

BERRIA

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Martin Scheinin

UN Rapporteur?

As Special Rapporteur on the promotion and protection of human rights while countering terrorism, he has analysed Spanish legislation and has provided various critiques to the Spanish executive branch to improve the legal safeguards in this regard.

“Spain has institutions that have no place in a democracy”

Xan Harriague

In spring of last year, Martin Scheinin (Helsinki, Finland, 1954), UN Special Rapporteur on the protection of human rights while countering terrorism, spent a whole week in Spain and the Basque Country. He analysed Spain's legislation, its justice system and its tribunals in the week of the 7th to the 14th of May. On March 9th 2009 the results of his analysis were made public in front of the UN Human Rights Commission in Geneva. He showed concern about several issues, mainly about the definition of terrorism, the freedom of speech, the practice of holding detainees incommunicado and the *Audiencia Nacional*¹. He offered Spanish Government suggested changes and specifications to improve laws.

He was nominated UN Special Rapporteur in 2005. His main area of expertise is international legislation on public relations, human rights, constitutional and anti-terrorism policy. He is also a professor of international law at the European University in Italy. He is vice-president of the International Association of Constitutional Treaties. He has also been a member of the Human Rights Committee during the years of 1997 and 2004 and President of the Abo Akademi Human Rights Institute from 1998 to 2008.

The Spanish Government has nevertheless attempted to discredit the conclusions presented by Mr. Scheinin. Mr. Javier Garrigues, the Spanish Government delegate, spoke in these terms about Mr. Scheinin and his report when it was his turn to enter the opposition: “He does not know the reality of the fight against terrorism, or the opinion of the majority of the Spanish population or the basis of the Spanish Constitution. It appears he does not even know the crime of the praising of terrorism. He has made his critiques and complaints that are baseless and that are not tested. He has doubted the impartiality of the judges and the division of powers.”

The Spanish Government says that your definition of terrorism is too limited. What do you think about that?

I believe that the definition of terrorism is well defined in the Spanish legislation but then there are many other derivative crimes. The definition extends itself more and more and

¹ Spanish National Court

at the end engulfs crimes that have nothing to do with terrorism. I believe that the use of the anti-terrorist legislation is too broad in Spain. Some of the issues treated in the Audiencia Nacional should not be there, like for example, the *kale borroka*².

Then, should the Government define the legislation?

Yes, I propose the use of anti-terrorist legislation against the real terrorism. The criminal court is enough to take care of the other crimes, without having to mention terrorism. *Kale borroka* is a violent act, but not terrorism. They are not the same.

What is your opinion about the politicians imprisoned as a result of their political activity having being accused of being members or collaborators of a “terrorist group”?

It is very difficult for me to know if there are means of evidence. It is very difficult to know if someone receives orders from ETA and like the Government says this person is part of ETA. I have received more information in the case of political parties and electorate platforms. I believe that the point of view of the Government is too broad. It acts against groups that have nothing to do with violence. To have the same political objectives as ETA should not be considered a crime, not a reason to have a political party made illegal, as long as there is no relation with violence.

The Spanish Government has answered your report stating that the terrorism is in the objective, not in the behaviour. What is your opinion about this logic?

I am in complete disagreement with that definition, I would rather the Government hadn't said that. It is a very extreme use of such a definition. In my opinion the definition of terrorism is always in the behaviour. It is a strategy defined by the use of violence against innocent people. Violence is symbolic. If we start defining violence by its political objectives, then any organization opposing the Government could be defined as terrorist.

Do you believe that there is freedom of speech in Spain and in the Basque Country?

It is a confusing picture. Spain is an insecure democracy that accepts many criticisms and points of view. At the same time it is true that the banning of political parties and the closing of newspapers limit the freedom of speech. Then it is the judges who decide if these limitations are acceptable or constitute a violation. As far as I'm concerned, the Spanish Government has gone too far in some cases.

In your opinion, is the Law of Parties a guarantee of freedom of speech?

It is too broad. It is too open to interpretation and in the end, it is confusing. The Law of Parties can be used against freedom of speech, but I would not say that this is specifically its objective. That would be going too far. Although in my opinion as it is too broad, it causes problems.

² Violent street protest

What would the Spanish Government need to change to guarantee freedom of speech?

I proposed an examination by an expert on Penal Code, in order to improve and clarify the Law of Parties. This expert would analyse how to make it not so weak and to leave less open to interpretation.

The Spanish Government has made it clear that they will continue to hold detainees incommunicado, ignoring your recommendations. What do you think of this?

I am not the first one who asks for such a measure. Many experts on human rights have said similar things before me. Most countries don't have similar measures. Spain is hanging itself with this practice. As long as it is being used it is debilitating itself in order to defend itself against complaints and false accusations of torture. I asked for the it to be discontinued and as long as it is being maintained, to improve the measures to guarantee the rights of the detainees.

In its defence, Spain has mentioned the legislatures of England and France...

There is a huge difference. Other countries limit the choice of a lawyer, but they can still choose one of confidence, which discards any suspicion of special treatment. They have some special measures for the first days of detention but not a system of incommunicado detention. Here lies the biggest difference in respect to Spain. The majority of countries allow for a choosing of a trusted lawyer from the very beginning of the detention, which is one of the most useful measures to avoid police mishandling. That is why Spain's attitude is much more dangerous than the majority of European countries.

What is your opinion on the *Ertzaintza*'s³ return to incommunicado detention?

As I have said before I am against the practice, which should be replaced with other measures. Therefore the news is no good in my opinion.

What do you think about the many torture complaints that are not investigated?

I believe that when there is a torture complaint, the criminal case should be postponed until the complaint gets clarified. I don't think it is good the way Spain deals with this issue, investigating the crime in one court and the torture complaint in another. Besides, there are very few cases of torture complaints that are actually investigated.

Is that why you say the *Audiencia Nacional*⁴ can be a problem?

Yes, among other reasons, but there are many more reasons. First of all, only one tribunal deals with too many offences. They should be better distributed. Second, it has too much

³ Basque Police

⁴ Spanish National Court

power from the very beginning of the investigation and finally, too much control. The *Audiencia Nacional* is above the countries. The appeal process is limited as the higher court is the one in charge from the beginning of the investigation. Therefore, the right of appeal is not possible in its entirety. Lastly, Madrid and the whole distribution of the context make the investigation dangerously flawed. Therefore, the Spanish Government should think again about dealing with terrorist crimes through the ordinary judicial means.

How do you interpret the fact that the Spanish Government says that when you mention the *Audiencia Nacional* you are entering territory that does not concern you?

What can I say...? The Spanish Government says it is its concern to establish its institutions and legislations, that this is part of its sovereignty. In my opinion, it is mistaken. Speaking as a UN Special Rapporteur I can give recommendations to any country to modify any law or to install a new institution or to depose another one. I am an expert in international legislation, above all concerning human rights and therefore I am in full capacity to do so. I do it in many countries and Spain is not the exception. In any case, yes, it is clear that Spain is sovereign and I am not reforming the law. I am simply giving some recommendations.

Do you think the Spanish Government's position goes far enough in the improvement of human rights?

It is a position with a double facet: Spain is a reference on many levels, above all, on an international level, in the promoting of dialogue among civilizations. In this field it is doing a good job. But I find problems in regard to the anti-terrorist legislation; it utilizes too many restrictive measures and besides, Spain has institutions that have no place in a democracy.

What is your opinion when the Spanish Government says that your report is a personal opinion and that it is based on unproved facts?

It is not true. I am an independent expert dedicated to analyse the bases of human rights international legislations. I analyse the current law. In regards to the method I am completely free to obtain information from any source. I should point out that in my report there is nothing that the Spanish Government has not previously seen. I have presented my report to them and they have had months to comment on it. Subsequently I am the one who decides what to include or not in the final report.

Is it common that the governments act this way?

Yes, I always receive criticism. From there it is a question of intensity and style. But I must state that the diplomatic relation established has been good. We have had interesting discussions. There is no animosity, only disagreement on some issues.

In the future, do you believe that Spain will move towards an improvement of human rights?

In general I perceive a good attitude. Especially since the change in the Government of the USA, many countries have admitted to making mistakes. I hope Spain will move in that direction, too.

What will the UN do after the answer that Spain has given to your report?

I don't think that the Human Rights Commission will take special measures. In regards to me personally I will keep a vigilant eye on the case.

But, do you believe that they should take measures?

They are not going to submit control measures to Spain as a special country. It would not be justified. It is not going to happen.