case *Stern Taulats and Roura Capellera v. Spain*](#) were the ECHR decided – against [the prior opinion of the *Tribunal Constitucional*](#)– that the burning of a picture of the Spanish King in a political demonstration was protected by the freedom of expression. But while the dissident judges emphasized the similarity of both cases, the court distinguished between expressions directed against persons who are of public relevance and subjected to criticism and citizens' scrutiny from expressions offensive towards a symbol.

It is common for European states to include disparaging acts to the national flag in their criminal codes. Some countries have only recently created a specific crime

for protecting the national flag (this is the case in France since July 2010, with a [decision of the *Conseil Constitutionnel* allowing some restrictions to expressions in public acts organized by authorities](#)). Nevertheless, sanctions frequently apply only in cases of unjustified attacks on the national symbol, mostly vandalism. As the protection of the right to freedom of expression covers any speech with political intentions, cases in which the flag is attacked as a way of expressing a political position are normally constitutionally legitimate. This is the case, for example, in the German decision on an antimilitarist pamphlet that showed a collage of a soldier urinating on the German flag. It was considered by the German Constitutional Court as a case of artistic freedom, basically because its aim was to denounce the militarization of the public life in Germany ([BVerfGE 81, 278](#)). As the German court said, the protection of symbols must not lead to an immunization of the state against criticism and even against disapproval.

The Spanish decision bears a special transcendence. While in other European states criminal courts are also criminalizing political acts of expression against the flag (for example in Italy, were the *Corte di cassazione* [has included in the crime “vilipendio alla bandiera” the burning of national flag even with political intentions](#)) it is uncommon that a Constitutional Court opposes so clearly to the interpretation of the extend of free speech by the ECHR.

A threat to the freedom of expression

The relevance of the ruling goes beyond the mere discrepancy on the circumstances of the case. In recent years, Spanish scholars have increasingly voiced concerns about threats to the freedom of expression. As mentioned in some of the dissenting opinions, even the Constitutional Court is being accused of restricting its own jurisprudence on freedom of expression. The judgement must, therefore, be understood as a serious message against those who advocate the recovery of its previous position, in favor of a greater space for freedom of expression.

Moreover, the political context is increasingly relevant for the understanding and interpretation of the decisions of the Spanish Constitutional Court. In this case, the slim majority of judges supporting the final version of the judgement was made up of two judges whose term ended a year ago; one more magistrate who was against it renounced a few months ago and has not been replaced so far. The failure of parliament in appointing new judges, most of whom would in principle be ideologically closer to the new progressist majority, has therefore been relevant for the sentence.

The rise of independentist claims in Catalonia and the prominence acquired by the monarchy in the current Spanish political debate has also undoubtedly influenced the decision. Part of the Court probably thinks that at this moment, the protection of national symbols against slander is its duty. Determining the room for criticism towards national symbols allowed under Spanish constitution will be, indeed, decisive for limiting the framework for public political debate. Despite the decisions of the ECHR, the Constitutional Court seems to be committed to protecting the image of the King and mitigating the strength of critics towards the institution. At the same

time, these magistrates seem sensitive to the frequent claims of the Spanish political right against the pro-independence public constantly whistling the national anthem and disrespecting the flag. They therefore try to show a new line for the system of being much stricter against dissidence and reducing the space for these vindications. Although there has never been a golden age for the freedom of expression in Spain, the freedom to publicly state dissident opinions is progressively at risk.

