

## EDITORIAL

# On the issue of unconstitutionality raised by the Supreme Court regarding gambling advertising

## *Sobre la cuestión de inconstitucionalidad planteada por el Tribunal Supremo respecto de la publicidad del juego*

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At the end of the last century, gambling ceased to be understood as a vice or a problem of willpower and came to be considered as a mental disorder, according to the two classifications of the most important mental illnesses in the field of science and health: DSM-III (APA, 1980) and ICD-9 (WHO, 1978). Pathological gambling was seen at this time as an impulse control disorder; that is to say, a mental pathology whose most characteristic symptoms are defined by the inability to stop gambling, even when the person in question cares about their money, health and the well-being of their own family.

In the 21st century, the current editions of both classifications, i.e., DSM-5 (APA, 2013) and ICD-11 (WHO, 2018), have recognised that what characterises this mental illness, beyond the difficulty in ceasing to bet, is the very need to play; that is, the gambler's dependence on gambling. The scientific proof of this addictive phenomenon is found in the fact that there is "...evidence that gambling behaviour activates the reward system in a way similar to drugs of abuse and produces behavioural symptoms comparable

to those caused by substance use disorders" (APA, 2013, p. 481). Pathological gambling is thus currently considered a mental illness within the addictive disorders category, and it is recognised as such in both DSM-5 and ICD-11.

Considering pathological gambling as an addictive disorder, beyond the conceptual precision to which all scientific knowledge aspires, has clear implications for health and, more specifically, for disease prevention. And this is the case because it is understood that it is gambling and, more specifically, the activity of betting, which is ultimately responsible for a mental illness that can cause financial, personal and family ruin for those affected. For this reason, preventive activities must of necessity grapple with and control the cause of the problem; that is to say, gambling.

Gambling, however, is an economic activity involving businesses and social agents, as well as the government itself. Betting company earnings come from the amounts gamblers bet, although it would be more exact to say from what they lose. So much so that betting is organised in such a way that the more betting possible, the greater the

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revenues of the firms, since in all cases the mathematical expectation, or expected value, will always favour whoever controls the bets.

Thus, we find ourselves with an unavoidable conflict of interest. On the one hand, betting companies earn greater revenues when more gambling is available and socially sanctioned. On the other, gambling is an activity that can cause addiction; that is to say, a disease characterised by an uncontrollable urge to bet. The problem is that the more a person gambles, the greater the probability not only of losing money but also of developing a mental disorder. A tragic vicious cycle for the gambler and a lucrative virtuous cycle for betting companies.

In a society like the one we find ourselves in, advertising and marketing strategies usually play a key role in promoting consumption. The desirable aspects of the product for sale are magnified and negative ones are minimised, and it is expected that the good in question will be consumed.

And this is the crux of the problem since betting is a toxic product, if we understand toxicity as the potential of an element to cause damage to the body when an interaction between the two occurs. Nothing would happen to a person if they did not bet. Only when one places a bet does the roulette start – Russian roulette.

What happened when bingo halls, machines and casinos were legalised in Spain, back in 1977, was that advertising was restricted, with the pre-constitutional legislator deeming that gambling incurred risks and that it was not advisable to promote the activity to an excessive extent. At the beginning of this century, however, online gambling emerged and was controlled by foreign firms since at that time there were no regulations in Spain that would allow it. However, not only was the product marketed without the mandatory authorisations for this commercial activity, but it was accompanied from the start by advertising campaigns and marketing techniques that, because they were prohibited, some forms of legal gambling, such as casinos, bingo or slot machine halls lacked. In fact, the Supreme Court itself ruled in 2017 that the firms who had been operating online gambling before Law 13/2011 had been doing so illegally.

Finally, Law 13/2011, which regulated gambling, legalised online betting, and the first licenses to operate were granted in July 2012. After this, the online betting market intensified even more, both in terms of supply and promotion, which led to a continuous rise in spending on this type of gambling (DGOJ, 2022). This gave rise to a public health problem as online gambling addiction grew (Chóliz, 2016; Chóliz, Marcos & Lázaro-Mateo, 2021), a problem which has been particularly serious in the case of adolescents or minors (Chóliz & Marcos, 2022).

Despite article 7.2 of the Gambling Law stipulating that advertising should be regulated by the government, it took almost ten years and three regulatory attempts for

said regulation to come into effect through Royal Decree 958/2020 on the marketing of gambling activities. This is a clear example of the difficulty involved in the legislation of gambling, as revealed in an editorial in this journal (Chóliz & Sáiz-Ruiz, 2016).

This royal decree is currently at risk of being null and void if the Constitutional Court rules in favour of the question of unconstitutionality raised by the Supreme Court against article 7.2 of Law 13/2011. The issue arose from the challenge presented by the Spanish online gambling industry federation, JDigital, which sees gambling regulation as a limitation of its constitutional right to freedom of enterprise.

Without entering into a discussion of strictly legal issues, such as whether regulating advertising is really an attack on the freedom of enterprise – when it is clearly encouraging an activity that can generate toxic effects – or whether a royal decree is the appropriate regulatory framework to restrict said right – when it is clearly a business activity whose profits derive directly from what gamblers lose – what we know that the High Court should take into account is that gambling is the key cause behind the development of a mental disorder, and this is a health issue. And when this activity is promoted at every level of society through advertising and marketing, mental illness becomes a public health problem.

Given the existence of such a conflict of rights, to freedom of enterprise and to public health, both included in the Constitution, the right to health should prevail. While the freedom of enterprise may be a constitutional right, the right to health, in addition to being present in article 43 of the Spanish Constitution of 1978, is also included in article 25 of the Universal Declaration of Human Rights. In a democratic state of law, citizens must be protected by their institutions.

## References

- APA, American Psychiatric Association (2013). *Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition (DSM-5)*. Washington, DC: American Psychiatric Association Pub.
- APA, American Psychiatric Association. (1980). *Diagnostic and Statistical Manual of Mental Disorder, Third Edition (DSM-III)*. Washington, DC: American Psychiatric Pub.
- Chóliz, M. (2016). The challenge of online gambling: The effect of legalization on the increase in online gambling addiction. *Journal of Gambling Studies*, 32, 749–756. doi:10.1007/s10899-015-9558-6.
- Chóliz, M. & Marcos, M. (2022). “That’s no country for ‘young’ men”: A critical perspective on responsible online gambling policies for gambling disorder prevention in Spanish minors. *Journal of Gambling Issues*, 49, 158–173. doi:10.4309/jgi.2022.49.7.

- Chóliz, M., Marcos, M. & Lázaro-Mateo, J. (2021). The risk of online gambling: A study of gambling disorder prevalence rates in Spain. *International Journal of Mental Health and Addiction*, 19, 404-417.
- Chóliz, M. & Sáiz-Ruiz, J. (2016). ¿Por qué (también) es tan difícil legislar sobre juego en España? Un 'déjà vu' de lo ocurrido con el alcohol. *Adicciones*, 28, 189-193. doi:10.20882/adicciones.886.
- DGOJ, Dirección General de Ordenación del Juego (2022). *Mercado del juego online estatal*. Retrieved at <https://www.ordenacionjuego.es/es/mercado-juego-online-estatal.html>.
- OMS (1978). *The ICD-9 classification of mental and behavioural disorders*. Geneva: WHO.
- OMS (2018). *Manual of the International Statistical Classification of Diseases, Injuries, and Causes of Death, 11th Revision*. Retrieved at <https://icd.who.int/browse11/1-m/en#/http%3a%2f%2fid.who.int%2fid%2fentity%2f499894965>.

