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Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression pursuant to Human Rights Council resolution 25/2.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **defamation laws, in particular the law of lese majesty, set out in the Dutch Criminal Code.**

According to the information received:

Lese majesty law and other provisions criminalising the defamation of public officials

Under section 111 of the Dutch Criminal Code, "[i]ntentional insults to the King shall be punishable by a term of imprisonment not exceeding five years or a fine of the fourth category [up to EUR 20,500]." Pursuant to section 112, "[i]ntentional insults to the King's consort, to the King's heir apparent or his spouse or to the Regent shall be punishable by a term of imprisonment not exceeding four years or a fine of the fourth category [up to EUR 20.500]." Persons convicted of violating sections 111 and 112 may also be disqualified from holding offices or certain offices, serving in the armed services and/or electing members of general representative bodies and standing for election to these bodies (section 114(2)).

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His Excellency
Mr. Roderick van Schreven
Ambassador Extraordinary and Plenipotentiary
Permanent Representative
Permanent Mission of the Kingdom of the Netherlands to the United Nations Office and other international organizations in Geneva

According to section 113, distributing, publicly displaying or posting "written matter or an image insulting the King, the King's consort, the King's heir apparent or his spouse, or the Regent, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category [up to EUR 8,200], if he knows or has serious reason to suspect such defamatory content of the written matter or image." The same applies to publicly stating the content of such written matter or image.

Sections 118 and 119 cover similar "Serious Offences against Heads of Friendly Nations and Other Internationally Protected Persons". Intentional insults to such public officials are, under section 118, "punishable by a term of imprisonment not exceeding two years or a fine of the fourth category [up to EUR 20,500]." Section 119 provides that anyone who distributes, publicly displays or posts written matter or an image "insulting a head or a member of the government of a friendly nation, present in the Netherlands in his official capacity", or "a person in his capacity as a representative of a friendly nation accredited to the Dutch government" may face imprisonment not exceeding six months or a fine of the third category (up to EUR 8,200).

Furthermore, section 267 allows for an increase of the terms of imprisonment for insults, if the victim is a public authority, a public body or a public institution (No. 1); a civil servant during or in connection with the lawful performance of his office (No. 2); or the head or a member of the government of a friendly nation (No. 3).

All of the above offences, except those set out in section 267 No. 3, may be prosecuted without a complaint from the person against whom the offence has been committed.

Recent reports of the prosecution and even conviction of individuals for making allegedly offensive public statements about the Dutch King suggest that the lese majesty law described above is still enforced. However, on 22 April 2016, a draft bill has been introduced into the Second Chamber of the Dutch Parliament, which, if enacted, would repeal sections 111-113 and 118-119 of the Criminal Code (34456-2). Although section 267 would be amended, it would continue to give courts the power to impose more severe punishments for insulting a public official. The draft bill is pending debate and approval.

Other criminal defamation provisions

Comparable provisions on insulting or defaming persons other than public officials prescribe significantly less severe punishments than sections 111-113, 118-119 and 267. Insulting another person is, according to section 266(1), only "punishable by a term of imprisonment not exceeding three months or a fine of the second category" (up to EUR 4,100). In addition, section 266(2) provides an exception from criminal liability under section 266(1) for "[a]cts which are

intended to express an opinion about the protection of public interests and which are not at the same time designed to cause any more offence or cause offence in any other way than follows from that intent". No such exception from the offences defined by sections 111-113 and 118-119 exists, Moreover, section 271 provides a significantly less severe punishment than its equivalent, the afore-mentioned section 113, stating that "[a]ny person who distributes, publicly displays or posts, or has in store to be distributed, publicly displayed or posted, written matter or an image whose contents are insulting or, with regard to a deceased person, slanderous or libellous," or "who publicly utters the content of such written matter", "if he knows or has serious reason to suspect that the written matter or the image contains such, shall be liable to a term of imprisonment not exceeding three months or a fine of the second category [up to EUR 4,100]."

Furthermore, the Dutch Criminal Code criminalises the following insulting and defamatory acts: According to section 261, slander is punished with a term of of imprisonment not exceeding six months or a fine of the third category (up to EUR 8,200). The punishment set for libel is imprisonment of up to one year or a fine of the third category (up to EUR 8,200). Committing slander or libel by knowingly making false statements, may be punished with a term of imprisonment not exceeding two years or a fine of the fourth category (up to EUR 20,500). The law provides two possible defences against the prosecution of acts as libel or slander: (1) the necessity of the act in defence of the offender's or another person's interest and (2) a good faith belief in the truth of the allegations, provided that the allegation was required in the public interest. Finally, according to section 270, libellous or slanderous acts with regard to a deceased person may be punished with imprisonment not exceeding three months or a fine of the second category (up to 4,100 EUR).

In certain cases, the Dutch Criminal Code provides that in addition to imprisonment and fines offenders may also face an occupational ban. Sections 113(3), 119(3) and 271(3) establish that "[i]f the offender commits any of the serious offences defined in this section in the practice of his profession and if at the time of commission of the serious offence two years have not yet expired since a previous conviction of the offender for any of these serious offences became final, he may be disqualified from the practice of that profession."

All offences defined by sections 261 et seqq., except those set out in section 267 No. 3, may only be prosecuted on complaint from the person against whom that offence has been committed, or in case of a contravention against section 270, on complaint from a relative of the deceased person (section 269).

Concern is expressed that the above provisions of the Dutch Criminal Code limit the right to freedom of expression in contradiction with article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the Netherlands on 12 December 1978. I therefore welcome the introduction of bill 34456-2 into the Dutch Parliament. By repealing sections 111-113, 114(2) and 118-119 of the Criminal Code,

this bill would redress many of the concerns specified below and would thus ensure better conformity of the Dutch legislation with the standards of international human rights law.

The right to freedom of expression, according to its definition, includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of [the individual's] choice". The exercise of the right to freedom of expression may only be restricted where the restriction is provided by law, serves a legitimate government interest, and meets the strict tests of necessity and proportionality.

In this respect, criminal sanctions, in particular imprisonment and occupational bans, for insults and defamation are not deemed proportional with an effective exercise of the right to freedom of expression. Imprisonment as well as occupational bans may have far-reaching consequences for the individuals concerned, including endangering their livelihood, resulting in a particularly strong "chilling effect" on the exercise of the right to freedom of expression.

Particular concern is expressed at the fact that persons found guilty of insults to the Dutch Royalty, foreign heads of states and officials, as well as Dutch public bodies and civil servants may face significantly more severe punishments than those who insult any other persons. In this context, it gives additional reason for concern that in this kind of cases the prosecution and conviction of offenders does not even require a request or complaint from the allegedly insulted or defamed person. In this respect, I would like to remind your Excellency's Government of the principles set out by the Human Rights Committee on expressing opinions concerning public figures in the political domain and public institutions. In its General Comment No. 34, it stated that "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties (...). Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, desacato, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned" (CCPR/C/GC/34).

Moreover, I am concerned that sections 111-113 and 118-119 of the Criminal Code provide neither a defence of truth nor a public interest exception. I would like to refer again to the General Comment No. 34 which points out that all defamation laws, "in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. (...) In any event, a public interest in the subject matter of the criticism should be recognized as a defence" (CCPR/C/GC/34).

It is my responsibility under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. Since I am expected to report on these cases to the Human Rights Council, I would be grateful for your cooperation and your observations on the following matters:

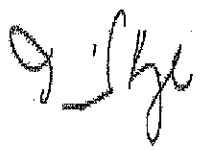
1. Please indicate how criminal penalties provided by Dutch law for insults to or defamation of another person, in particular by sections 111 through 113, sections 118 and 119 and section 267 of the Dutch Criminal Code are compatible with the Netherlands' obligations under international human rights instruments, in particular with the ICCPR.

2. Please also provide information on any steps taken or intended to be taken, in order to repeal or reform criminal defamation laws in Netherlands, in particular those concerning the Dutch Royal family, foreign Heads of States and similar special provisions. In particular, please provide information on the current status of draft bill 34456-2 and any further steps taken to its enactment.

Finally, we would like to inform your Excellency's Government that this communication will be made available to the public and posted on the website page of the mandate of the Special Rapporteur on the right to freedom of expression: (http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx).

Your Excellency's Government's response will also be made available on the same website as well as in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.



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