United Nations A/HRC/43/47/Add.2*

General Assembly

Distr.: General
9 March 2020

English and Spanish only

Human Rights Council
Forty-third session
24 February–20 March 2020
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on minority issues on his visit to Spain

Comments by the State**

* Reissued for technical reasons on 14 May 2020.
** The present document is being issued without formal editing.

GE.20-02021(E)
2002021

Comments by the Government of Spain on the report of the Special Rapporteur on minority issues following his visit to Spain, 14 to 25 January 2019

1. Spain thanks the Special Rapporteur on minority issues for his visit. The open, standing invitation extended to the Special Procedures to visit our country reflects Spain's conviction that such instruments can and must be useful mechanisms to help States meet the human rights commitments we have undertaken. The impartiality and independence of the Special Procedures, as well as the rigour of their work, guarantee their success in carrying out the mandate entrusted to them.

2. On the basis of our unwavering support for the Special Procedures and our defence of their independence, Spain feels compelled to register our disagreement with some of the conceptual categories used by the Rapporteur, Mr. De Varennes, as well as to address certain aspects of his Report which reflect an incomplete understanding of Spanish legislation and case law, and of its practical application.

3. Spain does not accept the concept of minority proposed by the Rapporteur in his 2019 Report (A/74/160) to the UN General Assembly, and which underpins the analysis contained in the Report on his mission to our country.

4. As the Rapporteur states in his 2019 Report, not even within the United Nations, nor in any other context, has it been possible to agree on a definition of the term minority. On the contrary, the concept has been subject to debate, and none of the numerous definitions put forward since the creation of the United Nations has met with consensus.

5. The definition proposed by Mr. de Varennes can now be added to this long list of attempts. The Rapporteur puts forward a merely numerical concept of minority ("any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these"). In its extreme simplicity, this definition takes no account whatsoever of context, including history, thus running the risk of reaching absurd conclusions, and fails to clarify the added value that the concept of minority contributes to the protection of the human rights of the individuals that comprise it. All of the above are compounded by doubts regarding how to determine the number of members of a supposed minority—its defining aspect—based on reliable data. For all these reasons, Spain reiterates its disagreement with the definition proposed by the Rapporteur and applied in the Report resulting from his mission to Spain in January 2019.

6. Sidestepping any analysis of our country's history—an analysis which would explain the accurate description of it included in paragraph 8 of the Report on his mission ("a rich tapestry of languages, cultures and religions")—the Rapporteur automatically applies the numerical definition of minority, which he himself has constructed, to a complex reality that does not easily fit into the narrow margins of the categories proposed. This simplistic approach does not allow for the fact that—to employ the same mathematical terminology used by the Rapporteur himself—the members of the so-called minorities make up the majority, which is the product of a long history of exchanges. There is no majority as such existing as a discrete and separate entity from the minorities mentioned by the Rapporteur; rather, the majority comprises these so-called minorities, in addition to many others. The members of the minorities are members of the majority. Broadly speaking, and looking beyond the situation in Spain, each individual has multiple identities, making it even harder to apply the simplified concept of minority proposed by the Rapporteur; this reduction to a single, dominant identity—with the aim of simplifying complex realities—could have a devastating impact on the freedom of individuals.

7. Regardless, majorities and minorities comprise individual bearers of human rights which are equal for all. As regards the Report's references to religious minorities or majorities, we would question the added value of these concepts when freedom of religion and belief is guaranteed by the State. Similarly, the concept of linguistic minorities becomes dubious when the cultural rights of the people who speak a specific language are also protected.

8. As mentioned in paragraph 11 of the Report, Spain is a State party to the Council of Europe's Framework Convention for the Protection of National Minorities. It is important to clarify in this regard that the content of the reports prepared by Spain with respect to the Convention refers exclusively to the "comunidad gitana" (roma, gipsies) which, while not constituting a "national minority", is the only group that falls within the spirit of the Framework Convention.

9. Spain regrets the lack of rigour applied in preparing the Report, which contains subjective judgements and claims not supported by any data, evidence-based information or arguments, all of which detracts from its conclusions. By way of example, we refer to the following paragraphs:

10. As explained above and as mentioned in the Report, article 14 of the Spanish Constitution of 1978 and article 23 of Organic Law 4/2000 contain an open-ended, non-exhaustive list of possible grounds of discrimination. Despite this fact, paragraphs 17 and 36 of the Report claim that the omission of language as a ground of discrimination in said provisions "is potentially inconsistent with a number of international treaty obligations". This claim is neither explained nor supported elsewhere in the Report. It is not correct that, as the Report claims, "it has been suggested by Spanish officials that these provisions are 'open-ended'; rather, as reflected in the exact wording of article 14 of the Spanish Constitution,[1] this provision actually contains an open-ended clause which includes any personal or social condition or circumstance, in addition to the grounds expressly mentioned. Established constitutional case law endorses this interpretation (most definitively, Constitutional Court Ruling 75/1983 of 3 August, Legal Basis 3), which is binding for all public authorities. Furthermore, it must be stressed that article 10.2 of the Spanish Constitution requires that the fundamental rights recognized therein be interpreted in accordance with the international treaties on human rights signed by Spain. As a result of this obligation, constitutional and ordinary case law reflects this interpretation of article 14 of the Constitution in recognizing the prohibition of discrimination on different grounds than those specifically mentioned (Constitutional Court Ruling 41/2006 of 13 February is one of many such examples). And, of course, this case law firmly and repeatedly maintains that the use of the term "Spaniards" must not be interpreted as stripping non-Spaniards of their rights. Consequently, it is not possible, as the Special Rapporteur claims, for judicial and other authorities to interpret the aforementioned provisions "liberally" in a manner "inconsistent with a number of international treaty obligations". Any such interpretation would be immediately reversed by the Constitutional Court or, if applicable, the European Court of Human Rights, whose case law is also crystal clear in this regard. The Report's own incoherence in this regard should be noted; an incoherence which becomes clear when comparing paragraphs 36 and 37, on the one hand, with 38, on the other. The Rapporteur concludes paragraph 38 by recommending that Spain amend its legislation to include all possible grounds of discrimination. This recommendation proves paradoxical, as not even the Report itself is capable of specifying all the possible grounds of discrimination and avails itself of an "open-ended" provision, ending its list with the formula "or other status".

11. In a certain number of paragraphs, the Rapporteur offers subjective judgements, not supported by data or evidence-based information. Thus, paragraph 33 conveys the suspicion that the police forces and the judiciary, institutions which are obliged to protect the most vulnerable, ridicule and harass these people and even commit acts of violence against them. To support such sweeping statements as are included in the Report, the Special Rapporteur should provide objective data—such as statistics, official complaints or reports—that properly reflect the existence of such serious conduct.

12. Contrary to the claims in paragraph 34, the mere filming of police officers, or processing of their data, does not constitute an infraction in Spain. In keeping with Constitutional Court case law, which determines that administrative infractions cannot be interpreted in a manner that is prejudicial to fundamental rights, Instruction 13/2018 of the State Secretariat for Security of 13 October 2018 (subsequent to the visit of the Working

[1] "Spaniards are equal before the law and may not be discriminated against in any way on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance" (article 14 of the Spanish Constitution).

Group of Experts on People of African Descent) determines that, in Spain, the actions described (the filming of law enforcement agents) only constitute an infraction when said images or data are used in a manner that endangers, inter alia, the personal safety of the agents or their families. Furthermore, at the end of paragraph 34, the Rapporteur states, without providing any evidence, that practice by law enforcement agents in the field in 2019 (it should be borne in mind that the Rapporteur visited Spain in January 2019) did not seem to fully comply with the strict instructions of the State Secretariat for Security (instructions issued in October 2018).

13. Paragraph 41 asserts: "Connected to events in Catalonia in 2017, the Special Rapporteur was presented reports of apparent increasing hate speech, vilification, vandalism, physical threats and even assaults on minorities such as the Catalans, and to a lesser degree on other national minorities. Some reports suggest that authorities are not sufficiently responding to or prosecuting these allegations, thus indirectly contributing to an increasing atmosphere of intolerance against minorities and nationalistic vitriol." There is no footnote providing any data from the reports on which the Rapporteur is basing these claims. What is more, the Rapporteur himself goes on to admit that "the Special Rapporteur is not able to comment on the veracity of these allegations…" Once again, at the end of paragraph 43 there is a reference to an "apparent rise of hate speech and intolerance against minorities". It is unacceptable for the Rapporteur to include statements in his Report which he himself recognizes to be unsubstantiated.

14. As regards the claims contained in paragraph 51, and to provide a comprehensive overview of the actual situation in Spain, it should also go on record that article 3.2 of the Spanish Constitution provides for the right of all Spaniards to use Castilian—the official Spanish language of the State—and their duty to know it. The above notwithstanding, in addition to what is set out in the following paragraph regarding the use of the official languages in the justice administration, we would mention the initiatives put into practice to promote the knowledge of the co-official languages of Spain among the members of the State law enforcement bodies. For this reason, the National Police provides assistance to its members to learn Catalan. Similarly, the Delegation of the Central Government in Catalonia has proposed to the Department of Culture of the Government of Catalonia the promotion of an agreement to provide courses on the Catalan language to National Police and Civil Guard officers posted to or recently arrived in Catalonia. Furthermore, for certain regional official positions in Autonomous Communities (Spain's self-governing regions) with a co-official language, knowledge of said language is taken into account as a point of merit when selecting candidates. In addition to all of this, the proceedings of the judicial police are assisted by providing documents drafted in co-official languages, both for the victim and for the alleged perpetrator of the crime. Finally, at the end of the same paragraph the Rapporteur states: "It has been suggested that this leads to a significant number of grievances and frustration in some of these communities…" We might then ask, yet again, if this suggestion has been supported by any kind of data, statistics, etc.

15. Paragraphs 53, 54 and 55. Article 231 of Organic Law 6/1985 of 1 July, on the Judiciary (Spanish acronym LOPJ), does not obstruct the use of official languages in the justice administration. On the contrary; this use is permitted, unless opposition is expressed by one of the parties in the proceedings and such use would give rise to unfairness contrary to the principle of effective remedy. Moreover, knowledge of official languages is taken into account as a point of merit when deciding on candidates for the post of president in the higher courts and appellate courts, as set forth in LOPJ, article 341. Also noteworthy here is the express inclusion of the right to translation and interpretation in the Criminal Procedure Act and in the Civil Procedure Act. This entails a set of rights for those defendants who do not speak Castilian or the official language of the proceedings, i.e. the co-official languages of certain Autonomous Communities: the assistance by an interpreter using a language that the defendant understands throughout the proceedings and in their conversations with their attorney, as well as the right to written translations of the documents that are essential to guarantee their right to defence. In such cases the expenses are defrayed by the administration, regardless of the outcome of the proceedings. Furthermore, this right is guaranteed in article 9 of Act 4/2015 of 27 April, on the standing of victims of crimes. However, paragraph 54 of the Report concludes: "…there have been consistent reports in

different parts of the country that individuals are simply told to comply with the chosen use of the national language"; again, there are no specific references to these reports, so they cannot be consulted. Notwithstanding the advisability of implementing the amendments that the Special Rapporteur proposes with regard to this issue in paragraph 55, it would be prudent for the wording of the recommendation to indicate that the approval of legislative amendments corresponds to the Parliament, and not to the Government of Spain.

16. Paragraph 56: "…the Rapporteur received consistent reports of the members of the Galician-speaking minority unable to use their own language despite the apparent right to do so with public authorities in the region." There are no references to these reports, and the statement is not supported by any data.

17. End of paragraph 59: "In some other Autonomous Communities such as Galicia …, it was argued that existing educational schemes were insufficient either to effectively guarantee minority children could be educated in the co-official minority language." Once again, this is a statement that does not appear to be backed up by any facts. Nevertheless, the Government of Galicia has provided the following figures, taken from surveys on the knowledge of Galician carried out every five years, from which it is impossible to draw the same conclusions set forth by the Special Rapporteur in his Report:

1. Language skills	2. 2013	3. 2018
4. Understanding	5. 95.83%	6. 95.46%
7. Speaking	8. 86.75%	9. 88.05%
10. Reading	11. 84.77%	12. 85.05%
13. Writing	14. 83.32%	15. 86.79%

18. Section VII. B (Language rights) of the Report includes several references to the situation in the Balearic Islands, Valencia and Navarre with regard to issues that fall under the authority of the Autonomous Communities. However, the Rapporteur held no meetings with representatives of the governments of these Autonomous Communities. Notwithstanding the value of the information that the Rapporteur was able to obtain from civil society organizations and other sources, it does not appear appropriate for such information to be included in the Report without any discussion of these issues with representatives of these regional governments. For this reason, the elimination of these comments with regard to those particular Autonomous Communities is requested.

19. Equally striking is the quotation of several paragraphs from the 2017 publication Language Rights of Linguistic Minorities: A Practical Guide for Implementation (paragraphs 52, 62 and 64 of the Report), without putting them into the context of the situation in Spain. By citing that publication, the Rapporteur implies that the instructions included therein were not being followed in Spain—when the exact opposite is true, at least with regard to the content of the quoted paragraphs. This must be made clear in his Report.

20. The Fifth Report of the Council of Europe Committee of Experts on compliance with the European Charter for Regional or Minority Languages (ECRML) was approved on 5 October 2019. That report included an in-depth analysis of Spain's compliance with every aspect of the ECRML: laws, actions, and real-world practice, all based on official sources—whether from the Spanish State or the Autonomous Communities—and on information obtained directly from civil society organizations. Examining the charts contained in the Report, it can be clearly seen that Spain's level of compliance with all of the articles of the ECRML is very high, and that in those cases where difficulties were found, the public

authorities have expressly stated their commitment to advancing towards greater protection of co-official languages.

21. Notwithstanding the improvements that could be made in the use and teaching of these co-official languages, the Rapporteur's analysis seems to forget the value of having a common language as an instrument of participation in the political community.

22. The content of section VII. C (Participation in public life) of the Report is simply unacceptable (besides being inconsistent with the positive assessment of Spain's judiciary set forth in paragraph 23). In that section of the Report, the Rapporteur has the temerity to insinuate, without providing a shred of evidence, that the convicts' belonging to a supposed "Catalan minority"—or, in any case, their Catalan heritage—influenced the Supreme Court decision of 14 October 2019. Once again, the Rapporteur includes a very serious accusation against the Spanish State in his Report without making even the slightest attempt at backing it up with evidence. Not a single piece of evidence, information, or argument is set forth to support this "suspicion". On the contrary. The Rapporteur even finds himself forced to twist statements from other Special Procedures to give an air of verisimilitude to the idea that he is suggesting. Upon citing a statement by the Special Rapporteur on the right to freedom of opinion and expression, made on 6 April 2018, the Report mentions "political figures and protesters belonging to the Catalan minority". However, not a single reference to a "Catalan minority" appears in that statement of 6 April 2018, which does mention "political figures and protesters in Catalonia" and "members of the Catalan Government and leaders of civil society organizations". But the Rapporteur needs to introduce this element to shoehorn into the framework of his mandate an issue that clearly falls outside it. Likewise, paragraph 68 mentions reports from Amnesty International, Human Rights Watch and the International Commission of Jurists without providing citations, so it is impossible to confirm even the existence of such reports from these organizations denouncing the supposed criminal persecution of members of a "Catalan minority" for the mere fact of belonging to that minority. By suggesting that the imprisonment of the 12 persons to whom he refers has to do with their belonging to a supposed minority, or to the expression of certain ideas, the Rapporteur shows his ignorance of the case tried before the Supreme Court which resulted in judgment 459/2019, of 14 October. In those proceedings, it was actions—not ideas or ideologies—that were on trial. Independentist politicians have always enjoyed the right to express and to defend their ideas. Ever since the beginning of the current democratic era in the 1970s, political parties that defended the independence of certain Spanish territories have been represented in both Houses of Parliament, as well as in the regional governments, legislative chambers, and municipalities of their respective Autonomous Communities. Their representatives have been able to express their political ideas freely; the members of the current regional Government of Catalonia continue to do so. Issues of freedom of ideology and of expression aside, the Supreme Court found that the proven facts fit the legal definition of sedition, embezzlement of public funds, and contempt of Constitutional Court orders. The Supreme Court handed down a judgment on the criminal offence of sedition because it found that the convicted parties revoked, de facto, the existing constitutional order, in order to replace it with another emanating from a regional body that manifestly lacked the legal authority to do so. It was a concerted action by those who should have acted as guarantors of public order (members of the Government of Catalonia and the Speaker of the Catalan Parliament), encouraging, in connivance with other social leaders, a citizen mobilization aimed at the de facto stripping of decision-making capacities from the government and judicial authorities who are democratically legitimized by our constitutional system. This new legal order included the Act on Legal Transition, creating a Catalan Republic and overthrowing the Spanish constitutional system, and the Referendum Act, according to which, if there were more votes for independence rather than against in the final tally of that referendum's ballots, the result would be the independence of Catalonia. The President of the Venice Commission of the Council of Europe, in a letter of 2 June 2017, refused to cooperate in holding said referendum, stressing the special emphasis that the Commission placed on the need for any referendum to be held in full compliance with the Constitution and the applicable legislation. The legislative procedure to pass the Referendum and Transition Acts was carried out by imposing an interpretation of the parliamentary rules that sought exclusively to act with unprecedented speed to approve it—and, above all, to silence the voice of the parties in the Catalan Parliament that had expressed their disagreement with the

break-up process. The European Court of Human Rights (in its decision on Forcadell i Lluis and Others v. Spain of 7 May 2019) ruled that the action of the Spanish Constitutional Court was "necessary in a democratic society", in particular for the maintenance of public safety, the defence of order, and the protection of the rights and freedoms of others, as well as to prevent the minority members of the Catalan Parliament from exercising their duties.

23. In spite of the confusing wording of paragraph 70, it seems that the reference is to the rights and freedoms of individuals.

24. With regard to paragraph 73, it should be pointed out that the legislative changes necessary to recognize the right to use Catalan Sign Language and to guarantee that use were already made in Catalonia by means of Act 17/2010 of 3 June. Likewise, the public services of Catalonia also include bilingual systems for public management and public events, as set forth in Act 13/2014 of 30 October, on accessibility, which will be developed more specifically in the upcoming decree on the implementation of that Act, the new Accessibility Code of Catalonia.

25. As to the recommendation contained in paragraph 85, the comments made above regarding paragraphs 53 and 54 are applicable here, as well.

26. The recommendation made in paragraph 88 regarding changing the legal definition of criminal offences is also outside the Rapporteur's mandate.