FREEDOM OF COMMUNICATION IN THE U.S. AND EUROPE

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SUMMARY

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1. DIFFERENT DENSITY OF THE LAW IN THE UNITED STATES SUPREME COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

The subject of this article addresses freedom of communication in the jurisprudence of the United States Supreme Court (hereafter referred to as USSC) and the European Court of Human Rights (hereafter referred to as ECtHR). Our discussion will attempt to compare the U.S. and Europe, from a juridical point of view[1], in-

[1] On the need for expanded empirical investigation of the foundations of First Amendment law, see Robert C. Entman, «Putting the First Amendment in its Place: Enhancing American Democracy through the Press», 1993 *U Chi Legal F* 61; L.A. Powe, Jr., «The Supreme Court, Social Change, and Legal Scholarship», 44 *Stan L Rev* 1615 (1992). According to David A. Strauss, «Rights and the System of Freedom of Expression», 1993 *U Chi Legal F* 197 1993, p. 197 and ff., we tend to frame questions about press regulation in such crude terms, because we lack the conceptual and empirical tools to determine which of the many proposals for regulation of the press is a good idea. The referred author considers that four possible empirical inquiries seem especially appropriate. (1) What correlation is there between the views expressed in newspaper editorials, or in the bias given to news stories in both print and broadcast media, and the views of various actors-such as owners, consumers (readers and viewers), and advertisers? [See C. Edwin Baker, «Advertising and a Democratic Press», 140 *U Pa L Rev* 2097 (1992)]. (2) How independent of political influence has public broadcasting been? [See, generally, *Public Television: A Program for Action, The Report and Recommendations of the Carnegie Commission on Educational Television* (Bantam Books, 1967)].(3) What have been the effects of FCC regulation of the broadcast media? The dual system of regulation of the media in the U.S. has, in effect, conducted a natural experiment over

cluding the jurisprudence of the USSC and the ECtHR but departing from the jurisprudence of the United States. More specifically, we will develop the following ideas: 1) we will discuss he different density of the jurisprudence of both the Tribunals; 2) we will describe the duality of models derived from the regulatory texts to identify how this duality is relative; 3) we will offer contrasts of specific statements of the United States Supreme Court and the European Court of Human Rights along three subsections, namely: 3.1. neutrality vs. belligerent democracy; 3.2. mature version of the doctrine of «clear and present danger» and its absence in Europe; 3.3. freedom of the press as a fundamental freedom, and the press as *watchdog*; 4) we will refer to the incorporation of the *Sullivan* and *Lingens* doctrines in the jurisprudence of our Constitutional Court; and 5) brief concluding remarks will be provided.

We begin with what has been called the different density of the jurisprudence of the two courts. In America, the system of freedom of expression[2] is the one established by the Supreme Court for the entire federation; there are no dif-

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the last half-century. The broadcast media have been regulated by the FCC; The print media have been left unregulated. See Lee C. Bollinger, «Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media», 75 *Mich L Rev* 1, 27 (1976) (this difference in the treatment of the media is «the best of both worlds»). These ideas are further developed, with emphasis on the notion of an «experiment», in Lee C. Bollinger*, Images of a Free Press 5* (University of Chicago Press, 1991). A comparison of the two media might go a long way in helping to assess the real risks of government regulation. (4) What effect has government ownership or regulation of content had on the media in other, similar societies, especially on the propensity of the press to criticize the government?

[2] According to David A. Strauss, «Rights and the System of Freedom of Expression», 1993 *U Chi Legal F* 197 1993, p. 197 and ff., two different approaches to freedom of expression are possible. The first is an approach based on the rights of the speaker. The rights-based justification has been stated in a variety of forms. See, for example, C. Edwin Baker*, Human Liberty And Freedom of Speech* (Oxford University Press, 1989); Martin Redish, «The Value of Free Speech», 130 *U Pa L Rev* 591 (1982); David A. J. Richards, «Free Speech And Obscenity Law: Toward a Moral Theory of the First Amendment», 123 *U Pa L Rev* 45, 59-70 (1974).The second is a «structural» or «systemic» approach: it is based not on the value of the speech to the speaker, but on the value of the speech to the overall system of free expression. A rights-based justification holds that each individual has a right to speak because speech is in some way especially important to the speaker. Under a rights-based approach, the reason that the government may not suppress speech is, roughly, this: if the particular speakers whom the state proposes to restrict cannot say what they want to say, they will suffer a harm or a loss, and that harm outweighs (in some sense) any legitimate benefit that the restriction might achieve. A Structural justification is sharply different. It holds that freedom of expression is important because of the kind of system that free speech creates or supports In fact, a standard (and plausible) justification for freedom of expression is that such a freedom is needed so that people can collectively arrive at a decision on matters of public importance. [See, for example, Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993); Alexander Meiklejohn, *Political Freedom* (Harper & Brothers, 1960)]. A correct decision

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ferences between California and Ohio. In Europe, there are different national characteristics. This is understandable because the U.S. is a federation and Europe is not. The USSC's power is much stronger than that of the ECtHR, which leaves the authorities of the Member States a margin of appreciation.

However, this has not always been the case. In fact, the USSC dealt little with freedom of speech until well into the twentieth century, when it delivered two important judgments, the *Schenk*[3] and *Abrams*[4], in 1919[5].

The context in which both these Judgments occur is particularly important. It was a time when the United States enjoyed a period of exaltation of militaristic nationalism, which led them to abandon the Monroe Doctrine and participate in the first World War. To encourage the country to focus on the war effort, two pieces of legislation were passed: an espionage bill (1917) and a sedition bill (1918), which limited freedom of expression and gave the Supreme Court the opportunity to participate in the debate. At the same time, Judge Holmes wrote a paper and a dissenting opinion, which were to be a landmark scheme of that freedom nearly to this day.

The facts of both Judgments may appear to be similar.

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about such matters is more likely if there is full debate than if debate is stifled in some way. Arguments roughly along these lines date back at least to Milton and are a staple in justifications of freedom of expression.' [See John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (Doves Press, 1907) (1st ed 1644)]. Under a structural or systemic approach, an individual's right to speak is derivative and instrumental. An individual is allowed to assert a right to speak not because it is especially important to that individual to be allowed to speak, but because we can bring about the kind of system we think is desirable only by allowing individuals to speak. According to David A. Strauss, current First Amendment doctrine is well suited to consider free speech issues when the claim to freedom of expression is based on the rights of the speaker, but not well suited to addressing structural or systemic issues.

[3] *Schenk v. United States*, 249 U.S. 47, 52 (1919), voted on March 3, 1919 by unanimous vote (nine votes). Judge issuing the Opinion of the Court: Judge Oliver W. Holmes. Voted by the Chief Justice and Judges White Van Devanter, Pitney, McKenna, Day, McReynolds, Brandeis, and Clarke.

[4] *Abrams v. United States*, 250 U.S. 616, 627.

[5] About *Schenck* and *Abrams,* in Spanish*:* Bernard Schwartz, *Los poderes del Gobierno. Vol I: Poderes federales y estatales,* UNAM, México D.F., 1966, p. 180; Burt Neuborne, *El papel de los juristas y del imperio de la ley en la sociedad americana,* Civitas, Madrid, 1995, pp. 64 and ff.; Pablo Salvador Coderch, María Teresa Castiñeira Palou, Fernando Igartua Arregui, Miquel Martín Casáis, Josep Santdiumenge Farre, *El mercado de las ideas,* CEC, Madrid, 1990, pp. 26-27 and 31*;* Christopher Wolfe, *La transformación de la interpretación constitucional,* Civitas, Madrid, 1991, pp. 250; Ana Laura Magaloni Kerpel, *El precedente constitucional en el sistema judicial norteamericano,* McGraw-Hill, Madrid, 2001, p. 143; Ignacio Villaverde Menéndez, *Estado democrático e información: el derecho a ser informado,* Junta General del Principado de Asturias, Oviedo, 1994, pp. 94 and ff.; Luis María Diez-Picazo, *Sistema de derechos fundamentales,* Civitas, Madrid, 2004, p. 297; Geoffrey Marshall, *Teoría constitucional,* Espasa-Calpe, Madrid, 1982, pp. 222 and ff.

In *Schenk v. U.S*., Charles T. Schenk, Secretary General of the Socialist Party, had ordered the printing and distribution of leaflets against the war inviting others to disobey orders to fight. He was convicted of three counts of espionage. Holmes issued the Opinion of the Court, which upheld the constitutionality of the Espionage Act and the convictions and gave birth to the doctrine of «clear and present danger.» This doctrine, at first glance, appears to mean that in times of war, in the context of the country at that time, such leaflets were not admissible.

In the words of Holmes:

> «The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.»

This theory represented a widening of the doctrine of freedom of expression that governed U.S. courts, a theory commonly called «the bad tendency doctrine». Under this doctrine, any event that could cause any damage or disturbance of public peace could be banned or penalized.

However, the doctrine did not please the colleagues of Holmes at Harvard, where he had been a Professor and was severely criticized. Some say that this influenced the change in another case that Holmes had to judge the same year, *Abrams v. USA*.

The facts of this case may seem similar to those of the previous one; it was a condemnatory sentence of an American citizen of Jewish origin who had distributed propaganda, written in Yiddish, harshly criticizing the U.S. government for sending troops to Russia.

The Supreme Court upheld the conviction by applying the doctrine of «clear and present danger», but Holmes turned away from the judgment of the majority. He did not depart from the *Schenk* doctrine of «clear and present danger», but he refused to support, among other things, that such a danger would exist in that particular case. For Holmes, the scale of the events was not comparable.

Even more than this, we are interested in the fact that in his Opinion, he introduced the notion of a «marketplace of ideas», which, for many, remains the foundation of the American concept of freedom of expression.

Holmes argues that in this case, the elements of the type are not present and, therefore, Abrams is being punished for professing his ideas. To justify that it is unconstitutional to punish an individual for professing ideas, he wrote the lines that have immortalized him:

«If a man is aware that the time has put paid to many conflicting ideas, then he will realize, even more than he believes in the foundations of his own conduct, that the coveted supreme good is best reached through the free exchange of ideas, that the best test to which truth can be subjected is the ability of thought

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to prevail in a market where it concurs in competition with contrary thoughts; ... ».

The Supreme Court continued to hand down judgments that restricted freedom of expression, with the disagreement Holmes, until at least 1931. We will return later to the doctrine of a «clear and present danger».

Now let us recover the thread of our discussion. Until well into the twentieth century, the USSC did not address freedom of expression. Soon after, following the «New Deal» in the late thirties when the Supreme Court lost control over economic laws and accepted minimal control over them, it decided to change the fate of freedom of expression.

The regime that USSC designed for the freedom of expression in the twentieth century is one of the most important developments of American constitutional law; it has given the USCC the power to shape customs and to enact moral change. However, we cannot forget that the Court accompanies social evolution rather than causing it. The new role of the Court is likely caused by the resolute defense of the rights of minorities like Jehovah's Witnesses or blacks or the concerns of a revolutionary youth disgusted with traditional «puritanism».

2. DUALITY OF MODELS DERIVED FROM REGULATORY TEXTS

At this point, we note that consideration of the legal texts governing freedom of information in the U.S. and Europe indicates that there are two models: one of absolute and unlimited freedom in the U.S. and one of limited freedom in Europe. This idea has been in place from the very beginning of U.S. history.

In the U.S., the starting point is the Virginia Declaration of Rights (1776), whose art. 12 states that «the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments». The text includes absolutely no limits at all.

Compare that with the Declaration of Rights of Man and Citizen (hereafter referred to as DDhc) of 1789[6], art. 11: the right is recognized by saying that «the free communication of ideas and opinions is one of the most precious of man» and goes on to say that «every citizen may therefore speak, write, print freely...» However, it adds: «…without prejudice to the responsibility for the

[6] Article 10 — «Nul ne doit être inquiété pour ses opinions, mêmes religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi».

Article 11 — «La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi».

abuse of this liberty in cases determined by law». Therefore, legal regulations were established to carry the responsibility for abuses.

However, we will not find the latter in the First Amendment of the U.S. Constitution[7], which was adopted in 1791 and, for our purposes, will establish categorically that «Congress shall make no law [respecting an establishment of religion, or prohibiting the free exercise thereof; or] abridging the freedom of speech, or of the press…»

Naturally, this text is filled with different content in each historical period. However, before discussing this, we must recognize that the comparison between art. 11 DDhc and the First Amendment make us think of an absolute and unlimited freedom in America and of limited freedom in France.

This notion is also confirmed by the reading of art. 10 of the European Convention on Human Rights[8] (hereafter referred to as ECHR). The first of its two paragraphs, in what concerns us here, contains a broad recognition of freedom of information, stating that, «everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas…»

However, the second paragraph immediately provides a wide range of possible limitations. Specifically, it begins by saying that the exercise of these freedoms carries duties and responsibilities. Therefore, it «may be subject to such formalities, conditions, restrictions or penalties». Of course, the latter must fulfill two requirements: first, they must be prescribed by law, and second, they must be necessary in a democratic society for a fairly wide range of purposes. There are nine purposes presented, nearly all of them of remarkable breadth: 1) national security; 2) territorial integrity or public safety; 3) prevention of disorder or crime; 4) protection of health; 5) protection of morals; 6) protection of the reputation of others; 7) protection of the rights of others; 8) preventing the disclosure of information received in confidence; and 9) maintaining the authority and impartiality of the judiciary[9].

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[7] Even without a First Amendment, we might infer from the Constitution-from the parts that establish a representative government-a right to free political debate, at least, because that is necessary to make a representative government work. See Charles L. Black, Jr*., Structure and Relationship in Constitutional Law* 35-51 (Ox Bow Press, 1985).

[8] And other international texts. It is observed with respect to the Universal Declaration of Human Rights 1948 (hereafter referred to as UDHR) (arts. 19 and 29.2), the International Covenant on Civil and Political Rights of 1966 (hereafter referred to as ICCPR) (Article 19), and the Inter-American Convention of Human Rights of 1969 (hereafter referred to as IACHR), art. 13.

[9] Article 10 ECHR: «1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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In short, we must recognize that anyone reading these texts would conclude the existence of two very different models.

However, the distinction between the two models must be qualified.

In fact, two reasons make it difficult to establish a clear distinction.

1) The first reason is that freedom of expression has never been absolute in the U.S. because it knew the limits of common law, which are all but negligible. Traditionally, by applying secular principles of *common law*, the state and every public person was an owner in the U.S. Public expression on the streets or in public parks could be prohibited. This principle makes the State more powerful than other owners[10]. Second, there are limits that affect the public employee[11]. Third, in the late 1930s, the law of states used to contain various *offenses* (criminal and civil offenses), all inherited from *common law*, but often aggravated by the legislator, who gagged freedom of expression by establishing substantial penalties for the authors of written statements or biased writings, either criminal (for disorderly conduct[12] or defamatory sedition) or civil (for defamation). Fourth, there was the cri-

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary».

[10] There was not and still there is not any distinction between public and private property, and there is even less notion of what we could translate as «public use affected domain». Therefore, the public authority has the power, considered the quintessential property right, of excluding others from its property. This regime found an excellent illustration in the decision of the Supreme Court of a Massachusetts case, *Commonwealth v. Davis* [167 U.S. 43 (1897)]. The preacher Davis had been convicted for preaching on Boston municipal land without permission from the mayor, which was required by a law passed by the House in the city. The Court (via Justice Holmes, who was not yet in the USSC) confirmed his sentence, explaining that «the Legislature has the absolute and unconditional right to prohibit the public expression on the streets or public parks and in the exercise of its right, does not decrease the public's rights further than a private owner when he prohibits the public into his house» [*Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895)].

[11] What best illustrates the extraordinary submission that was used to join the civil servant to his superiors in the U.S. is the spoils system. The party that won the election took all public offices and appointed public officials. In the position to which he was appointed, the public official was protected from freedom of speech; one must be silent except to praise him. The consequences of this psychological state of mind were felt far beyond what we call «discretionary appointment jobs in the government». All public functions, in the relative sense that this term has in the U.S., suffered this situation, including at both the federal and state levels.

[12] In *common law*, any act or event that altered or is likely to disturb public order is a «crime» (*misdemeanor*). The notion of public disorder was understood broadly: any facts or gesture, even the slightest claim, may threaten the peace and disrupt the sense of security that every citizen is entitled

me of sedition, in embryo in an English law of 1275 prohibiting the stories and news that would lead to discord between the King and his people, which was defined in colonial America as «the intentional publication, without legal excuse or justification, of any paper which criticized a public man, an Act, or a public institution»[13]. However, in 1735, a law was established in America that the truth was always a cause for exemption from liability for seditious libel[14]. Fifth, in the *common law*, defamation was based on a system that could be called *strict liability*. It mattered little what could have been intended by the author of the defamatory statements; it was enough that he had published biased writings, dyed with what Blackstone referred to as «evil inclination», meaning that the writings injured the reputation or honor of a citizen, throwing upon him the public opprobrium, exposing him to ridicule, contempt or the hatred of others, or that they intended to tarnish the memory of the dead. In all of these cases, the victim was provided the opportunity to prosecute for libel[15]. Through *common law*, the reason

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to expect from the authorities, was described as a «breach of the peace» and was punished as such. This ancient concept of the *common law* was general, had indefinite nature and was likely to contain anything. Any unauthorized parade or demonstration, even if it was purely peaceful and would not have gathered more than a handful of individuals, was capable of constituting a crime. The most harmless effect on public order could mean jail. Small American cities consisted of calm, submissive workers. Jehovah's Witnesses had many difficulties with preaching their beliefs; regardless of what they did, they were considered guilty of disorderly conduct (*breach of the peace*). In addition to public nuisance, the broad concept of *breach of the peace* also included vulgar language and tacos (the so-called «improper language»), which, when uttered in public, could be subject to criminal penalties.

[13] Quoted by Stone, Geoffrey R., et al., *Constitutional Law*, 5th ed., Aspen Publishers, 2005, p. 1050.

[14] Prosecutions for seditious libel were common in England, where despite the absence of prior censorship, the press was effectively muzzled through a deterrent effect. However, these prosecutions were rather rare in the colonies. The best known example often cited is that of John Peter Zanger, a New York pamphleteer, who, in 1735, was tried for criticizing the governor-general of the colony in his weekly publication. Zanger's lawyers argued the truth of the facts as an absolutory excuse, but the judge instructed the jury not to give credence to this argument. Rejecting the judge's instructions, the jury acquitted Zanger. The issue raised a great cloud of dust and established the rule that in America, the truth of the facts was always a cause for exemption from liability for seditious libel. The idea that no one could criticize the government was not in keeping with the democratic culture that was being implemented across the Atlantic. In 1798, however, the ideas of the French Revolution were becoming too popular in the eyes of American conservatives, and the Federalist party passed a Sedition Act in Congress, which expired in 1801. The Republican Jefferson, then U.S. President, pardoned those who had been convicted, and Congress passed a law and even refunded the fines imposed. Levy, LW, «Liberty and First Amendement: 1790-1800», *American Historical Review*, vol. 68, 1962, p. 27 et seq.

[15] In *common law*, defamation could be performed through libel (written) or by slander (libel, slander). The distinction between the two is that libel is permanent because it is written, while the injury of slander is temporary because it is through words (oral).

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for the action against defamation is by no means the protection of an individual right or the protection of the reputation or honor of an individual; rather, it is a response to the need to prevent and avoid the tendency of every defamatory claim to cause a disturbance of public peace[16]. In addition, libel was doubly punishable from the civil standpoint and for criminal matters. The civil action for defamation used to have particularly strong effects[17]. As conceived, the system had a radical deterrent effect on the press. In theory, the press could say anything because there was no censorship, but in practice, it did not dare to say anything, knowing that it would be subject to pecuniary penalties that may take it to the edge of bankruptcy.

2)The second reason that relativizes the impression given by the reading of texts is the initial scope of the First Amendment. This document was not adopted to ensure the free expression of citizens before Congress but to distinguish the powers of the Federation and of the Member States. That is, it was used to prohibit regulating free speech to the Congress but not to the legislatures of the Member States; it was an allocation of power to the Member States against the Federation.

Therefore, one cannot say, based on the First Amendment, that freedom of expression is broader in the U.S. than in Europe before 1925, but this point is true from the latter date.

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[16] This very point was emphasized by Sir Edward Coke in the report on libels made in 1606 for the Court of Star Chamber. The English judge then explained that defamation of an individual should be punished because it was likely to call a revenge that would cause a public nuisance, while defamation of a public person deserved to be punished even more for not only going against public order but also discrediting the Government guarantor of public order. Therefore, before the UK incorporated the ECHR into English law, freedom of expression had been emancipated and developed only as far as it could go in some areas (e.g., in access to information) or for contributing to a public interest. V. Boyle, A., «Freedom of Expression as a Public Interest in English Law», *Public Law*, 1982, pp. 574 and ff.

[17] The responsibility of the author of the considered defamatory statements came not only from deliberate lies but also from assertions containing an inaccurate (intended or unintended) factual description. Once it had been proven that the author had published the statements intentionally and that these statements were defamatory in the sense that it tended to cause injury to the reputation of the victim, the offender was automatically liable unless he proved the accuracy of the reported facts or credited a «privilege» to allow him to act in such a way (the «privilege» could derive from the rules that ensure the proper administration of justice or the proper functioning of the elected assemblies). In the absence of proof of truth or justification of privilege, the author of the libel was automatically condemned, whether he had been negligent or not. The victim could prove the damage but did not even need to do so to the extent that the judge of the facts was entitled to presume damages. Moreover, they could be declared «punitive damages» based on varied criteria according to the States.

This is because in 1925, in *Gitlow v. People of New York*[18], the Supreme Court decided to establish this right as a «fundamental right» enforceable against the States. From this Judgment, although in other respects it was a step backwards (as it upheld the doctrine of the «bad tendency»), freedom of expression is a fundamental right[19] equal to those of the Fourteenth Amendment: life, liberty and property. This view of freedom of expression as a fundamental right[20] would be confirmed during the years 1938-1939.

Therefore, only after this time[21], and thanks not only to the wording of the Constitution but also to the Supreme Court's jurisprudence, we might say that freedom of expression is unlimited in the U.S. but limited in Europe.

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[18] *Gitlow v. People of New York*, 268 US 652, 666 (1925).

[19] We have seen that according to David A. Strauss, «Rights and the System of Freedom of Expression», 1993 *U Chi Legal F* 197 1993, p. 197 and ff., two different approaches to freedom of expression are possible. The first is an approach based on the rights of the speaker. The second is a «structural» or «systemic» approach. It is sometimes suggested that the contrast is between a justification for freedom of expression that rests on notions of «autonomy» and one that emphasizes systemic goals like community self determination. [«See, for example, Owen M. Fiss, «Free Speech and Social Structure», 71 *Iowa L Rev* 1405, 1408-11 (1986)]. But this formulation might be misleading if it suggests that the systemic justification does not also serve autonomy. The autonomy at stake in the structural or systemic account is the autonomy of the listeners or the audience, not the autonomy of the speaker. The listeners' autonomy might be impaired if they do not have access to available speech, or if that speech is restricted in a way that expresses disrespect for the audience. For efforts to base freedom of expression on listener autonomy notions of these general kinds, see T.M. Scanlon, «A Theory of Freedom of Expression», 1 *Phil & Pub Aff* 204 (1972); David A. Strauss, «Persuasion, Autonomy, and Freedom of Expression», 91 *Colum L Rev* 334 (1991). But see T. M. Scanlon, «Freedom of Expression and Categories of Expression», 40 *U Pitt L Rev* 519, 530-35 (1979).

[20] To determine whether a measure is consistent with freedom of expression rights-based or structural, an aphorism of Alexander Meiklejohn illustrates the point: «What is essential is not that everyone shall speak, but that everything worth saying shall be said». [Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 25 (Harper & Brothers, 1948). For a criticism of this notion, see, for example, Kenneth L. Karst, «Equality as a Central Principle in the First Amendment», 43 *U Chi L Rev* 20, 39-40 (1975)].

[21] Some violations of freedom of expression were not subject to review by the Supreme Court. We could probably consider in this regard the case of the Sedition Act of 1798, which punished with criminal penalties anyone who discredited the Federal Government with his statements, or the resolution called the «gag rule», adopted by the House of Representatives in 1840, which forbade the elected members to debate countless requests referring to the question of slavery (the rule became permanent in parliamentary procedures); v. Haynes, C. C., Chaltain, S. and Glisson, S M, *First Freedoms, A Documentary History of First Amendment Rights in America*, Oxford UP, 2006, p. 77 and ff.

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3. CONTRASTIVE ANALYSIS OF SPECIFIC JUDGMENTS OF THE SUPREME COURT OF THE UNITED STATES AND THE EUROPEAN COURT OF HUMAN RIGHTS

Let us consider some reasons and examples to show that today, freedom of speech in America is broader than in Europe, but not because it is derived from the texts and regulations. We will proceed to do this by distinguishing three main points. First, we will note how in one place, the principle of neutrality prevails, while in the other place, the principle of «belligerent democracy» prevails. Second, we will refer to the mature version of the doctrine of «clear and present danger» and its absence in Europe. Then, we will refer to the freedom of the press as a fundamental freedom and the notion of press as *watchdog*, noting how in Europe, freedom of the press enters into competition with other rights.

3.1. Neutrality vs. belligerent democracy

We will consider here some reasons and examples to demonstrate that freedom of speech is currently broader in America than in Europe.

Since 1925, the Supreme Court has not only converted the freedom of expression into a fundamental right in a technical sense but has also ensured that this is a freedom with great scope and is a basic part of the system.

To explain this, first let us mention two key ideas and illustrate them with two examples.

a) The doctrine of a «clear and present danger», which, after *Abrams* (1919), was used in a restrictive way for freedom of expression, has had a long journey that has resulted in a very favorable sense for that freedom.

To begin, the Judgment *Whitney v. California* (1927)[22] certainly applied the doctrine as a restraining line (confirming the conviction of Mrs. Whitney for membership in the Communist Workers Party), but Justice Brandeis vigorously explained in his Dissenting Opinion that the fundamental value of freedom of expression requires a distinction between what we might translate as a defense of a political doctrine, i.e., the exposure of ideas to obtain supporters («advocacy») and the incitement to immediate violent action, break the law and commit unlawful acts («incitement»).

Brandeis thus traced the tracks of a new law that would mature in the second half of the twentieth century.

[22] *Whitney v. California*, 274 US 357, 374 (1927).

In 1957, in the case of *Yates v. United States*[23], USSCJ distinguished between the advocacy of communism («advocacy») and the provocation («incitement») to commit an illegal action.

b) The other line of development in American law[24] fixed as an essential criterion for accepting the constitutionality of a regulation its neutrality, meaning that it must abstract the content of what is regulated. This idea was already suggested in the words of Justice Holmes when he said that we must look at the effects of what is expressed, not the content of what is expressed. However, the Court used this idea clearly in the Judgment *United States v. O'Brien* in 1968[25] and clearly formulated it the following year in the Judgment *Tinker v. Des Moines School District*[26].

We announced at the beginning of this section that we would present some cases to clarify the noticeable difference with which freedom of expression in America is conceived.

Brandenburg v. Ohio (1969)[27] is one example. In it, the doctrine of a «clear and present danger» and the distinction between «advocacy» and «incitement»

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[23] *Yates v. USA,* 354 US 298 (1957). V. Lassale, J.-P., *La Cour suprême et le problème communiste aux États-Unis*, Paris, Cahiers de la FNSP, A. Colin, 1960.

[24] For an analysis of the inconsistency of the jurisprudence see Elena Kagan, «The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion», 1992 *S Ct Rev* 29, 38-45.

[25] *USA v. O'Brien*, U.S. 367 391, 377 (1968). Indeed, the Court founded the idea of neutrality of regulation in the *USA v. O'Brien* case, 1968. On March 31, 1966, O'Brien and his three companions burned their draft cards on the steps of the City Court of South Boston to protest the call-up (by lot) that fed U.S. troops fighting in Vietnam. Arrested by the FBI, he was convicted by a Federal District Court of Massachusetts to 6 years of correctional incarceration. As a defense, he invoked his right to freedom of expression. The case reached the Supreme Court, which dismissed his appeal, establishing that the federal law that provides sanctions against those «who falsify, alter, modify, destroy or mutilate a draft card» was «unrelated to the suppression of free expression» [*USA v. O'Brien*, 391 U.S. 367, 377 (1968)]; it was unbiased and objective, therefore valid or, as stated in 1970, the law was neutral (*content-neutral*) and impartial (*content-based*).

[26] *Tinker v. Des Moines School District* [393 U.S. 503, 509 (1969). In *Tinker v. Des Moines School District* [393 U.S. 503, 509 (1969)], the Court recognized the right of two high school students to wear inside the establishment a black armband in protest against the Vietnam War. «A restriction on freedom of expression, said the Court, must be justified by something more than a mere desire to avoid the discomfort and disgust that an unpopular viewpoint always raises.» In 2007, the Supreme Court held that the Tinker case did not apply to expressions that do not contribute to the political debate and did not protect a student who can be reasonably considered a person who promotes the use of a drug. In this sense, the Court declared constitutional sanctions against a high school student who had displayed outside the establishment an incomprehensible and incoherent sign («Bong Hits 4 Jesus») that seemed if not to encourage, at least to sympathize with those who smoked pot [*Morse v. Frederick*, 127 S. Ct. 2618 (2007)].

[27] *Brandemburg v. Ohio* 395 US 444, 449 (1969).

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was used to avoid the conviction of a Ku Klux Klan member who had made a clearly racist, insulting, incendiary and threatening speech. Moreover, the Supreme Court overturned the state law upon which the conviction was based for lack of specificity in drafting the offense.

The other Judgment we are going to discuss is also related to a hate speech. The case of *RAV v. St. Paul* in 1992[28] was related to the challenge of a conviction for having burned a cross on the lawn of a black family. Although this act was threatening, it no longer had the meaning it once did, when it was used to imply that the family must leave the neighborhood immediately unless they were ready to assume the risk of violent reprisals against them.

The decree applied in this case was used to prohibit the placement «of objects such as burning a cross or a swastika likely to cause anger or fear on the basis of criteria of race, faith or color.»

The Supreme Court overturned the conviction. According to the Court, the error made by the authorities was to regulate the insult and injury that incited violence based on race, color, religion, creed or sex. In legislating only on these particular cases and not on any form of abuse in general, the authorities had approved a decree that was based on expression[29], thus violating the Constitution; as long as it was based on the content of speech, the regulation[30] was unconstitutional.

We have not discussed all of the most significant Judgments issued by the USSC, but I believe the Judgments mentioned herein are sufficient to perform an initial contrastive analysis with those of the EctHR.

In contrast with this interpretation of the neutrality of U.S. regulation, we found in Europe and the ECtHR the idea of «belligerent democracy.» Torres del Moral has indicated conclusively that in a sense, any democracy is «belligerent»[31].

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[28] *RAV v. St. Paul*, 505 U.S. 377 (1992).

[29] For an explanation of the SC doctrine about the neutrality of content, see, for example, Geoffrey R. Stone, «Content Regulation and the First Amendment», 25 *Wm & Mary L Rev* 189, 198-200 (1983).

[30] Some authors have tried to apply procedural rules to the regulation of freedom of speech. For an illuminating discussion of the analogy between the rules of evidence and the system of free expression, see Geoffrey R. Stone, «The Rules of Evidence and the Rules of Public Debate», 1993 *U Chi Legal F* 127. Rules and rulings allocating time and other resources between the parties are designed to ensure that one side does not have an unfair advantage. There are similar rules governing parliamentary assemblies and meetings of organizations of all kinds. See Harry Kalven, Jr., «The Concept of the Public Forum», 1965 *S Ct Rev* 1, 12: «What is required is in effect a set of Robert's Rules of Order for the new uses of the public forum, albeit the designing of such rules poses a problem of formidable practical difficulty.»

[31] The «democratic society» is tolerant but not inert. As a «militant democracy» or «democracy that defends itself», it must ensure the protection of its essential principles. Therefore, it must fight against abuses in the exercise of freedom of expression openly directed against its va-

By «belligerent», we mean that democracy in Europe not only enables but even requires the regulation of freedom of expression to suppress the speech «denier», the speeches inciting hatred and intolerance and violent speech.

a) As for the actions of speech «deniers», they are considered a crime in Germany and other European countries, and this position has been endorsed by the European Council decision of May 24, 2003, *Garaudy v. France*. Indeed, as an extension of the jurisprudence of the European Commission of Human Rights[32], the ECtHR has confirmed the existence of a category of clearly established historical fact negations or revisions subtracted by Article 17 ECHR to the protection of art. 10 ECHR[33]. Until now, «notorious historical truths» have been considered in this regard: the Holocaust, the persecution of Jews by Nazi Germany, Nuremberg and the crimes against humanity committed during World War II. Prohibition from discussing these «notorious historical truths» refers both to their reality and their magnitude or severity. ECtHR not only justifies its position in the denial of a «notorious historical truth» but also in the ignorance of fundamental values of the Convention[34].

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lues. If freedom of expression occupies a privileged place among the rights and freedoms guaranteed by the Convention, it must nevertheless coexist with possibly competing rights and freedoms, which are likely to come into conflict with it. Torres del Moral, A.: «Democracia militante», in VV. AA: *Derecho constitucional para el siglo XXI*; Navarra, 2006.

[32] Wachsmann, P., «La jurisprudente récente de la Commission européenne des droits de l'homme en matière de négationnisme», in Flauss, J.-F., y Salvia, M. de (dir.), *La Convention européenne des droits de l'homme: développements récents et nouveaux défis*, Nemesis-Bruylant, coll. «Droit et justice», n. 19, 1997, pp. 103 and ff.

[33] ECtHRJ of September 23, 1998, case *Lehideux et Isorni v. France*, EctHR of June 29, 2004, case *Chauvy et al. v. France*, n. 64915/01 and Comission EHR Decision of 24 May 2003, *Garaudy v. France*, n. 65871/01

[34] «There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention». (Decision of May 24, 2003, case *Garaudy v. France*, n. 65871/01). However, at other times, the EC limits itself to appeal to the existence of an abuse of freedom of expression incompatible with democracy and human rights (Decision of December 13, 2005, case *Witzsch v. Germany*, no. 7805/03). But in any case, the Court is far from any possible complacency with revisionism, even by omission, although some have seen it in the JECtHR of September 23, 1998, case *Lehideux et Isorni v. France*.

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The Spanish legislator incorporated it as a crime, but the Spanish Constitutional Court [STC (hereafter referred to as Spanish Constitutional Court Judgment) 235/2007 of November 7th] declared this reform unconstitutional, in part maintaining that the strict scientific discussion of historical facts could not be considered contrary to the Constitution[35].

b) With reference to the speech inciting hatred and intolerance, the apparent contradiction between the doctrine affirmed by the Judgments and the decision made should be outlined. In other words, it is not difficult to find statements censoring hate speech, but for various reasons, these actions are granted the protection at the end of art. 10 of the ECHR. To date, the protection of art. 10 has been statistically granted only rarely on claims of hate speech[36], which is precisely why the Court's decisions in this regard deserve attention[37].

Indeed, there are certainly cases, such as the *Norwood v. United Kingdom* case, 2004, in which the ECtHR not only proclaims that hate speech is generally objectionable but also considers it an abuse of freedom of expression that a British citizen places a poster in a window of his home with the words «Islam outside England / we protect the British people» accompanied by a photograph of the Twin Towers on fire. The criminalization of all Islamic people was considered unacceptable by the Court.

However, in other cases, the conviction of hate speech may not be accompanied by the expulsion of the appellant outside the field of art. 10 ECHR, e.g., the case *Gunduz v. Turkey*, 2003[38], which condemned «intolerance, including religious intolerance.» The case was about statements that stigmatized and slandered children of unmarried parents under the law of the Qu'ran. However, considering that a religious dignitary had uttered the words on live television, the Court did not feel that he had committed an abuse of the law.

c) With respect to violent speech, the ECtHR considers incitement to violence, an uprising, or armed resistance intolerable in a democratic society, even

[35] Although in Spain it is not as easy to understand this as it is in the countries that participated in the second World War, I am in favor of the criminalization of Holocaust denial. We must consider that the facts on which these crimes are borne are precisely defined: they are only the Holocaust, the persecution of Jews by the Nazi regime, and the Nuremberg trials and crimes against humanity committed in World War II. And in my view, the discussion about the truthfulness or extent of these issues is related to pro-Nazi positions. For historical reasons, this idea may not be perceived the same way in Spain as it is in Germany and in other countries that participated in World War II.

[36] V. *La liberté d'expression en Europe*, 3ª ed., Estrasburgo, Éditions du Conseil de l'Europe, 2006, p. 48.

[37] V. Oetheimer, M., «La Cour européenne des droits de l'homme face au discours de haine», *RTEDH 2007,* pp. 74-75.

[38] JECtHR of December 4, 2003, case *Günduz v. Turkey*, n. 35071/97.

when there is a national minority that considers itself unlawfully subjugated. In this respect, we may mention, inter alia, the Judgment in the case *Zana v. Turkey*, 1997[39], a judgment in which an allegedly ambiguous statement («I support the national liberation movement of the PKK, however, I am not in favor of the attacks. Everyone makes mistakes and it is by mistake that the PKK kills women and children») of a Kurdish independent supporting the PKK Kurdish terrorist party did not receive the protection of the Convention against the prison sentence imposed by Turkish authorities.

3.2. The mature version of the doctrine of a «clear and present danger» and its absence in Europe

To understand the liberal spirit of the USSC and to fully understand the mature version of the doctrine of a «clear and present danger», it is more interesting to proceed with knowledge of the Judgment, *New York Times Co. v. United States,* of 1971[40]. This case is known as the «Pentagon Papers» and involves Judgments of the USSC related to hate speech, to which we have just referred.

The so-called «Pentagon Papers» consist of approximately 7000 pages written for the Secretary of Defense under President Johnson, Robert McNamara, by an expert group. Through this document, the strategy of concealment of the Democratic Administration concerning the Vietnam War became clear. One of the authors of the document leaked it to the New York Times and the Washington Post, who released its publication. The government went to Court for an injunction barring the publication, but the Supreme Court answered that in an emergency appeal that requests a judge to ban any press publication, the burden of explaining the reasons for the urgency and the proof of the harm to national

[39] JECtHR of November 25, 1997, case *Zana v. Turkey*, n. 18954/91.

[40] *New York Times Co. v. USA*, 403 U. S. 713 (1971). Voted on June 30, 1971 per curiam. Concurring Opinion of the judges Black —to which Douglas adheres—, Douglas, —to which Black adheres—, Brennan, Stewart, —who joins White—, White —to whom Stewart and Marshall adhere—. Dissenting individual opinions of Chief Justice Burger and Justice Harlan, —to whom judges Burger and Blackmun adhere. I follow here the excellent presentation of Beltrán de Felipe, Miguel, and Gonzalez García, Julio V., *Las sentencias básicas del Tribunal Supremo de los Estados Unidos de América,* Centro de Estudios Políticos y Constitucionales— BOE, Madrid, 2005, pp. 357 and ff. V. also Revenga Sánchez, Miguel, *El imperio de la política. Seguridad nacional y secreto de Estado en el sistema constitucional norteamericano*, Ariel, Barcelona, 1995, pp. 42 and ff, and «Razonamiento judicial, seguridad nacional y secreto de Estado», *REDC*, núm. 53 (1998), p. 66; Villaverde Menéndez, Ignacio, *Estado democrático e información: el derecho a ser informado*, Junta General del Principado de Asturias, Oviedo, 1994, pp. 73 y 94; Santolaya Machetti, Pablo, «El control de los secretos de Estado: la experiencia en Derecho comparado», *Poder Judicial,* n. 40 (1997), p. 69.

security rests upon the plaintiff. That is, the individual or group who calls for the ban must justify the «clear and present danger». In this case, the Administration had not raised such a charge, and its request was rejected.

As a counterpoint, we must mention the Judgment of the ECtHR in the case of *The Observer and The Guardian v. UK* (1991)[41]. The British judges agreed, at the request of the government, to provisionally ban the referred newspapers from publishing information related to the book *Spycatcher* and other information from the author of the volume. The book contained the memoirs of the author, who had been an agent in the British secret service and narrated numerous illegalities and facts that were embarrassing to the British authorities.

However, the ECtHR considered the injunction established by the British courts throughout the period of time in which it had been effectively compatible with the Convention. The Court only considered the ban contrary to the ECHR when the book had been published in other countries because the measure could not be considered «necessary in a democratic society» as required by the repeated art. 10 ECHR.

3.3.Freedom of the press as a fundamental freedom, and the press as watchdog

a) The above brings us to a Judgment that is, for many, the most important Judgment on freedom of the press issued by the USSC.

In 1964, the Supreme Court overturned the libel regime that had been established by «*common law*» and created a legal regime that establishes the press, in the very words of the Judgment, as the *watchdog* of freedom.

The facts of the Judgment are as follows: The New York Times had published an advertisement that supported the movement of Dr. Martin Luther King, Jr. and alluded to protests and excessive police response. The commissioner of Montgomery, Alabama, where the more serious incidents took place, felt that these comments alluded to him. Therefore, he sued the newspaper and the latter was condemned to indemnify Sullivan with $500,000, an amount that was very high at that time.

The Supreme Court overturned the conviction on the grounds that the law of Alabama (encoding the old law) was contrary to the Constitution due to its deterrent effect on the press, and it established jurisprudence that can be summarized as follows:

1) The errors in the expression of information are inevitable if we want to protect the freedom of expression, and this is a guarantee that the freedoms can breathe.

[41] JECtHR of November 26, 1991, *Observer and Guardian v. UK*.

2) The prosecution has the burden of proof in establishing the intent to defame.

3) The injured party must prove the lack of veracity.

These changes, apparently simple, represent a shift in the regime of the press, which hereafter did not fear the sentences of the courts when acting with minimal care.

b) The *Sullivan* Judgment[42] projected its influence beyond the borders of the United States.

It has been said that *Sullivan* ideas were incorporated into the jurisprudence of the ECtHR in the *Handyside* case[43] in 1976. I do not think this is accurate; rather, it was JECtHR *Lingens*, 1986[44] that captures the essence of *Sullivan*.

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[42] *New York Times Co. v. Sullivan* 376 US 254, 270, 279-280 (1964).

[43] In a first general approach, we can say that the liberal philosophy that inspires this case has been followed by the ECtHR in the case *Handyside v. United Kingdom,* where the ECtHR said that democratic society is that who knows how to bear or endure all expressions, to accept all the information, all ideas, including those hitting, shocking or disturbing the State or any sector of the population, and the Court adds that this is required by pluralism, tolerance and broadmindedness [JECtHR of December 7, 1976 (Grand Chamber), case *Handyside v. United Kingdom* (Series A no. 24), paragraph 49]. For an assessment of the American experience compared to the European one, or some of the European ones, like Germany, France and the ECtHR, please see v. Pech, Laurent, *La liberté d'expression et sa limitation*, Presses Universitaires de Faculté de droit de Clermont-Ferrand, LGDJ, 2003, and the article by the same author «El mercado de las ideas. Una metáfora americana», in Kiyindou, A., and Mathien, M. (ed.), *Evolution de l'économie et liberté d'expression libérale*, Bruylant, 2007, p. 59 et seq. V. likewise Docquir, P.-Fr., *Variable et Variations of liberté d'expression en Europe et aux Etats-Unis*, Bruylant, coll. «Droit et Justice, n. 72, 2007. In the series Science and Technique of Democracy, the Venice Commission of the Council of Europe organized a symposium in 2003 that dealt with freedom of expression in Europe and the USA.

[44] *Lingens* JECtHR of July 8, 1986. In Spanish, v. Santiago Muñoz Machado, *Libertad de expresión y procesos por difamación,* Ariel, Barcelona, 1988, p. 43; Owen M. Fiss, *La ironía de la libertad de expresión,* Gedisa, Barcelona, 1999, pp. 18 and pp. 71 and ff.; Ignacio Villaverde Menéndez, *Estado democrático e información: el derecho a ser informado,* Junta General del Principado de Asturias, Oviedo, 1994, p. 91; Pablo Salvador Coderch; María Teresa Castiñeira Palou; Fernando Igartua Arregui; Miquel Martín Casáis; Josep Santdiumenge Farre, *El mercado de las ideas,* CEC, Madrid, 1990, pp. 8 and ff.*;* Pablo Salvador Coderch *El derecho de la libertad,* CEC, Madrid, 1993, pp. 64 and ff.; Burt Neuborne; *El papel de los juristas y del imperio de la ley en la sociedad americana,* Civitas, Madrid, 1994, pp. 76 y 79; Andrés Boix Palop «Libertad de expresión y pluralismo en la red», *REDC* núm. 65 (2002), p. 153; Antonio Jesús Sánchez Rodríguez, «Libertad de expresión y programación especial en derecho norteamericano de los medios audiovisuales», *RAP* núm. 151 (2000), pp. 513 and ff; Antonio Fayos Gardó «Reflexiones sobre la jurisprudencia norteamericana en materia de libertad de expresión: de Holmes a la sentencia del caso Internet», *RAP* número 141 (1996), págs 395 and ff. y «El nuevo mercado de las ideas (Sobre la sentencia del Tribunal Supremo norteamericano del caso Internet)», *RAP* núm. 144 (1997), pp. 231 and ff.

The *Lingens* facts are difficult to summarize. Lingens was a journalist who criticized Peter, leader of the Austrian Liberal Party, for having been a member of the S.S. Prime Minister Kreisky made statements defending Peter and accusing Lingens of using mafia methods. Lingens then wrote an article criticizing Kreisky and referring to him as the «worst and most odious opportunist» and calling him «immoral and unworthy». Kreisky sued Lingens, and the courts convicted the latter on the grounds that he had not proven his charges as required by law.

The ECtHR does offer a doctrine and jurisprudence that recalls the case of *Sullivan*. In its doctrine, it incorporates the idea that the Convention also protects the ideas that «offend, shock or disturb». It is for this reason, and because the expressions used by *Lingens* were value judgments and not facts and therefore did not constitute proof, that the sentence overturned the conviction to Lingens.

c) What interests us is to establish whether the freedom of expression enjoys such a favorable status in the context of the jurisprudence of the ECtHR. Here we must note that in European jurisprudence, we find resolutions that lead us to speak, in opposition to freedom of expression, about a competing right of strengthened opposability, which would be the protection of religious beliefs and other concurrent rights with freedom of expression, which would enjoy only attenuated enforceability, including the claim to fame and respect for the intimacy of private life[45]. In practice, pure and simple submission to freedom of expression is rarely recognized by the ECtHR[46].

Beginning with the right to the protection of religious convictions, the Court has considered it «the protection of the reputation or the rights of others» (art. 10 ECHR). The Court referred to this protection in an important Judgment, the *Otto-Preminger-Institute* case [47], which involved the banning and confiscation of a film offensive to the Catholic religion by the Austrian judicial authorities. The film was clearly blasphemous against God the Father, against Christ and against the Virgin Mary. The ECtHR confirmed the decisions of the Austrian courts on the grounds that 80% of the population of the region was Catholic.

[45] The Court has yet to develop a general doctrine for the resolution of such conflicts (Smet, Stijn, «Freedom of expression and the right to reputation: human rights in conflict», 26 *Am. U. Int'l L. Rev*. 183 2010-2011, p. 186). While the Court introduced a tentative theoretical approach to conflicts between human rights in *Chassagnou v.France*, App. Nos. 25088/94, 28331/95, & 28443/95 (Eur Ct HR Apr. 29, 1999,), it has not applied this theory in its subsequent case law.

[46] V. Drooghenbroeck, S. Van, «L'article 17 of the Convention européenne des droits de l'homme est-il indispensable?», *RTEDH* 2001, n. special, *Le droit à la face du racisme et montée the xénophobie*, p. 542 and ff.

[47] JECtHR of September 22, 1994, *Otto-Preminger Institut v. Austria*, Series A, n.13470/87.

In another important case, the Court based its protection of an effective religious pluralism on the idea that to tolerate hard attacks against religious beliefs may lead people to avoid public observance of their faith. This was the foundation to confirm the UK decision to refuse the license for distributing and screening a video about the Ecstasy of St. Theresa, a video that was confused with carnal passion to the point of insinuating Christ's correspondence to it. The ECtHR, in the Judgment *Wingrove v. United Kingdom* (1996)[48], held that the decision fell within the discretion of the State.

If we try to define what anti-religious attacks are proscribed and which are permitted, it should be noted that the «obligation to avoid expressions that are gratuitously offensive» and «do not contribute to any form of public debate capable of furthering progress in the affairs of men» were apparently the reasons for protecting Paul Giniewsky, a journalist. Following the publication of the encyclical *Veritatis Splendor* in 1993, Giniewsky published an article titled «The Darkness in the Error», which stated that the Catholic Church considers itself the only guardian of divine truth in terms that made up the humus that had «germinated the idea and culmination of Auschwitz». The director of the publication and the author of the article were sentenced to a fine of 6000 francs, but the ECtHR found that the fine violated Art. 10 ECHR, explaining that the article did not open an absurd debate, that it referred to a text of the Pope and not of all Christendom, and that it was not offensive or libelous.

Another criterion to identify which ideas are contrary to the Convention may be that which considers that ideas hostile to the faith should be tolerated. But it can not be said the same about the offensive attacks against sacred symbols, as follows from *Aydin Tatlav v. Turkey*[49], Judgment in which, for that reason, was strucked down a modest fine imposed by Turkey on the religious desecration of the author of a book with scientific pretensions which held that God did not exist, that had been created to fool the illiterate people, that Islam is a primitive religion that deceives the public with stories about heaven and hell and that worships relations of exploitation, including slavery.

Moreover, we can discuss competing rights of attenuated enforceability; one would be the fame or reputation of an individual, which certainly is a novelty in recent years.

Indeed, there are many cases that could be brought to bear to illustrate the Court's preference for freedom of expression about fame[50], which is also justified

[48] JECtHR of 1996 November 25, case *Wingrove v. United Kingdom*, Series A, rec. number 17419/90.

[49] JECtHR of May 2, 2006, case *Aydin Tatlav v.Turquia*, rec. Number 50692/99.

[50] According to Smet, Stijn («Freedom of expression and the right to reputation: human rights in conflict», 26 *American University International Law Review* 183 2010-2011, p. 236) considered on the whole, the Court's defamation case law clearly supports a *Praktische Konkordanz* so-

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if we consider that the ECHR does not recognize such rights. Nothing in the Convention expressly guarantees a right to fame. This explains why this right has not been protected except when it was a legitimate restriction on freedom of expression as an extension of the rights «for the protection of [the reputation or] the rights of others»[51].

In recent years, the overprotection thus conferred to the right of freedom of expression compared to the protection of the reputation of others[5253]seems to be corrected in the jurisprudence of the Court[5455].

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lution to the conflict between freedom of expression and the right to reputation-where neither right is granted absolute preference. The Court advocates finding a middle ground between both rights because the freedom of expression does not confer an unlimited right to make statements that affect another's reputation, and because the right to reputation does not warrant a complete protection against all critical statements.

[51] A detailed study of the jurisprudence of the old and the new Court would demonstrate, statistically at least, that the Court recognizes the prevalence of freedom of expression in case of conflict with safeguarding the reputation of others. This prevalence for freedom of expression seems indifferent to the identity of persons claiming the protection of their reputation or honor. All are delivered to the same fate as in the case of employers (JECtHR of 29 February 2000, case *Fuentes Bobo v. Spain*, No. 39293/98, JECtHR of January 21, 1999, case *Fressoz and Roire v. France*), employees (in the particular case, sealers) (JECtHR of May 20, 1999, case *Bladet Tromso and Stensaas v. Norway*, N. 27980/93), doctors (particularly surgeons: JECtHR of May 2 2000, case *Bergens Tidende et al. v. Norway*, N. 25132/95, JECtHR of November 16, 2004, case *Selistö v. Finland*, No. 57767/00, JECtHR of October 11, 2007, case *Kanellopoulou v. Greece*, N 29504/05) political figures (JECtHR of September 29, 1999, case *Dalban v. Romania*, No. 28114/95) or businessmen (Judgment of the Grand Chamber of 15 February 2005, case *Steel and Morris v. United Kingdom*, N. 68416/01). This approach has often been criticized. See Cohen Jonathan, G «Abus de droit et Libertés fondamentales», *Au Carrefour des droits, Melanges en l `honneur de L. Dubouis*, Dalloz, 2002, page 538; Morange, G «The protetion of réputation ou des droits d'autrui et la liberté d'expression», en *Libertés, justice, tolerance. Melanges en hommage au Doyen G. Jonathan Cohen*, Volume II, Bruylant, 2004, pp. 1249 et seq. Exceptionally, the European Court has founded the advantage recognized to freedom of expression on the existence of a hierarchy: in the JECtHR of May 2 2000, case *Bergens Tidende et al. v. Norway* (No. 26132/95), the Court stated that even considering the obvious interest of Dr. R .... to protect his professional reputation, it was necessary to prioritize the public interest in preserving the freedom of the press to provide information on issues that have a legitimate public interest. Usually, however, the prevalence of those ideas recognized as freedom of expression is the result of the weighing of the two conflicting rights: the protection of the reputation of others systematically weighs less than the defense of the right guaranteed by Art. 10.1 ECHR. Thus, individuals have become «hostages of legitimate public interest» linked to any general debate.

[52] Eva Brems, *Introduction to Conflicts between fundamental rights* (Eva Brems ed., 2008) 1, 4-6, refers lines of reasoning that may be useful for developing a «polyvalent» model for legislators and judges dealing with conflicting human rights: eliminating fake conflicts, preferring compromise, and developing criteria and modalities for prioritizing rights.

Similarly, it may seem curious that the European Court, as prone to the use of the doctrine of «living law» as it is, has not erected respect to fame into an independent fundamental right deriving from the Convention itself[56]. Moreover, the Court has erected the right to protection of fame into a component of the right to respect for private life (JECtHR of November 15, 2007, issue *Pfeifer v. Austria*, N.12556/03, with dissenting opinion of Judge Loucaïdes).

However, fame and honor are recognized in art. 12 of the Universal Declaration of Human Rights (hereafter referred to as UDHR) and art. 17 of the International Covenant on Civil and Political Rights.

The fact that fame and honor are recognized in international agreements and perhaps the transformation of the role of the press, which often acts as a mere economic activity designed to obtain maximum profitability and tends to be ac-

[53] Several authors have identified the possible value of the doctrine of Praktische Konkordanz, developed by the German Constitutional Court (Bundesverfassungsgericht) for the resolution of conflicts between human rights. This doctrine involves a judicial search for a compromise in which both human rights give way to each other and a solution is reached that keeps both rights intact to the greatest extent possible. Yet, in the majority of cases, a compromise solution will not be achievable and the Court will need to undertake the difficult exercise of determining which right deserves preference over the other. See Olivier De Schutter & Frangoise Tulkens, «Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution», in *Conflicts between fundamental rights*, Eva Brems ed., 2008, p. 203 (clarifying that «Praktische Konkordanz,» or «practical concordance,» achieves a compromise between conflicting rights by «optimizing» each right against the other). See Smet, Stijn,»Freedom of expression and the right to reputation: human rights in conflict», 26 *American University International Law Review* 183 2010-2011, p. 188 and ff.

[54] We will summarize the case later. The change in the attitude of the Court is particularly remarkable if we consider that it has been applied to safeguard the reputation of a particularly controversial politician, who occupied a position considered extremist (JECtHR, Grand Chamber of 22 October 2007, case *Lindon Otchakovsky -Laurens and July v. France*, No. 21279/02 and 36448/02).

[55] Gavin Millar, «Whither the Spirit of Lingens?», 3 *EuR. HUM. RTS. L. REV.* 277 (2009), chartes the shift in the Strasbourg jurisprudence from stringently protecting free speech to permitting more restrictions on speech, especially in privacy cases.

[56] It is true that, literally, the protection of fame is only permissible when considering it a limit of freedom of expression, but this technique does not seem decisive when considering the «manipulative» interpretation (that is, without any pejorative sense) made by the Court of art. 4. ECHR to conclude the applicability of art. 14 (JECtHR of July 18, 1994, case *Karlheinz Schmidt v. Germany*, Series A, 291-B). The consecration of a right to the protection of fame is legitimate not only from the standpoint of the fundamental nature of it in a democratic society but also because of the mutation of the press, which has become nothing more than an economic activity only concerned with obtaining maximum profitability and with a clear tendency to consider that it is accountable only to itself.

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countable only to itself, seems to induce the ECtHR to recognize that right, linking it under the heading of the «protection of the rights of others.»[57]

Two cases deserve to be mentioned in this regard. In one, JECtHR, Grand Chamber, of 22 October 2007, case *Lindon Otchakovsky —Laurens and July v. France*, an appeal from the indisputably public and political character Jean—Marie Le Pen was considered[58].

The facts are as follows: Lindon and his editor had written an anti-Le Pen novel, and a magazine editor had sympathized with them. The novel, inspired by real events, particularly the murder of a young Moroccan by a militant of Le Pen's party, linked the latter to a «leader of a gang of murderers», claimed the murder of the young Moroccan had been «recommended» by Le Pen and described the latter as «a vampire who feeds not only on the bitterness of his constituents but also sometimes on their blood».

The French authorities sentenced the author of the novel and the magazine editor to fines and to pay damages, and the ECtHR confirmed this view, considering that the criticism made against Le Pen stoked violence and hatred and could not be protected under the umbrella of art. 10 ECHR[59].

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[57] *Chauvy v. France*, is the Article 10 case in which the Court for the first time identified the existence of a conflict between two ECHR rights in defamation cases. *Chauvy* represented a classic example of a defamation case. A closer examination of all Court judgments and relevant admissibility decisions in defamation cases since *Chauvy* shows that the Court has explicitly identified the conflict between freedom of expression and the right to reputation in twenty-four of the ninety relevant cases. Compare *Kulis v. Poland*, App. No. 15601/01, T 54 (ECtHR Mar. 18, 2008) (acknowledging that the domestic courts failed to strike a balance between the competing interests), and *Kwiecien v. Poland*, App. No. 51744/99, 52 (ECtHR Jan. 9, 2007) (indicating that the domestic courts failed to recognize a conflict between the right to freedom of expression and the protection of reputation), with *Ivanova v. Bulgaria*, App. No. 36207/03, 67 (ECtHR Feb 14, 2008) (noting that the domestic courts fully recognized the conflict). See Smet, Stijn,»Freedom of expression and the right to reputation: human rights in conflict», 26 *American University International Law Review* 183 2010-2011, p. 183 and ff.

[58] Remember that the Court, in *Lingens v. Austria*, 103 ECtHR (ser. A) 14, 25-26 (1986), described the level of acceptable criticism for politicians as higher than that for a private individual.

[59] The solution was all the more unexpected for not addressing, contrary to what the dissenting judges would have liked (Rozakis, Bratza, Tulkens and Sikuta), the nature of ideas («good» or «bad») to influence the protection of reputation. The revaluation of the protection of the reputation of others is also a clear objective of many judges, who believe that it is necessary not only to fight against the abuses of the mass media but also, and perhaps above all, to enter in the law of the Convention a real right to fame that would have a similar status to that of freedom of expression. The concurring opinion of Judge Loucaïdes to JECtHR of October 22, 2007, case *Lindon Otchakovsky - Laurens and July v. France*, is significant in this sense. Indeed, it may seem paradoxical that the Convention explicitly protects rights of minor importance (such as the secrecy of correspondence) and marginalizes a major element of human value, which is ultimately the dignity of the person. The right to fame and honor is recognized both by art. 12 of the Universal Declaration of Human Rights and art. 17 of the International Covenant on Civil and Political Rights.

The other issue is one in which the ECtHR explicitly relates the claim to fame to the right of respect for private life. The *Pfeifer* case[60] involved a claim that a right-wing weekly magazine had accused him of having formed a «partnership for hunting» a certain person who had written an article trivializing Nazi crimes. The latter person had just committed suicide. The ECtHR held that the newspaper had violated the right to fame or reputation, which is considered implicit in art. 8 ECHR[61].

The European Court of Human Rights recognized the existence of a conflict between the right to freedom of expression and the right to reputation in defamation cases in *Chauvy v. France*. Yet, the effect of this recognition on the legal reasoning of the Court under Article 10 has been minimal. While the legal reasoning of the Court under Article 8 appears, to a certain extent, to be more systematic, there remains a lack of consistency and transparency in the Court's reasoning under both Articles. The main problem is preferential framing, primarily caused by what can be referred to as the one-sided application of the impact criterion. There are strong indications that the Court's ruling in a given case indeed depends on which Article is invoked by the applicant[62].

The right that appears in the Convention and that we consider of attenuated enforceability is respect for the intimacy of private life. The protection afforded by European case law for the respect of the reputation of others is part of a broader movement that reinforces the protection of privacy and underlines the intimacy of private life[63].

Freedom of expression in conflicts with the reputation of others has a large space but does not have a position of seniority; these freedoms must be weighed. The key element of the reconciliation between the two rights is the contribution of the publication or the message to the debate of general interest or public interest.

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[60] JECtHR of November 15, 2007, case *Pfeifer v. Austria*, N.12556/03.

[61] Article 8 ECHR: «1. Everyone has the right of respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

[62] Smet, Stijn,»Freedom of expression and the right to reputation: human rights in conflict», 26 *American University International Law Review* 183 2010-2011, p. 235.

[63] V. Wachsmann, P. «Le droit au secret de la vie privée» in Sudre, F (ed.), *Le droit au Respect de la vie privée au sene de la Convention Européene de droits de l'homme*, Nemesis-Bruylant, coll. «Droit et justice», n. 63, 2005, p. 151; Dreyer, E. «Observationes sur quelques applications récentes de l'article 10 de la Convention européenne (Janvier 2006-janvier 2007)», *RTEDH,* 2007. p. 639.

The issue *Hannover*[64], 2004, can be considered of great importance in this context. In it, the ECtHR, although renewing its famous doctrine of ideas that collide and the press as *watchdog*, advances in the recognition of privacy when a publication does not enrich the public debate, despite the curiosity of public and commercial interest magazines.

The case concerned the publication, at different times, of a series of photographs of Princess Caroline of Monaco. The ordinary jurisdiction considered her claim to prohibit the publication of some of the photographs in which she appeared with a friend on the back patio of a restaurant and others in which she appeared with her children. There were others that had no public significance: horseback riding, in a restaurant with a friend, skiing, leaving home, playing tennis and taking a trip.

The ECtHR applied art. 8 ECHR and Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy and recalled that the emphasis must be placed on the possible contribution of the photos to the debate of general interest and on the fact that the press, as *watchdog* in a democracy, should communicate ideas and information on matters of public interest.

Thus, although according to the law of the country Carolina could be described as «absolute personality» and although there was public interest and commercial interest in the magazines, the publication of the photos did not contribute to the debate of general interest, as the photos were not taken during events in the performance of official duties but rather shared details of her private life.

4. INCORPORATING THE *SULLIVAN* AND *LINGENS* DOCTRINES IN SPAIN

According to Muñoz Machado[65], the current situation of the media in which they should have no fear of million-dollar indemnity convictions if they behave with minimal diligence is derived from *Sullivan* and, in particular, from the doctrine that affirms it. First, mistakes are inevitable. Second, the plaintiff must prove the malice of the slanderer. Third, the individual must prove the lack of veracity of the slanderer's statements. In this way, this doctrine allows the press to play its role of *watchdog* of freedom.

[64] JECtHR of June 24, 2004, case *Hannover v. Germany*, N. 59320/00.

[65] Muñoz Machado, Santiago, *Libertad de prensa y procesos por difamación,* Ariel, Barcelona, 1988, p. 81 and ff.

In Spain, the press also appears to exercise that role, and this requires us to ask whether there is, or was, a *Sullivan* judgment in Spain and to ask about the situation regarding the burden of proof in proceedings for defamation and violation of privacy. The following observations must be made.

We tend to attribute the privileged position of the press among us to the fact that the Constitutional Court has provided it with a preferential position with respect to the rights that collide against it, such as honor, intimacy and self-image, and has justified that position of preference on the grounds of the role of the press in democratic societies[66].

However, it should be noted that since the STC 6/1981 of March 16th, our Constitutional Court came to stress the importance of freedom of information for democracy, and since STC 159/1986 of December 16th, the Constitutional Court has been discussing the preferred position of freedom of expression. However, the incorporation of the *Sullivan* case into our system actually took place through STC 6/1988 of January 21st, nearly 10 years after the proclamation of the Constitution.

Indeed, from that moment, the rules governing evidence in Spain, in Articles 24.2 of the Spanish Constitution and 217 of the Code of Civil Procedure, will be interpreted in the specific way established by the jurisprudence of the Spanish Constitutional Court.

In fact, in the jurisprudence of the Spanish Constitutional Court, there are Judgments in which the substance of the *Sullivan* doctrine joins Spanish law in a labor process[67] and in civil[68] and criminal[69] matters. These Judgments affect

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[66] A cornerstone of the system of freedom of expression is the belief that robust or even acrimonious debate is a sign of a healthy democracy, also in the United States. This is a theme of many of the classics of First Amendment literature-notably Justice Brandeis's famous opinion in *Whitney v California* and, in a different way, John Stuart Mill's *On Liberty.*' (Hackett Publishing Co., 1978). For a discussion of the emergence of this idea, see Samuel H. Beer, *To Make A Nation* (Harvard University Press, 1993). See also Federalist 70 (Hamilton), in Clinton Rossiter, ed*, The Federalist Papers*, 426-27 (Mentor, 1961) («The differences of opinion, and the jarring of parties ... Though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.»).

[67] The doctrine is imported with a labor case: STC 6/1988 of January 21st. Mr. Crespo Martinez, having served in regular employment in the governmental organization Medios de Comunicación Social del Estado, passed in 1981 to work at the press office of the Ministry of Justice, professional editor category, assigned to the Undersecretariat of the Ministry and reporting directly to the Head of Press Office of the same. By Order of the said Undersecretary of February 12, 1985, he was dismissed for committing a very serious offense of disloyalty and breach of trust and a slight of work, so he filed a claim. The *Lingens* case, and indirectly *Sullivan*, were received in the LC 5: 1) Accurate information is protected that is diligently sought but not completely true. 2) «Actual malice», insult, contemptuous expression unnecessary to inform, are not protected, which is different from introspection operations required by the animus iniuriandi. 3) In addition,

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not only the freedom of information but also the freedom of speech[70]. These are judgments in which the person who expresses his or her opinion or who informs must prove only diligence in seeking the information. However, if the person affected by the information believes that dishonorable data were unnecessarily acquired from the information that was released, he must prove it[71].

It is also possible to show that, in Spain, the regime of the burden of proof makes the honor of people with public relevance more vulnerable.

The STC 112/2000 of May 5th is very expressive to show it. An article titled «The Spanish Falcon Crest», published in *Época* magazine, included data that infringed on the privacy of a person without public relevance in a way that reduced her image in the eyes of others. The Court, with quotes from the European Court of Human Rights and, in particular, the *Lingens* case, stressed that the honor of people with public relevance is similar to that of other individuals. However, these individuals do not have the burden of proving that the dishonorable terms are unnecessary for informative speech, so the Court examined that aspect *ex officio.*

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to exercise the right to enjoy constitutional protection, the facts have to be of public importance. It concludes: «The dismissal, in short, was decided, in this case, with damage to freedom of information of the claimant, for the sanction was not imposed for breach of a duty of confidentiality, and it was not proved during the trial phase the negligence or *nocendi animus* that may have concurred in its transmission, the information itself referring to hypothetical anomalies that would merit public attention».

[68] STC 232/1993 of July 12th was one of the top two cases. The *Sullivan* doctrine about neutral reportage was received, but it was explained that: Who merely repeats what someone else says has to prove it. Who generates the repeated news must be truthful. The two publications must be of public importance. V. also STC 171/1990 of 12 November.

[69] STC 105/1990 of June 6th: translation of *Sullivan* to criminal matters. Applies STC 6/1988: accuracy: LC 5. But it considered that malice concurred, and so the relief requested was denied. V. also SSTC 200/1998 of 14 October and 29/2009 of January 26th.

[70] V. STC 151/2004 of 20 September.

[71] Other cases of application of the STC 6/1988 are as follows: In STC 139/1995 of September 26th, the truth doctrine is invoked (CL 7); it is applied to a report in the journal «Interviú» and concludes that the information was not true and was denied protection. STC 6/1988 is also quoted, resulting in denying the veracity of what was published in STC 28/1996 of February 26th, which states that the more serious the information, the deeper the inquiries must be. The STC 110/2000 of May 5th, applies the STC 6/1988 to an article written by environmentalists against a mayor. The article, considered truthful and not malicious, was within art. 20 of the Spanish Constitution (freedom of speech and information). The STC 158/2003 of September 15th applied STC 6/1988 to information published about a law firm, which, considered truthful and not malicious, was within art. 20 of the Spanish Constitution. In the STC 61/2004 of April 19th, a long list of Judgments repeating the doctrine of the truth of the STC 6/1988 was quoted, applying it to a story published on sexual harassment that was considered truthful and within art. 20 of the Spanish Constitution (freedom of speech and information).

5. FINAL COMMENTS

We deliberately title this final chapter «Final Comments», as we propose further dialogue and deliberation on these issues rather than a list of conclusions.

1) The first reflection arising from the study of the main judgments on the freedom of expression that the USSC and the ECtHR have dictated is that there are many ways to regulate freedom of expression that are compatible with democracy: the version of the United States prior to 1919, the version of the United States prior to sentencing *Sullivan*, the European version prior to the *Lingens* case, the European version after the *Lingens* case, etc. All of these systems have been or are considered to be democratic. For now, there is no legal model for the press that can claim to be the only version essential to democracy[72].

Specifically, the regime of the press currently in force in the U.S. and Europe has yet to explain why the honor and privacy of public figures should suffer the way it does.

However, we may add that some regimes of freedom of expression could be considered more appropriate to democracy than others.

2) A second point raised by this paper is that, at times, large changes do not occur because of grand and solemn declarations but by the virtue of the fine print of things. We have observed, in this sense, how changing the burden of proof in defamation (*Sullivan*) has been a groundbreaking in the legal regime of the press.

As we have observed, the current situation of the media is such that if they behave with minimal diligence, they have little fear of being sentenced to multimillion dollar compensations. This regime derives from the *Sullivan* case, which established a doctrine that can be summarized as follows: First, mistakes are inevitable. Second, the offended must prove the malice of the slanderer. Third, the claimant must prove the lack of veracity of the slanderer. This doctrine allows the press to play its role as the *watchdog* of freedom.

3) In Spain, the press appears to have this role also, and this requires us to ask whether there is, or was, a *Sullivan* judgment in Spain, i.e., we must ask ourselves about the situation regarding the burden of proof in proceedings for defamation and violation of privacy. We can make the following observations:

[72] According to David A. Strauss, «Rights and the System of Freedom of Expression», 1993, *U Chi Legal F* 197 1993, today First Amendment rights, conceived as the rights of the speaker, are, to a greater and greater extent, important mostly in a derivative sense. They are important because they serve broader systemic and structural values. Until we have the conceptual and empirical tools to address those structural issues, solutions to many of today's problems will continue to elude our grasp.

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In Spain, we tend to attribute the privileged position of the press to the fact that the Constitutional Court has given it a preferential position on the rights that collide with it, such as honor, intimacy and self-image. The Constitutional Court justifies that position, explaining its connection to democracy.

However, it should be noted that since the STC 6/1981 of March 16th, our Constitutional Court came to stress the importance of freedom of information for democracy and that from STC 159/1986 of December 16th, the Constitutional Court has been discussing the preferred position of freedom of expression.

However, the incorporation of the *Sullivan* case in our system occurred through STC 6/1988 of January 21st, almost 10 years after the adoption of the Constitution.

Título:

LA LIBERTAD DE COMUNICACIÓN EN ESTADOS UNIDOS Y EN EUROPA

Abstract:

This paper compares the freedom of communication in the jurisprudence of the Supreme Court of the United States and the European Court of Human Rights, departing from the judgments of the Supreme Court of the United States. It is noted that there are differences, as specified herein. Regulatory texts invite to speak of two distinct models, though this may be a far-fetched statement. This paper makes the following concluding remarks: 1) There are many concepts of freedom of expression that are compatible with democracy; the one derived from the *Sullivan* Judgment in the U.S. (and in Europe from the *Lingens* Judgment) is not the only one, although it is currently considered the most consistent with democracy. This point is not discussed here. 2) Major changes sometimes occur through seemingly small detail. In this sense, the shift of the burden of proof in defamation cases (*Sullivan*) has created an earthquake in the legal regime governing the press. The *Sullivan* doctrine can be summarized as follows: first, errors are inevitable, as freedom of speech requires «breathing room»; second, the malice of those accused of defamation must be proven; third, it is necessary to prove the lack of veracity of the slanderer. This doctrine allows the press to play its role as the *watchdog* of freedom. 3) In Spain, the press also appears to play this role, thus re-

quiring us to ask whether there is, or ever was, a *Sullivan* Judgment in Spanish jurisprudence. We tend to attribute the privileged position of the press in Spain to the fact that the Constitutional Court has given preferential consideration to freedom of speech when it is in conflict with honor, intimacy and self-image privacy. This preference is justified by its connection to democracy. Since the judgment of the Spanish Constitutional Court (STC hereafter) 6/1981 of March 16th, the Spanish Constitutional Court has stressed the importance of freedom of information for democracy, and since the STC 159/1986 of December 16th, the Constitutional Court has suggested the preferential position of freedom of expression. However, the incorporation of the *Sullivan* doctrine into the Spanish system occurred through STC 6/1988 of January 21st, almost ten years after the passage of the Constitution into law.

Resumen:

El trabajo compara la libertad de comunicación en la jurisprudencia del Tribunal Supremo de Estados Unidos y del Tribunal Europeo de Derechos Humanos, pero partiendo de la primera de ellas. Existen diferencias, que se especifican. Los textos reguladores invitan a hablar de dualidad de modelos. Pero tal vez sea excesivo. Consideraciones finales: 1) existen muchos regímenes de la libertad de expresión compatibles con la democracia: el generado a partir de la Sentencia *Sullivan* en Estados Unidos (en Europa, *Lingens*) no es el único, aunque en la actualidad se considera el más coherente con ella, lo que no se discute. 2) Los grandes cambios se producen a veces en virtud de detalles aparentemente pequeños. El cambio de la carga de la prueba en la difamación (*Sullivan*) ha supuesto un terremoto en el régimen jurídico de la prensa. La doctrina *Sullivan* se puede resumir en los siguientes puntos: primero, los errores son inevitables para respirar; segundo: ha de probarse la malicia del difamador; tercero, ha de probarse la falta de veracidad del difamador. Esta doctrina le permite jugar a la prensa su papel de «perro guardián» de las libertades. 3) En España la prensa parece ejercer también ese papel, y esto nos exige preguntarnos si hay o hubo una Sentencia *Sullivan* en la jurisprudencia del Tribunal constitucional español; se suele atribuir la privilegiada posición de la prensa en España a que el Tribunal Constitucional la ha dotado de posición preferente sobre los derechos que entran en colisión con ella, como honor, intimidad y propia imagen, y se justifica esa posición preferente por su conexión con la democracia; pues bien, ya desde la STC 6/1981, de 16 marzo, nuestro Tribunal Constitucional venía subrayando la importancia de las

libertades informativas para la democracia; y desde la STC 159/1986, del 16 diciembre, venía hablando de posición preferente de la libertad de expresión; sin embargo, la incorporación de la jurisprudencia *Sullivan* a nuestro sistema se produce en la STC 6/1988, de 21 enero, casi 10 años después de la aprobación de la Constitución.

Key words:

freedom of expression; freedom of communication; *Sullivan; Lingens;* preferred position; burden of proof; *watchdog*; democracy.

Palabras clave:

libertad de expresión; libertad de comunicación; *Sullivan*; *Lingens*; posición preferente; carga de la prueba; «perro guardián»; democracia.