



SPANISH CONSTITUTIONAL COURT

Cabinet of the President

Press Office

INFORMATIVE NOTE No. 72/2016

THE TC UPHOLDS THE CONVICTION ORDERED AGAINST TASIO ERKIZIA FOR HIS GLORIFICATION OF TERRORISM

The Plenary Meeting of the Constitutional Court (TC) has denied constitutional protection to Tasio Erkizia Almandoz, who was convicted by the Spanish National Court to one year's imprisonment and seven years of total disqualification as the perpetrator of a terrorism glorification offence. The Chamber considers that this punishment, subsequently upheld by the Supreme Court, did not breach the rights of ideological freedom (Art. 16.1 Spanish Constitution (CE)) and of expression (Art. 20.1.a) CE). The Reporting Judge, Juan Antonio Xiol, issued a particular vote.

According to the facts declared as proven by the Spanish National Court, on 21 December 2008 the appellant participated as the main speaker in an act held in Arrigorriaga (Vizcaya) in remembrance of and to honour the head of the terrorist organisation ETA, José Miguel Beñaran Ordeñana (a.k.a. “*Argala*”), who was murdered in France thirty years ago. The act was publicized by fixing posters in the streets; as part of the scenography, a huge photo of the honoured individual was placed, where the appellant laid a carnation at its base; pictures of hooded individuals and ETA prisoners were displayed; during his speech, the appellant (who was not a friend of “*Argala*” or had dealt or communicated with him particularly) asked for a “*reflection [to] find the most suitable path, a path that causes the most harm to the State, providing our people with a new democratic scenario*” and ended with cries of “*Gora Euskal Herria Askatuta*”, “*Gora Euskal Herria euskalduna*” and “*Gora Argala*” [Translator's note: the Basque word “*Gora*” is equivalent to “*Long live (...)*”].

First of all, the Chamber explained that the special constitutional relevance of this appeal for protection resides in the fact that it has allowed the Court for the first time to pronounce itself on the conflict between the application of a terrorism glorification offence (Art. 578 of the Criminal Code) and the right to freedom of expression (Art. 20.1.a) CE). It has in fact pronounced itself on similar criminal offences that punish the dissemination of ideas in support of genocides and, in this case, the Court has declared that a conviction does not entail a breach of the freedom of expression if public support of a genocide is used to incite commission of the crime, albeit indirectly; on the other hand, a criminal reproach would be unconstitutional if the punishment is merely addressed to an ideological subscription of any kind of political position.

The European Court of Human Rights (ECHR) has also settled the conflict, on the grounds that the freedom of expression is not unlimited and that this limitation may be justified if exercising said right entails “*a risk for national security, territorial integrity or public safety, public order or the prevention of crimes*”.

In light of preceding case-law, the Court should analyse whether the reasoning contained in the challenged judgments may lead to the conclusion that the appellant's conduct constituted a statement of a hate speech and incited violence, albeit indirectly.

In this case, affirms the Chamber, the conviction of the appellant as the perpetrator of a terrorism glorification crime *“has not breached his right to the freedom of expression”*. In fact, his behaviour departed from a legitimate exercise of this right as soon as it met the requirements to be considered a *“statement of what is known as a hate speech”*: he expressed hatred based on intolerance (which was publicized in posters bearing a text on *“Argala”*, referring to *“armed fighting”* as an *“essential instrument to move forward”*); photographs were displayed of hooded members of the terrorist group; the appellant, *“with calculated vagueness”*, encouraged thought to choose *“the most suitable path, a path that causes the most harm to the State (...)”*; he expressed *“aggressive nationalism”* with *“unequivocal hostility against other people”*. And, above all, in a public act that was reported in the press and on television. Finally, the Chamber affirms that there was *“instigation to violence”*, as actions such as the appellant’s *“create a breeding ground, an atmosphere or social ambience that tends towards terrorist action, as a forerunner of the crime itself”*.

The resolutions challenged, concludes the Court, adequately appraised all circumstances before affirming that the conduct of the applicant for constitutional protection was deserving of a criminal sanction. Consequently, the conviction ordered did not breach the fundamental right to freedom of expression.

In his particular vote, Juan Antonio Xiol, Reporting Judge of the resolution, affirms that there are circumstances that should have led to the conclusion that a criminal conviction *“was not necessary or proportional, from the point of view of the right to freedom of expression”*; consequently, these should have led to a granting of constitutional protection. Amongst other circumstances, the Judge refers to the fact that the appellant had been invited to the act and was not responsible for its announcement or organisation; with respect to his participation, he points out that *“it was not sufficiently relevant”* to be considered *“incitement, albeit indirectly, to commit criminal offences”*, as his speech represented *“the prevalent debate at the time within the left-wing “Abertzale”, in favour of seeking other peaceful ways to complete the independence process”*.

Madrid, 27 July 2016