

Ref: CommHR/DM/sf 015-2021

Mr. Juan Carlos CAMPO
Minister of Justice of Spain

Strasbourg, 11 March 2021

Dear Minister,

I am writing to you in relation to several provisions of Spain's criminal legislation which have a negative impact, including a chilling effect, on the exercise of freedom of expression, a right of crucial importance for a free and pluralistic public debate.

I note that in the last few years, a growing number of criminal convictions, including custodial sentences, have been handed over on artists for controversial lyrics and other performances, and on social media activists for statements considered offensive, including for remarks conceived as humour, on grounds of the Criminal Code provisions on glorification of terrorism (Article 578) and others, including those criminalising libels and insults to the Crown (Articles 490 and 491). I therefore welcome recent information indicating that your government intends to amend some aspects of the Criminal Code, in particular the offence of glorification of terrorism, to ensure a better protection of freedom of expression. In this context, I would like to share with you my main concerns regarding the overall effect of the following Criminal Code provisions in light of the international human rights standards in this field.

Firstly, the offence of glorification or justification of terrorism as defined in Article 578 of the Criminal Code appears to be problematic from the point of view of legal certainty because of its ambiguous and imprecise wording. The lack of a clear definition of some of the notions enshrined in it has generated diverging -sometimes contradictory- interpretations of this provisions by Spanish courts, some of them at odds with international standards on freedom of expression, even though I note that some controversial sentences have been overturned by higher courts. In a [Human Rights Comment](#) published in 2018 on the impact on freedom of expression of misusing anti-terrorist legislation, I stressed the potential danger posed by the use of catch-all labels and of broad and insufficiently defined offences which may lead to unnecessary or disproportionate restrictions to the right to freedom of expression. This includes for instance the use of such labels to punish statements that do not contain elements of apology of terrorism but incite to other forms of violence or simply are non-consensual, shocking or politically embarrassing.

I note in particular that some Spanish court decisions have failed to adequately determine whether the glorification of terrorism really entailed the risk of a real, concrete and imminent danger. In contradiction with the caselaw of the European Court of Human Rights ("the Court"), some Spanish courts have also interpreted the notion of intent of the perpetrators in an abstract manner, without taking into account any other element than the wording at stake, and without adequate consideration for the context surrounding the incriminated speech or for its consequences. I would like to reiterate that anti-terror legislation should only apply to content or activities which necessarily and directly imply the use or threat of violence with the intention to spread fear and provoke terror. Any other type of content or activities, as non-consensual, shocking or disturbing they may be, should be addressed in the context of the duties and responsibilities that the exercise of freedom of expression carries with it, as defined by Article 10 paragraph 2 of the European Convention on Human Rights (ECHR).¹

¹ See for instance [Belek and Velioğlu v. Turkey](#) (2015).

Secondly, I note that other Criminal Code provisions raise concerns from the point of view of freedom of expression, in particular Article 490 and 491 criminalising libels and insults to the monarch or members of the royal family. The Court has found violations of Article 10 of the European Convention on Human Rights in a number of judgments concerning Spain. It has underlined that the possibility of imposing restrictions on freedom of expression in the context of political debate are very limited and must be proportionate and necessary in a democratic society. Moreover, the limits of admissible criticism of politicians, representatives of the authorities and other public figures are wider than for average citizens, as those holding public functions inevitably and knowingly lay themselves open to close scrutiny of their every word and deed and must consequently display a greater degree of tolerance. A custodial sentence for an offence committed as part of political debate would therefore be compatible with freedom of expression only in exceptional circumstances, when the speech concerned calls for the use of violence or constitutes hate speech.

Article 490 was last scrutinised by the Court in 2018 (case of [Stern Taulats and Roura Capellera v. Spain](#)) which held that the conviction of two Spanish nationals for setting fire to a photograph of the royal couple at a public demonstration had violated the right to freedom of expression. The Court considered in particular that political criticism of public authorities and personalities, as provocative and radical as it may be, could not be considered as hate speech and incitement to violence. I expect that the implementation of this judgment will be used as a basis for bringing the Criminal Code fully in line with the Court's caselaw under Article 10 of the ECHR.

I would like to share additional concerns regarding the excessively wide interpretation which has at times been given by some Spanish courts to the notion of hate speech, which could reinforce the chilling effect on freedom of expression of the above-mentioned provisions, especially Article 578 on glorification of terrorism. In order to avoid unnecessary and disproportionate restrictions of freedom of expression, it is crucial to restrict the application of provisions related to hate speech to cases prohibited under international human rights law, that is to expressions of hatred based on xenophobia, antisemitism and other forms of hatred based on intolerance that constitute incitement to discrimination, hostility or violence.

In the context of a review of the legislation on freedom of expression, I would like to invite your authorities to take a comprehensive approach and also consider decriminalising insults to religious feelings, as enshrined in Article 525 of the Criminal Code, which can result in undue limitations to freedom of expression and hinder pluralistic debate. According to the Court, a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance. Lastly, I invite you to consider decriminalising defamation. As stressed by the Court, the imposition of criminal sanctions for defamation, but also the mere fact that such sanctions can be applied, is in itself capable of having a chilling effect on the exercise of freedom of expression.

To conclude, I believe that comprehensively amending the above-mentioned criminal law provisions will strengthen existing safeguards of the right to freedom of expression and facilitate the work of Spanish courts in making decisions in full line with Article 10 of the ECHR as interpreted by the Court. It would also demonstrate your government's commitment to fully protecting the right to freedom of expression.

I look forward to continuing a constructive dialogue with you on this and other issues.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Dunja Mijatović', with a stylized flourish at the end.

Dunja Mijatović