ARTICLE 19

Spain: Speech related offences of the Penal Code

March 2020

Legal analysis

Executive summary

In March 2020, ARTICLE 19 analysed a number of speech related offences of the Spanish Penal Code for their compliance with international human rights law.

ARTICLE 19 has found that the Penal Code contains a number of provisions that are extremely broad and vague and can be used to restrict expression. In particular:

- Provisions criminalising "terrorism" and the "glorification" or "incitement" thereof, as well as the criminalisation of accessing "online terrorist content." These provisions were amended in 2019 in order to transpose Spain's obligations under the EU Directive 2017/541 on combating terrorism; however, they are still overly broad and fail to include crucial elements to comply with international human rights law.

- Provisions on different types of 'hate speech' that do not sufficiently distinguish between the severity of the expression and its impact to adequately determine proportionate sanctions that comply with both Article 20(2) and 19(3) of the International Covenant on Civil and Political Rights (ICCPR).

- Provisions providing protection to a wide range of State institutions and public officials from offence and insults, notwithstanding that such abstract entities are not rights-holders under international human rights law.

Additionally, ARTICLE 19 is concerned about the application of these provisions to target political and artistic expression.

ARTICLE 19 urges the Spanish National Government and Parliament (*Cortes Generales*) to undertake a substantial reform of the Penal Code to put it in line with international standards on freedom of expression. The analysis provides specific recommendations in this respect.

Key recommendations

1. The definition of "terrorism" in Article 573 of the Penal Code should be tightened so that it is clearly limited to acts of violence, introducing the intent element and safeguards to ensure that it cannot be used to limit political expression;

2. Article 578(4) on measures related to online content should be amended;

3. Article 575(2) should be repealed;

4. Article 578 on the "glorification of terrorism" should be repealed in its entirety;

5. Article 579 should be revised to make clear that "incitement to terrorism" requires intent for the commission of a terrorism offence, and proof that the expression is likely to incite imminent violence;

6. Criminal defamation provisions - Articles 208-2016 - and lèse-majesté provisions - Articles 490(3), 491(1), and 491(2) - should be abolished in their entirety. Defamation should be fully decriminalised and replaced by appropriate civil remedies. There should be no heightened

defamation protection provided to public officials, including the royal family, as they should tolerate higher-level criticism due to their position in the society;

7. Provisions on reputation protection to public institutions - Articles 496, 504(1) and (2) and 543 - should be repealed in their entirety;

8. Provisions providing protection from insult to religions and religious feeling - Articles 524 and 525(1) - should be repealed entirely. Only protections for incitement to violence, hostility and discrimination on religious grounds should be permitted. The state should make positive efforts to promote religious tolerance in place of criminal sanctions;

9. Article 510 of the Penal Code should be revised. The advocacy of discriminatory hatred which constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the ICCPR, establishing a high threshold for limitations on free expression (as set out in the Rabat Plan of Action);

10. Article 510(1)(c) should be amended to bring it into line with international criminal law, by narrowing the provision to "direct and public incitement to genocide";

11. All aggravating penalties based on online expression should be removed;

12. The government should develop a comprehensive plan on the implementation of the Rabat Plan of Action. In particular, it should adopt and implement a comprehensive plan for training law enforcement authorities, the judiciary, and those involved in the administration of justice on issues concerning the prohibition of incitement to hatred and 'hate speech.'

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Introduction

In this analysis, ARTICLE 19 reviews selected provisions of the Spanish Penal Code, Organic Act 10/1995 (Penal Code).'[1] This analysis does not detail all of ARTICLE 19's concerns with the Penal Code provisions, rather, it focuses only on the most important of these concerns and issues relevant to our mandate.

In the past decades, Spain has suffered from the acts of terrorism, both from movements coming from within and abroad. Although the risks associated to terrorism are real and should not be underestimated, all measures in place to combat and prevent terrorism should comply with international human rights standards. ARTICLE 19 points out that it is questionable whether the imposition of restrictions to freedom of expression would actually ensure additional safety, and it could be argued if these would rather limit free public discussion and flow of ideas that are necessary within a democratic society.

ARTICLE 19 finds that a number of provisions of the Penal Code, namely those related to terrorism, 'hate speech,' defamation and insult and protection of state institutions, restrict speech in an extremely broad way, and are subject to excessive penalties. These types of provisions are easily abused. ARTICLE 19 is concerned that they are used to target political[2] and artistic expression,[3] especially online, or expression that the Government considers embarrassing, inappropriate or offensive, with several of these provisions concluding in severe criminal penalties.

ARTICLE 19 notes that a number of provisions of the Penal Code have been subject to criticism and/or review by international human rights bodies. For instance, numerous Human Rights Council special procedures have called on Spain to reform terrorism related provisions of the Penal Code.[4] The UN Special Rapporteur on countering terrorism has further proposed as a model a much narrower provision targeting "incitement" only, with clear requirements of showing both intent and likelihood of harm as a result of the expression.[5]

The European Court of Human Rights (European Court) also found prosecutions under some of these provisions to violate the right to freedom of expression.[6]

Most recently, in January 2020, during the 3rd cycle of the Universal Periodic Review (UPR) of Spain, Spain received 20 recommendations on freedom of expression, including the recommendations to decriminalise defamation, repeal restrictive laws on the grounds of religious insult, and amend the provisions of the Penal Code that impose unduly limitations on the right to freedom of expression and peaceful assembly.[7]

The current coalition in power, following the November 2019 elections, has committed to the review of the legal framework with a view of prioritising the protection of human rights. ARTICLE 19 hope that this analysis and our recommendations will inform the reform process of the Penal Code and ensure its full compliance with international freedom of expression standards. ARTICLE 19 stands ready to provide further support in this process.

Applicable international standards

ARTICLE 19's' comments on the Penal Code are informed by international human rights law and standards. Any legislative and regulatory framework aimed at restricting the right to freedom of expression should also comply with these standards.

The protection of the right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),[8] and given legal force through Article 19 of the ICCPR.[9] At the European level, Article 10 of the European Convention) protects the right to freedom of expression in similar terms to Article 19 of the ICCPR, with permissible limitations set out in Article 10(2).[10] Within the EU, the right to freedom of expression and information is guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union.[11]

The scope of the right to freedom of expression is broad. Article 19 of the ICCPR and Article 10 of the European Convention require States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice; this also includes the Internet and digital media.[12]

Importantly, in General Comment No 34,[13] the UN Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, explicitly recognises that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.[14] State parties to the ICCPR are also required to consider the extent to which developments in information technology, such as Internet and mobile-based electronic information dissemination systems, have dramatically changed communication practices around the world.[15]

Limitations on the right to freedom of expression

Under international human rights law, States may exceptionally limit freedom of expression under Article 19 para 3 of the ICCPR. The restrictions may be legitimate only under specific circumstances (the so-called "three-part test"), requiring that limitations must:

- **Be provided by for law**: any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly; assurance of legality on limitations to Article 19 should comprise the oversight of independent and impartial judicial authorities;

- **Pursue a legitimate aim**: listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals;

- **Be necessary and proportionate**: requiring States to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[16]

Thus, any limitation imposed by the State on the right to freedom of expression must conform to the strict requirements of this three-part test. Further, Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law (see more below).

Anti-terrorism and freedom of expression

The protection of freedom of expression in the context of combating terrorism has been a matter of significant debate for a number of years. While there is no definition of "terrorism" under international human rights law, it is well understood that freedom of expression may be restricted in order to protect public order and national security and recognised that the State has a duty to protect its people from terrorist threats and acts.[17] At the same time, under international law, it is well recognized that human rights, including free expression must be respected in the fight against terrorism and cannot be arbitrarily limited.

For example, the UN Security Council Resolution 1456 (2003) states that:

> States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.[18]

General Comment No. 34 also clearly provides:

> States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising," "glorifying," or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities."[19]

In addition, the Johannesburg Principles provide that when restricting freedom of expression on the basis of protecting national security, for the purposes of Article 19(3) of the ICCPR, States must show that:

> [G]enuine purpose and demonstrable effect [of the restriction] is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.[20]

Subsequently, expression may be limited as a threat to national security only if the state can demonstrate that:

- the expression is intended to incite imminent violence;
- it is likely to incite such violence; and
- there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[21]

Drawing on these recommendations, the UN Special Rapporteur on countering terrorism has proposed a model definition for "incitement to terrorist offences":

> It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.[22]

Restricting 'hate speech'

'Hate speech' is a broad term that has no definition under international human rights law. The expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response required from States under international human rights law.[23]

- Severe forms of 'hate speech' that international law requires States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;

- Other forms of 'hate speech' that States may prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment;

- 'Hate speech' that is lawful but nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State but which should be protected from restrictions under Article 19 para 3 of the ICCPR.

At the international level, the Rabat Plan of Action provides guidance on what constitutes incitement under Article 20(2) of the ICCPR.[24] It states that prohibitions on incitement must be focused on advocacy of discriminatory hatred targeting a protected group, with characteristics of a protected group to be interpreted on a broad basis, including such characteristics as sex, sexuality, gender identity, political belief or ethnic origin. It sets out that the speaker's intention or capability of inciting action by the audience against the target group must be considered. In order to determine this, the Rabat Plan of Action sets out six factors to consider:

- **Context**: considering the social, political or economic context of the speech, particularly any history of conflict or persecution of the protected group.

- **Identity of the speaker**: the position of authority or influence the speaker holds, such as whether they are a public official or religious leader.

- **Intent**: whether the speaker intended to engage in advocacy to discriminatory hatred, namely whether they intended to target a protected group on the basis of their protected characteristics, and whether they knew that their expression would likely incite the audience to discrimination, hostility or violence.

- **Content of the expression**: what was said, including consideration of the form and style of the expression and what the audience understood from this.

- **Extent and magnitude of the expression**: the public nature of the expression and the means of it, as well as its intensity or magnitude in terms of its frequency or amount.

- **Likelihood of harm occurring, including its imminence**: there should be a reasonable probability of discrimination, hostility or violence occurring as a direct result of the expression.

Other forms of 'hate speech' or discriminatory expression that does not meet the threshold of Article 20(2) according to these criteria may still be prohibited, however any such prohibition must pass the three-part test to conform to international standards on freedom of expression.

Additionally, as noted above, there will be a broad range of expression that does not reach the threshold of permissible limitations. The HR Committee and the European Court have repeatedly affirmed that the scope of the right to freedom of expression extends to the expression of opinions and ideas that others may find deeply offensive,[25] and that this may encompass discriminatory expression. This does not preclude States from taking other measures to address this type of expression and underlying prejudices of which this category of 'hate speech' is symptomatic, or from maximising the opportunities for all people, including public officials and institutions, to engage in counter-speech. Many of these positive measures are set out in the Rabat Plan of Action.

At the European level, the European Convention does not contain any obligation on States to prohibit any form of expression, as under Article 20(2) of the ICCPR. However, the European Court has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the European Convention as a whole.[26] The European Court has also exercised particularly strict supervision in cases where criminal sanctions have been imposed by the State, and in many instances it has found that the imposition of a criminal conviction violated the proportionality principle.[27] Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression if less severe sanctions would achieve the same effect.

At the EU level, the Council's Framework Decision **"**on combating certain forms and expressions of racism and xenophobia by means of criminal law" requires States to sanction racism and xenophobia through **"**effective, proportionate and dissuasive criminal penalties."[28] It establishes four categories of incitement to violence or hatred offences that States are required to criminalise with penalties of up to 3 years' imprisonment, including condoning, denying or grossly trivialising historical crimes. States are afforded the discretion of choosing to punish only conduct which is carried out in "a manner likely to disturb public order" or "which is threatening, abusive, or insulting," implying that limitations on expression not likely to have these negative impacts can legitimately be restricted. In the view of ARTICLE 19, these obligations are broader and more severe in the penalties prescribed than the prohibitions in Article 20 para 2 of the ICCPR, and do not comply with the requirements of Article 19 para 3 of the ICCPR.[29] Efforts at the national level to transpose the Framework Decision into penal codes consequently produce a potential conflict with States' obligations under the ICCPR.

Protection of reputation and freedom of expression

The right to a reputation is guaranteed by Article 17 of the ICCPR which prohibits only "*unlawful attacks*" (emphasis added) on honour and reputation. This qualification was inserted as an additional safeguard for freedom of expression and to allow States some scope to decide what sort of attacks they wish to make unlawful. The use of the word "attacks" makes it clear that only deliberate and serious interferences are prohibited.

Laws that aim to protect the reputation of individuals, usually grouped together under the collective name 'defamation' laws, pursue the legitimate aim of 'protecting the rights of others.'

A 'good' defamation law – one which lays the groundwork for striking a proper balance between the protection of individuals' reputation and freedom of expression – could be defined as follows: a defamation law is a law which aims to protect people against false statements of fact which cause damage to their reputation.

On the other hand, laws explicitly seeking to discourage debate about official institutions by broadly prohibiting criticism of the head of State, the flag or other public bodies and symbols, or by imposing higher penalties when a defamatory statement affects one of these entities, constitute impermissible limitations on freedom of expression. The mere existence of laws of this type may encourage self-censorship amongst the media and individual citizens. The same applies to defamation or "insult" laws that are aimed at the protection of feelings rather than reputations.

Importantly, international human rights courts have consistently held that public officials should tolerate *more*, not less, criticism than ordinary citizens. By choosing a profession involving responsibilities to the public, officials knowingly lay themselves open to scrutiny of their words and deeds by the media and the public at large. [30] Moreover, vigorous debate about the functioning of public officials and the government is an important aspect of democracy. To ensure that this debate can take place freely, uninhibited by the threat of legal action, the use of defamation laws by public officials should be circumscribed as far as possible. In general, the more senior the public official, the more criticism he or she may be expected to tolerate, including of his or her behaviour outside of official duties. Politicians come at the top of the scale due to the importance of debate about candidates for election.

Analysis of the Penal Code

'Terrorism'

From the outset, ARTICLE 19 highlights that preventing and countering terrorism, regardless of the ideological, political or religious motivations of the perpetrators, is a legitimate and important goal for European governments that seek to protect liberty and security for individuals and societies. However, numerous provisions of the Penal Code relating to terrorism raise serious freedom of expression concerns, including the offence of "terrorism," "glorification of" and "incitement to" acts of terrorism, as well as the act of accessing online information displaying terrorist recruitment and training content.

We are aware that some of these offences were amended in 2015 and 2019 in order to transpose Spain's obligations under a number of UN Security Council Resolutions, and in order to transpose into domestic law the Directive (EU) 2017/541 of the European Parliament and the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (the EU Anti-Terrorism Directive). ARTICLE 19 has previously raised concerns that several aspects of the EU regulations would significantly endanger freedom of expression and information in Europe.[31] Serious human rights concerns have been raised in virtue of the fact that the legal framework resulting from this process is opening space for abuse and unwarranted restrictions to freedom of expression, peaceful assembly, and privacy, among other rights. For instance, in her 2019 report, the UN Special Rapporteur on countering terrorism warned about the "negative effects on human rights of these regulatory developments, […] generating ineffectiveness and confusion thereby limiting or disregarding the application of primary legal regimes including international human rights law."[32]

Definition of "terrorism"

The definition of "terrorism" is set out in **Article 573** of the Penal Code:

- Article 573(1) provides the basic definition of terrorism (basic terrorism) and
- Article 573(3) provides an extension of this definition (extended terrorism)

Our analysis begins with the basic definition of terrorism.

In its basic form, terrorism is defined as the commission of a "serious crime"[33] against any of the specific legal interests mentioned in Article 573(1) - including "life or physical integrity," "freedom," "moral integrity," "property," and "the Crown"- for any of the following purposes:

(1) "subverting the Constitutional Order";
(2) "suppressing or seriously destabilising the functioning of political institutions or the economic or social structures of the State";
(3) "forcing the public authorities to perform an act or refrain from doing it";
(4) "seriously altering the public peace";
(5) "seriously destabilising the functioning of an international organisation"; or
(6) "provoking a state of terror among the population or a section of it."

The basic crime of terrorism[34] requires not only that a separate crime is committed and that the crime committed constitutes a "serious crime;" it requires also that the underlying crime is contained in one of the chapters of the Penal Code protecting any of the legal interests mentioned in Article 573(1).

Basic terrorism is a referential crime, in that it is defined by reference to the commission of a different offense. The crime of terrorism presupposes that a separate and distinct crime (also punishable under the Penal Code) is committed, and that the separate crime committed constitutes, at the same time, a "serious crime," and a crime against one of the legal interests mentioned in Article 573(1). These last two requirements are clarified below.

It follows from the above that the distinguishing feature of basic terrorism is not the objective nature of the conduct committed - which is in fact identical to that of the underlying crime; but rather the ulterior purpose for which the underlying crime is committed, which must be of any of the (six) types of purposes specified in Article 573(1).

In its basic form, the crime of terrorism is unlikely to interfere directly with the right to freedom of expression. Freedom of expression protects the right of every person to seek, receive and impart information and ideas of any kind and through any chosen medium. Outside the scope of protection of this right, however, is the use of physical force on another person. Now, as previously explained, basic terrorism presupposes the commission of a separate crime taking the form of murder, manslaughter, kidnapping or any of the other underlying crimes prescribed by Article 573(1). The common feature of all these possible underlying crimes is that they all involve the actual application of force on another person. Basic terrorism, therefore, by its very definition, involves the use of physical force going beyond mere expression. For this reason, Article 573(1) is unlikely to interfere directly with the right to freedom of expression.

However, the basic definition of terrorism is likely to interfere indirectly with freedom of expression. Article 573(3) extends the definition of terrorism to include the "glorification" and the "incitement" of terrorism, as defined in Articles 578 and 589 of the Penal Code respectively. These two extended forms of terrorism are clearly capable of interfering with the free circulation of information and ideas, and therefore with the right to freedom of expression. More important to our analysis, the two extended forms of terrorism are based and contingent on the basic definition of terrorism provided in Article 573(1). In other words, what constitutes "glorification" or "incitement of terrorism" ultimately depends on what constitutes terrorism in the first place. In this way, the basic definition of terrorism is likely to interfere indirectly with freedom of expression.

Since terrorism, in its basic form, is likely to interfere indirectly with free expression, it is subject to the same international standards applicable to any other restriction on free expression. It is therefore appropriate to analyse Article 573(1) in light of these standards.

Some of the ulterior purposes required by Article 573(1) of the Penal Code are excessively broad and ambiguous. That is particularly the case of the purposes of "subverting the Constitutional Order," "suppressing or seriously destabilising the functioning of political institutions or the economic or social structures of the State," "forcing the public authorities to perform an act or refrain from doing it," and "seriously altering the public peace." The first three of these purposes are clearly based on Article 3(2)(b) and (c) of EU Anti-Terrorism Directive. They are nonetheless vague and ambiguous to an inadmissible degree.

The offence of "terrorism" in Article 573 of the Penal Code, to the extent that it is applied to expressive conduct, feasibly captures expression that does not pose an immediate threat to national security. Recent experience demonstrates that other provisions in the Penal Code that are contingent on the definition of "terrorism" have been applied to criminalise expression that is non-violent and which does not pose a real and justifiable danger to national security.

"Glorification of terrorism"

Additionally, **Article 578(1)** of the Penal Code makes it a criminal offence to engage in any "public praise or justification" of a terrorism offence listed in the Penal Code (Article 572 – 577), or to praise or justify the acts of "those who have participated in its execution, or the performance of acts that entail discredit, contempt or humiliation of the victims of terrorist crimes or their relatives."[35]

Further provisions specify circumstances in which sentences must be given within the upper half of this range. This includes where the offending conduct is committed online (Article 578(2)), or where the offence "disturbs the public peace" or "creates a serious feeling of insecurity" (Article 578(3)).

Article 578(4) stipulates that offending materials may be destroyed, online copies deleted, and online hosts ordered to remove or prevent access, pursuant to a court order.

ARTICLE 19 finds that these prohibitions violate the right to freedom of expression.

- First, terminology employed in Article 578(1) is so vague as to fail the requirement that restrictions on freedom of expression should be provided by law. The interpretation of all key words is likely to be highly subjective. We note that although States have committed at the UN to "prohibit by law incitement to commit a terrorist act or acts,"[36] offences of "glorifying terrorism" generally fall short of the incitement threshold, and raise serious concerns from a freedom of expression perspective. The HR Committee has raised particular concerns that offences of "praising," "glorifying," or "justifying" terrorism, should be clearly defined so that they do not lead to unnecessary or disproportionate interference with freedom of expression.[37] Further, they specify that "it is not compatible with paragraph 3 [of Article 19, ICCPR], for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security."[38]

- Second, we do not believe that the glorification, justification or any other form of expression concerning terrorism or any form of violence can be prohibited unless it is clearly intended to directly incite such conduct. In this case, rather than be limited to acts of "incitement," Article 578(1) may be applied to limit any commentary that casts terrorist acts or persons who have committed such acts in a positive light, or which may be upsetting or insulting to victims of terrorist acts, survivors or relatives. The absence of any requirement for intent to incite a terrorist act, and the absence of any need to show that the expression may lead to the imminent commission of such acts, is overly broad and not justified under international human rights law.[39] These concerns are exacerbated by the breath of the definition for terrorism under Article 573, which may extend the application of "glorification" to expressions or acts of non-violent protest that have a political purpose.

- Third, aggravated penalties for online expression in Article 578(2) raise concerns from the point of proportionality of sanctions. We note that for example, the Council of Europe Declaration on freedom of communication on the Internet specifies that "member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery."[40] The 2019 report of the UN Special Rapporteur on countering terrorism also highlighted that the adverse impacts of invoking counter-terrorism to restrict freedom of expression is exacerbated when applied to online-based forms of expression.[41] ARTICLE 19 notes that the government has not made the case as to why an increase in sentencing for online

expression is necessary. This is particularly concerning in light of the fact that online expression is often much more reactionary, flippant, and inconsequential than types of expression.

As for Article 578(4), ARTICLE 19 finds that it is positive that in line with the recommendations of the Special Rapporteur on freedom of expression,[42] removal of offending content is to be ordered by a court - rather than a government body. However, we consider that Article 578(4), combined with previous provisions, lacks clarity in breach of the first limb of the three-part test. In particular, there is no requirement to consider the impact that removal orders may have on freedom of expression and no specification of the precise measures that may be ordered by the courts. For instance, there is nothing in these provisions to prevent a court from ordering a wholesale (and therefore disproportionate) blocking of access to domain names contrary to international standards on freedom of expression.

Hence, ARTICLE 19 believes that the law should specify criteria that courts should be required to take into considerations when issuing orders under provisions of Article 578(4) of the Penal Code. This should include *inter alia* the considerations of:

- whether the order is the least restrictive means available to bring an end to individual acts of infringement including an assessment of any adverse impact on the right to freedom of expression;
- whether access to other non-infringing material will be impeded and if so to what extent, bearing in mind that in principle, non-infringing content should never be blocked;
- the overall effectiveness of the measure and the risks of over-blocking.

Here, or in another legislation, it should be specified that the blocking of an entire domain name is never permitted as it disproportionately impacts the right to freedom of expression. The law should provide safeguards against abuse in the implementation of interim blocking measures.

ARTICLE 19 notes that Article 578(1) has been interpreted on multiple occasions by the Spanish Supreme Tribunal, the Constitutional Tribunal and several other lower courts. The most recent position of the Criminal Chamber of the Supreme Tribunal, which is the result of a dragged and unfruitful process the of evolution of its case law,[43] posits that the application of Article 578(1) does not require that the defendant *directly* incites another to commit a *concrete* act of terrorism; it suffices that the defendant creates, "even indirectly, a situation of risk for individuals, or the rights of third parties, or for the system of freedoms itself."[44] According to the Supreme Tribunal, the existence of this risk is to be assessed "in the abstract," and it can be established if the content of the expression in question is "intrinsically capable" of creating such risk.[45] The construction made by the Supreme Tribunal of Article 578(1) unequivocally confirms that this provision fails to comply with international standards on freedom of expression.

"Incitement to terrorism"

Article 579 of the Penal Code on "incitement to terrorist acts" makes it a criminal offence for any person "who, by any means, publicly disseminates messages or slogans that have as purpose or that, by their content, are suitable to incite to others to the commission of any of the crimes of this Chapter." This offence comprises the "terrorist acts" described in Articles 573 and 578. Penalties vary according to which "terrorist act" the expression is alleged to incite.

Article 579(2) specifies a particular offence, though subject to the same penalties, for "incitement" that is "public" or "before a gathering of persons." The same penalty applies to other acts of

provocation, conspiracy and proposition to commit any of the crimes of the respective Chapter of the Criminal Code.

Article 579(3) states that online blocking and content removal orders of "incitement to terrorist acts" are also applicable under this offence (579(4)).

Though much narrower than the offence of "glorification" under Article 578, and seemingly used less frequently, this provision still raises serious freedom of expression concerns for many of the same reasons:

- As noted earlier, the definition of "terrorism" in Article 573 is so broad that the offence of "incitement to terrorist acts" may capture expression that merely encourages non-violent political organising that the government considers destabilising but does not threaten genuine national security interests;

- The offence is not limited to intentional incitement, but also covers expression that may be judged on the basis of its content alone to be considered "incitement," including artistic or other forms of expression as captured under Article 378;

- The standard of being "suitable" to incite is vague, and does not explicitly require (i) proof that the expression is *likely* to incite *imminent* violence, or (ii) evidence of a direct and immediate connection between the expression and the likelihood or occurrence of such violence;

- It is not necessary in a democratic society to create particular categories of content-based restrictions in assemblies, as in Article 579(2), as this is likely to have a chilling effect on peaceful assemblies;

- This offence leaves opportunity to arbitrarily restrict online expression that is protected under international human rights law.

ARTICLE 19 reiterates that the UN Special Rapporteur on countering terrorism has set out that the threshold for these inchoate content-based crimes requires reasonable probability that the expression in question would succeed in inciting a terrorist act, thus establishing a degree of causal link or actual risk of the proscribed result occurring.[46]

For these reasons, reforms are necessary to bring Article 579 in line with international human rights law.

"Recruitment and/or indoctrination"

Article 575 contains provisions related to recruitment and indoctrination to terrorism.

Article 575(1) criminalises training or combat indoctrination for purposes of carrying terrorism acts (as specified in Articles 573-579). Further, Article 575(2) specifies that "anyone who for this purpose, regularly accesses one or more communication services accessible to the public online or content accessible through the Internet or an electronic communications service whose contents are directed at or are suitable for incitement to join a terrorist organization or group, or to collaborate with any of them or in their aims commits an offence."[47]

ARTICLE 19 is gravely concerned by Article 575(2):

- The provisions are vague and overbroad. It is not clear what is meant by "regularly accessing" the offending content; for instance how many times the individual must open a link or see certain communication. Even if the State intended to capture certain patterns of behaviour, given the nature and common Internet connection problems, it is highly likely that an individual seeking to view terrorist material out of mere curiosity would seek to reload several times before being able to view it.

- In any event, individuals should not be criminalised when they are merely trying to take an informed view about terrorist groups' motivations and actions without intent to commit a terrorist offence. Mere viewing of material by a person without actual intent to commit a terrorist act would seem to be enough to engage criminal liability.

- There is no defence available in these provisions, hence they can have a dramatic chilling effect on investigative journalism, academic research or individuals merely trying to understand the ideology driving terrorist groups.

From a comparative perspective, we note that the French Constitutional Council ('*Conseil constitutionnel*'), the highest constitutional authority in France, declared a similar provision unconstitutional in 2017.[48] The Constitutional Council noted that the authorities already had several powers allowing them to deal with the threat of terrorism, including a range of terrorism offences and the power to block access to sites inciting terrorism and/or publicly condoning terrorism. It further considered that the *mens rea* for the offence of "regularly consulting terrorist websites," namely that the defendant espoused the views expressed in the websites at issue, was not sufficient to establish that the defendant intended to commit acts of terrorism; it also found that the 'reasonable excuse' defence in the French law (which is not provided here) was insufficient to protect the right of individuals to seek information online.

Finally, we draw attention to the 2017 EU Terrorism Directive 2017; although far from perfect, we consider that Article 8 of the Directive, which enjoins Member States to make it an offence to receive training for terrorism, coupled with Recitals 11 and 40, provide much greater clarity than Article 575(2) of the Penal Code.[49]

Recommendations:

- The definition of "terrorism" in Article 573 of the Penal Code should be tightened so that it is clearly limited to acts of violence, introducing the intent element and safeguards to ensure that it cannot be used to limit political expression;

- Article 578(4) on measures related to online content should be amended;

- Article 575(2) should be repealed;

- Article 578 on the "glorification of terrorism" should be repealed in its entirety;

- Article 579 should be revised to make clear that "incitement to terrorism" requires intent for the commission of a terrorism offence, and to require proof that the expression is likely to incite imminent violence.

Defamation

Criminal defamation

Articles **208-2016** of the Penal Code provide for criminal defamation.

Article 208 defines defamation as "the actions or expression that injure the dignity of another person, undermining their reputation or attacking their self-esteem." It further specifies that only defamation that, due to its "nature, effects and circumstances, is considered as serious by public at large"[50] constitutes a serious offence; this covers situations when "attributing acts to another... has been carried out knowingly of the falsehood thereof or with recklessly disregards of the truth."[51]

Article 210 provides defence of truth in cases when impugned statements were "against civil servants concerning events in exercise of their duties of office or referring to the commission of criminal or administrative offences." Further, Article 215 stipulates that the offences under this section (Articles 208 - 216) shall be prosecuted upon request of the affected party unless the offence is committed against a "public official, authority or agent of an authority concerning the exercise of their duties."

ARTICLE 19 finds that these provisions do not comply with international human rights law.[52]

First, as noted earlier, the only legitimate purpose of a defamation law is to protect people from false statements of fact that cause damage to their reputation. It is not legitimate for a defamation law to be crafted to protect subjective feelings or a subjective understanding of one's own sense of honour.[53]

Second, no one should be held liable for the expression of an opinion. As the European Court has noted:

> [A] careful distinction must be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof… As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself.[54]

Second, ARTICLE 19 notes that international human rights bodies increasingly recognise that criminal sanctions are *never* a proportionate penalty for defamation and recommend States to repeal *all* criminal defamation and insult laws, on the basis that individuals' reputational rights can be more effectively protected through the civil law.[55]

The criminalisation of a particular activity implies a clear State interest in controlling it and imparts a social stigma to it, neither of which we believe to be justified in relation to the protection of individuals' reputations. International courts have stressed the need for governments to exercise restraint in applying criminal remedies when restricting fundamental rights. For instance, the European Court has repeatedly stated that criminal sanctions should only be used as a last resort, and only in the most extreme circumstances.[56] The paucity of criminal defamation cases in the established common law democracies suggests that such an offence is unnecessary. Defamation should be dealt with through the civil law.

Lèse-majesté

The Penal Code contains a number of offences that provide heightened protection to royal family (so called lèse-majesté). Namely:

- **Article 490(3)** criminalises "slander" and "insult" against various members of the Spanish Royal Family, during or related to the exercise of their official functions;[57]

- **Article 491(1)** criminalises "slander" and "insults" against various members of the Spanish Royal Family, without the connection to the exercise of their official functions;[58]

- **Article 491(2)** criminalises the use of images of past, present or future Kings or Queens, or other present members of the Royal Family, "in any way that could damage the prestige of the Crown."[59]

ARTICLE 19 notes that these provisions do not meet the criteria of legality, necessity and proportionality, set out in light of international freedom of expression standards.

- First, these provisions do not meet the criteria of legality as they are formulated in an overly broad manner, leaving wide discretion for its application and implementation and are open to broad interpretation and potential abuse.

- Second, these provisions set disproportionate and unnecessary restrictions on the right to freedom of expression. As noted earlier, international human rights courts have consistently held, however, that public officials should tolerate more, not less, criticism than ordinary citizens, in particular the officials of the highest rank, such as heads of state and unelected monarchy.[60]

- Further, the Penal Code sets disproportionate level of sanction for the violation of these provisions. As noted above, defamation should be fully decriminalised. Under no circumstances, therefore, should legislation provide any special protection for public officials or public figures, whatever their status or rank.

Lèse-majesté provisions, such as those contained in the Penal Code, are a hall-mark of repressive regimes.[61] Their existence, even as historical relics, in the Criminal Codes of democracies, including when they do not lead to prosecutions, sets a regressive example internationally.

Recommendations:

- Articles 208-2016 and Articles 490(3), 491(1), and 491(2) should be abolished in their entirety. Defamation should be fully decriminalised and replaced by appropriate civil remedies.

Protection of state institutions

Four provisions of the Penal Code criminalise "insult" directed against public institutions and symbols:

- **Article 496** criminalises "seriously insult" against any of the chambers of Parliament ('Cortes Generales') or the legislative assembly ('Asamblea Legislativa') of any of the Autonomous Communities, or any of their committees representing them in public acts, whilst they are in session.[62]

- **Article 504(1)** criminalises "slander, defamation or threats" against the National Government, the Constitutional Tribunal, the Supreme Tribunal, or the government ('Consejo de Gobierno') or Supreme Tribunal of any of the Autonomous Communities.[63]

- **Article 504(2)** criminalises "seriously insult or threat" against the Armed Forces, the Security Divisions, Bodies and Forces ('Clases o Cuerpor y Fuerzas de Securidad').[64]

- **Article 543** criminalises offences against "Spain" which is defined as "verbal or written offense or insult, against Spain, its Autonomous Communities, or their symbols or emblems when made publicly, in oral, written and *de facto* "offenses or outrages of words."[65]

ARTICLE 19 finds that these four provisions are fundamentally incompatible with international standards on freedom of expression.

It is not a legitimate aim under Article 19(3) of the ICCPR to limit freedom of expression in order to protect the reputation of public institutions. Several established democracies do not allow public bodies (such as ministries, government agencies or municipalities) to sue for defamation under any circumstances, both because of the importance of open debate about the functioning of such bodies and because they are not seen as having a 'reputation' entitled to protection. Neither States nor public bodies are rights-holders under international human rights law: they are only the subject of obligations and should not have legally actionable reputational interests.[66] As abstract entities without a profit motive, public bodies lack an emotional or financial interest in preventing damage to their good name. Moreover, the bringing of defamation suits by these bodies is seen as an improper use of public money, particularly given the ample non-legal means available to them to respond to criticism, for example through a public counter-statement.

A ban on defamation suits should apply to all public bodies, whether they are part of the legislative or any other power.

Recommendations:
- Articles 496, 504(1) and (2) and 543 should be repealed in their entirety.

Insulting religion and religious feelings

Two provisions of the Penal Code Provisions protect the followers of a religion or belief from offence or insult:
- **Article 524** criminalises perpetration of "profane acts that offend the feeling of religious confession in a temple or place of worship, or at religious ceremonies."[67]
- **Article 525 (1)** criminalises "offending the feelings of members and followers of a religious belief, by publicly disparaging, in writing, by work or any type of document, their dogmas, beliefs, rites, or ceremonies."[68]

ARTICLE 19 finds that these provisions do not comply with international freedom of expressions standards.

It is not a legitimate aim under Article 19(3) of the ICCPR and Article 10(2) of the European Convention to limit freedom of expression to protect religions or belief from criticism, or to shield followers of a religion or belief from offence, criticism or insult. International human rights law does not protect abstract concepts, such as religion or belief systems. Reputational rights in their limited form only attach to individuals, so offences such as Articles 524 and 525(1) fail to meet a legitimate aim under international law.

ARTICLE 19 is concerned that under these provisions, it is likely that many forms of expression, including legitimate artistic, political, and religious forms of expression, will be subject to arbitrary

restrictions and censorship by the State. This should be of concern also to religious persons in Spain especially, as the very freedom to express religious viewpoints is threatened by these provisions.

ARTICLE 19 also notes that the repeal of laws protecting religion and religious feelings from insult is supported by the UN Human Rights Committee,[69] the UN Human Rights Council (HRC),[70] as well as by the Rabat Plan of Action,[71] numerous special procedures of the HRC,[72] the Venice Commission,[73] the Parliamentary Assembly of the Council of Europe,[74] and in the European Union's Guidelines on Freedom of Religion or Belief.[75] Various countries in Europe have decided to repeal their blasphemy laws.[76]

Recommendations:

- Articles 524 and 525(1) should be repealed entirely. Only protections for incitement to violence, hostility and discrimination on religious grounds should be permitted. The state should make positive efforts to promote religious tolerance in place of criminal sanctions.

'Hate speech'

Incitement

Article 510 prohibits several types of incitement offences:[77]

- Article 510(1)(a) criminalises publicly encouraging, promoting or inciting directly or indirectly to hatred, discrimination, hostility or violence against groups or a part thereof or against a person determined by reason of their belonging to it, for to racist, anti-Semitic reasons or any other related to ideology, religion or belief, family situation, belonging to an ethnic group, race or nation, their national origin, their sex, sexual identity or orientation, for reasons of gender, illness or disability;

- Article 510(1)(b) criminalises producing, developing, possessing for the purpose of distribution, facilitating access to third parties, distribution, dissemination or sale writings or any other kind of material or media that are suitable for encouraging, promoting, or inciting direct or indirectly to hatred, hostility, discrimination or violence against a group, a part of it, or against a person determined by reason of their belonging to it, for racist, anti-Semitic or other reasons related to ideology, religion or beliefs, family situation, the belonging of its members to an ethnic group, race or nation, their national origin, their sex, or sexual identity or orientation, for reasons of gender, illness or disability.

- Article 510(1)(c) criminalises publicly denying, gravely trivializing or glorifying the crimes of genocide, crimes against humanity or against persons and property protected in the event of armed conflict, or exalt their perpetrators, when they have been committed against a group or a part thereof, or against a person determined by reason of their membership thereof, for racist, anti-Semitic or other reasons related to the ideology, religion or beliefs, the family situation or the membership of their members to an ethnic group, race or nation, their national origin, their sex, sexual identity or orientation, for reasons of gender, illness or disability, when in this way a climate of violence, hostility, hatred or discrimination against them is promoted or favored.

As outlined earlier, international law only requires that states restrict freedom of expression in limited circumstances, set out in Article 20(2) and Article 19(3) of the ICCPR. Article 20(2) of the ICCPR prohibits the advocacy of hatred that constitutes incitement to hostility, discrimination or violence. The use of the terms "advocacy" and "incitement" implies that only expression that intentionally advocates

discrimination, hostility or violence should be prohibited, and further that such expression must also be likely to and intended to cause hostility, discrimination or violence towards the protected group.

When assessing the incitement offences in provisions of Article 510(1), the following key features should be mentioned:

First, Article 510(1) prohibitions do not meet these requirements because they prohibit conduct without requiring intent and without requiring proof that a prohibited outcome was intended or likely as a consequence of that expression.

Second, a broad range of conduct is prohibited:

- Prohibitions in 510(1)(b) of "producing, developing, possessing for the purpose of distribution, facilitating access to third parties, distribution, dissemination or sale writings or any other kind of material or media that are suitable for encouraging, promoting, or inciting" prohibited conduct, go beyond the provisions of Article 20(2) of the ICCPR.

  ARTICLE 19 is aware that under Article 4(a) of the International Convention on the Elimination of Racial Discrimination (ICERD),[78] States are obliged to "declare [as] an offence punishable by law" different type of conduct[79] than in Article 20(2) of the ICCPR. ARTICLE 19 has previously pointed out that treaties are to be interpreted in accordance with the Vienna Convention on the Law of Treaties.[80] The Vienna Convention stipulates that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[81] and any subsequent practice or agreement. When the interpretation "leaves the meaning ambiguous or obscure or leads to" a manifestly absurd or unreasonable result, supplementary means of interpretation can be used. ARTICLE 19 argues that, based on the Vienna Convention, Article 4(a) of the ICERD should be interpreted with "due regard" to the right to freedom of expression (as protected in Article 5 of the ICERD and Article 19 of the ICCPR) and more generally to any agreement that has followed the adoption of the ICERD, including the ICCPR.

  We also suggest that the provisions of "dissemination of ideas based on racial superiority or hatred" and "assistance to racial activities" should be interpreted narrowly, according to the level of severity and the threshold set by Article 20(2) of ICCPR. Only the dissemination of ideas or the financing of activities on a very large and serious scale should be prohibited. Moreover, States should ensure that any prohibitions undertaken in law to interpret Article 4(a) of the ICERD should be necessary and proportionate to a legitimate aim and should include a requirement of intent to bring about a prohibited result.

- Provisions on 510(1)(c), prohibiting "publicly denying, gravely trivializing or glorifying the crimes of genocide, crimes against humanity" and other crimes deviate from international provisions, criminalising "direct and indirect incitement to genocide." This wording is vague and much broader than provisions of the Genocide Convention and in the international criminal law. Under international criminal law, convictions for direct and public incitement to genocide require proof of several key elements, including public[82] and direct[83] nature and intent[84] to incite to genocide. For example, we note that the International Criminal Tribunal for Rwanda stated that incitement to genocide must include a direct call to commit an act of genocide, as well as the requisite intent;[85] and that the specific context is a factor to consider in deciding whether expression constitutes direct incitement to commit genocide.[86]

- The Penal Code does not outline a specific test for assessing incitement cases.

ARTICLE 19 therefore recommends to revise these provisions and bring them in compliance with Article 20(2) of the ICCPR, preferably drawing on the guidance provided in the Rabat Plan of Action.

Other types of 'hate speech'

Article 510(2) criminalises a number of other 'hate speech' offences:[87]

- Article 510 (2)(a) prohibits harming people's dignity through actions involving humiliation, disregard or discredit of any of the groups or individuals under the protected characteristics (as defined in Article (510(1)), and producing, elaborating or possessing content in writing or any other type with the purposes of distributing, disseminating, selling or enabling access by third parties to content suitable to harm people's dignity in virtue of representing a serious humiliation, disregard or discredit of any of the aforementioned groups, a part thereof, or of any particular person belonging to them;

- Article 510 (2)(b) prohibits exalting or justifying by any means of public expression or dissemination the crimes, or the perpetrators, committed against a group, a part or a persons based on the protected characteristics. Higher penalty can be levied if these acts "promote or favor a climate of violence, hostility, hatred or discrimination against such groups."

ARTICLE 19 understands that these provisions are intended to provide protection to groups and individuals on the basis of protected characteristics. However, we observe that although under international standards states are required to prohibit certain types of expression (under Article 20(2) of the ICCPR) and may prohibit certain speech (e.g. in order to protect the rights of others under Article 19(3) of the ICCPR), a broad range of expression that is concerning in terms of intolerance and discrimination should be protected from restriction under Article 19(3) of the ICCPR.

ARTICLE 19 notes that this provision lacks sufficient clarity in terms of what "harming dignity," "humiliation, disregard or discredit" could encompass. The provisions also do not require the audience of the expression to be incited to committing a harmful act against those under protected characteristics as outlined in Article 20(2) of the ICCPR. It also fails the test of necessity; some of these provisions resemble defamation provisions which should not be addressed in the criminal law (see above).

ARTICLE 19 also notes that international human rights law does not require criminal sanctions for cases of incitement, in particular for cases of incitement to discrimination or hostility. The focus on custodial sentences, including the provision of minimum sentences, does not provide judges with sufficient flexibility to ensure that any sanctions imposed are proportionate. Fines and community sentences should also be considered as alternative sentences. In addition, alternative causes of action in civil and administrative law provide alternative forms of seeking redress that can prove more proportionate and effective.

Recommendations:

- Article 510 of the Penal Code should be revised. The advocacy of discriminatory hatred which constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the ICCPR, establishing a high threshold for limitations on free expression (as set out in the Rabat Plan of Action);

- Article 510(1)(c) should be amended to bring it in line with international criminal law, by narrowing the provision to 'direct and public incitement to genocide';
- All aggravating penalties based on online expression should be removed;
- The government should develop a comprehensive plan on the implementation of the Rabat Plan of Action. In particular, it should adopt and implement a comprehensive plan for training law enforcement authorities, the judiciary, and those involved in the administration of justice on issues concerning the prohibition of incitement to hatred and 'hate speech.'

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, under implementation in domestic legal systems. The organisation has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, freedom of expression and equality, access to information and broadcast regulations.

On the basis of this publications and ARTICLE 19's overall legal expertise, the organisation published a number of legal analyses each year, comment on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform effort worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at https://www.article19.org/law-and-policy/.

If you would like discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by email at: legal@article19.org. For more information about ARTICLE 19's work in Europe in general and in Spain in particular, contact Sarah Clarke, Head of Europe and Central Asia at ARTICLE 19.

End notes

[1] Official State Gazette, Organic Law 2/2015, of March 30, amending Organic Law 10/1995, of November 23, of the Criminal Code, in the area of terrorist offenses, 31 March 2015, and its amendments Organic Law 1/2019, 20 February, which modified Organic Law 10/1995, 21 November, Penal Code, to transpose the EU Directives on finance and terrorism, and adopt other international matters.

[2] For instance, in April 2017, Cassandra Vera received a suspended one-year prison sentence and seven-year ban from working in the public sector for a series of jokes relating to the 1973 murder by Basque separatists of Spanish Prime Minister, and successor to Dictator Francisco Franco, Admiral Luis Carrero Blanco. In February 2018, the Supreme Court of Spain overturned the sentence for allegedly "humiliating victims of terrorism" recognising that Vera was making fun of human tragedy but it was not a case that required a penal system response; see, e.g. The Guardian, Jail for a joke: student's case puts free speech under spotlight in Spain, 18 April 2017.

In 2017, satirical journal "El Jueves" was charged with the offence of insults after implying in various satirical articles that police officers consumed cocaine in Catalonia during 2017 referendum demonstrations. After 18 months, in March 2019 the case was closed by the Court of Barcelona; RTVE, The Appellate Court of Barcelona closes the case to 'El Jueves' for the satire of the National Police, 27 May 2019.

In 2017, actor Toni Albà was charged with serious offence of insults for a series of Twitter posts in which he criticised the National Police and security officials deployed in Catalonia for 1-O. He responded to disseminated pictures calling them "a group of State terrorism" and "both Islamic and Hispanics run over citizens." In February 2020, a judge concluded that his comments conform with the serious offence of insults under the Penal Code but there was a need to weigh them against the right to freedom of expression, resolving that the actor gave his opinions on issues of public relevance and, therefore, the speech deserved a broader protection; El Pais, Actor Toni Albà acquitted of insults to Judge Carmen Lamela and police forces, 7 February 2020.

[3] In March 2018, Pablo Rivadulla, a rapper also known as Pablo Hásel, was sentenced to two years and one day of imprisonment and a fine of EUR 24,300, for *inter alia* glorifying the terrorist groups ETA and GRAPO (Article 578). The charges related to multiple Twitter posts and a song posted on YouTube. Following an appeal before the Spanish High Court, his sentence was reduced to nine months and one day of imprisonment, in light of the fact that the terrorist groups ETA and GRAPO were inactive at the time the crime was committed. See El Pais, The national Appellate Court once again condemns rapper Pablo Hásel for inciting terrorism, 2 March 2018, or Actualidad, The National Appellate Court suspends the execution of the first sentence against Pablo Hasél for exalting terrorism, 30 September 2019.

In 2015, César Augusto Montaña Lehmann (also known as César Strawberry), a rapper and leader of Def Con Dos band, was among nineteen people arrested for "glorifying terrorism." In January 2017, the Spanish Supreme Court overturned an earlier acquittal, sentencing César to one-year (suspended) in prison for tweets between 2013 and 2014, including one joking to send the King of Spain a "cake bomb" on his birthday. In February 2020, the Constitutional High Court found that Strawberry's comments were protected by freedom of expression under political speech and nullified the rapper's sentence. See, The Columbia University, The Case of César Strawberry; and El Diario, The Constitutional Court overturns the conviction of César Strawberry for his tweets and protects them in the freedom of expression. 25 February 2020.

In February 2016, Alfonso Lazaro de la Fuente and Raul Garcia Perez, two puppeteers, were detained for five days on suspicion of "glorifying terrorism" for a satirical performance in Madrid; the puppets held signs supportive of ETA, an effigy of a judge was hanged, a nun raped and then stabbed to death with a crucifix, and police brutality depicted. The investigation was later dropped without charges under Article 578 but remained under a different offence, also dismissed in 2017. See Amnesty International, Spain: Puppeteers accused of glorifying terrorism: Alfonso Lázaro de la Fuente and Raúl García Pérez, 12 February 2016; and New York Times, Spain Dismisses Terror and Hate Crime Case Against Puppeteers, 11 January 2017.

In February 2017, Jose Miguel Arenas Beltran, known as Rapper Valtonyc, was sentenced to three years and six months to prison for *lese-majesté* provisions of the criminal code, the judges determined that his songs published on the Internet include expressions against the King and his relatives; the Supreme Court confirmed the sentenced in February 2018. See El Pais, Rapper Sentenced to More Than 3 Years in Prison for Exalting Terrorism, 22 February 2017; and RTVE, Supreme Court confirms three years in prison for rapper Valtonyc for insulting the Crown and glorifying terrorism, 20 February 2018.

[4] See, e.g. UN experts, Two legal reform projects undermine the rights of assembly and expression in Spain, 23 February 2015; or the report of the UN Special Rapporteur on countering terrorism, A/HRC/16/51, 22 December 2010, para 32(8).

[5] The proposed model definition of "incitement to terrorist acts" is as follows: "It is an offence to intentionally and unlawfully distribute, or otherwise make available, a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed" report A/HRC/16/51, at para 32(8).

[6] European Court of Human Rights, *Stern Taulats & Roura Capellera v. Spain,* App. No. 51168/15 and 51186/15, 13 June 2018.

[7] HRC, Draft report of the Working Group on the Universal Periodic Review, A/HRC/WG.6/35/L.4, 24 January 2020, recommendations 6.80 – 6.98.

[8] Although as the UN General Assembly resolution, the UDHR is not strictly binding on states, many of its provisions are regarded as having acquired legal force as customary international law; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).
[9] International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UN Doc. A/6316, Spain ratified the ICCPR on 27 April 1977.
[10] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.
[11] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.
[12] Human Rights Committee, General Comment No. 34 on Article 19: on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011. See also Human Rights Council, Resolution: The promotion, protection and enjoyment of human rights on the Internet, A/HRC/20/L.13, 29 June 2012.
[13] Human Rights Committee (HR Committee), General Comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34
[14] *Ibid*, para 12.
[15] *Ibid*, para 17.
[16] *Ibid.*, para 22.
[17] UN Security Council Resolution 1624 (2005), para 1(a). Note, while this Resolution is often referred to as binding, it is not: it was not issued under the UNSC Chapter 7 powers.
[18] Resolution 1456 (2003), para 6. See also General Assembly resolution 60/288 of 20 September 2006 on Global Counter-Terrorism Strategy.
[19] General Comment No 34, *op.cit.*, para 46.
[20] ARTICLE 19, Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 2006, Principle 2.
[21] *Ibid.*, Principle 6
[22] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 22 December 2010, A/HRC/16/51, paras 30 – 31.
[23] For a full explanation of ARTICLE 19's policy on 'hate speech,' see ARTICLE 19, "Hate Speech" Explained: A Tool Kit, 2015, p. 8.
[24] See UN Rabat Plan of Action (2012). In particular, it clarifies that regard should be had to the six-part test in assessing whether speech should be criminalised by states as incitement.
[25] General Comment 34, *op.cit.*, para 11. See also European Court, *Handyside v. the UK*, App. No. 5493/72, 7 December 1976.
[26] European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para 56; or *Gündüz v. Turkey*, App.No. 35071/97 (2004), para 22.
[27] European Court, *Jersild v. Denmark*, App. No 15890/89 (1992), para 35.
[28] Council Framework Decision 2008/913/ JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.
[29] See, e.g. ARTICLE 19, Submission to the Consultations on the European Union's Justice Policy, December 2013.
[30] European Court, *Bodrozoc and Vujin v. Serbia,* App. 38435/05 (2009), para 34.
[31] See, e.g. Joint letter on European Commission regulation on online terrorist content, ARTICLE 19, 6 December 2018.
[32] Special Rapporteur on counterterrorism, *op.cit.*, paras 8 – 9.
[33] The Penal Code classifies offences according to the severity of the penalty attached to them. "Serious crimes" are defined in Article 13(1) as those offences to which the law attaches a "serious penalty." "Serious penalties," in turn, are the most severe penalties authorised by the Penal Code and are listed (exhaustively) in Article 33(2). Consequently, "serious crimes" are effectively those crimes to which the law attaches the most severe penalties. In addition to classifying offences according to the severity of the applicable penalties, the Penal Code also classifies offenses in accordance to the legal interest they seek to protect. Murder and involuntary manslaughter, for example, fall within the category of "crimes against life." For each category of crimes, there is a corresponding chapter in the Second Part of the Penal Code. Following the previous example, "crimes against life" are contained in Chapter 1 of the Second Part of the Penal Code.
[34] Basic terrorism is a referential crime, in that it is defined by reference to the commission of a different offense. The crime of terrorism presupposes that a separate and distinct crime (also punishable under the Penal Code) is committed, and that the separate crime committed constitutes, at the same time, a "serious crime," and a crime against one of the legal interests mentioned in Article 573(1).
[35] The offence is punishable with a sentence of one to three years' imprisonment, and a fine (Article 578(1)).
[36] UN Security Council Resolution 1624 (2005), at paragraph 1(a). Note, while this Resolution is often referred to as binding, it is not. It was not issued under the UNSC Chapter 7 powers.
[37] *Op. cit.*, para 46.
[38] *Op. cit.*, para 35.
[39] Johannesburg Principles, *op.cit.*, Principle 2, and Principle 6: "expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."

[40] Council of Europe, Committee of Ministers, Declaration on freedom of communication on the Internet, adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies.
[41] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/40/52, 1 March 2019, para 36.
[42] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, 6 April 2018, para 66.
[43] In its earlier case law on Article 478, the Supreme Tribunal interpreted this provision as requiring neither a direct nor an indirect incitation to commit an act of terrorism: STS 149/2007 of 26 February 2007; STS 585/2007 of 26 June 2007; and STS 539/2008 of 23 September 2008. This construction was based on a purely literal interpretation of Article 478.
This line of case law remained unaltered by 2015. In one important decision of 19 February 2015, the Supreme Tribunal confirmed that Article 478 was a "mere conduct crime" and therefore did not require neither direct *nor indirect* incitation to commit a terrorist act: STS 106/2015 of 19 February 2015. According to the Supreme Tribunal, Article 478 anticipated the barrier of protection afforded by criminal law in order to repress the "merely generic praising or justification, either of terrorist acts or of those who executed them."
In 2016, the Spanish Constitutional Tribunal issued a landmark decision establishing that Article 478 would only be applicable upon demonstration that the expression sought to be restricted "created the occasion for or encouraged, even if indirectly, a situation of risk for individuals, or the rights of third parties, or the system of freedoms itself;" see Judgement 112/2016 of 20 June 2016. This decision motivated the Supreme Tribunal to slightly modify its previous case law in 2017.
[44] STS 79/2018 of 15 February 2017.
[45] *Ibid*.
[46] Special Rapporteur on counterterrorism, 2019, *op.cit*., para 37.
[47] This crime is punishable with imprisonment of two to five years, including when the offence "is committed by those who, for the same purpose, acquire or have in their possession documents that are addressed or, due to their content, are suitable for inciting the incorporation into a terrorist organization or group or collaborating with any of them or in its ends."
[48] The Constitutional Council, Decision no. 2017-682 QPC, 15 December 2017.
[49] Article 8 provides "Member States shall take the necessary measures to ensure that receiving instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1) is punishable as a criminal offence when committed intentionally."
[50] According to Article 211, insult and defamation are perpetrated with publicity when committed by means of the printing press, by radio broadcasting or any other similarly effective means.
[51] Under Article 209, severe defamation perpetrated with publicity is punishable the penalty of a fine from six to fourteen months and, otherwise, with that of three to seven months.
[52] *C.f.* also ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2017
[53] *Ibid*., Principle 2 (vi}.
[54] European Court, *Oberschlink v. Austria*, 23 May 1991, Series A no. 204, para 13. See also Defining Defamation, *op.cit.*, Principle 19.
[55] General Comment No. 34, *op. cit.*, para 47; and Defining Defamation, *op.cit.*
[56] See, e.g., European Court, *Gavrilovici v. Moldova*, App. 25464/05, 2009, para 60; *Cumpana & Mazare v. Romania*, App. 33348/96, 2004, para 115; *Mahmudov & Agazade v. Azerbaijan*, App. 38577/04, 2008, para 50; *Bodrožić & Vujin v. Serbia*, App. 38435/05, 2009, para 39; or *Tolstoy Miloslavsky v. the UK*, App. 18139/91, 1995.
[57] The offence is punishable with six months to two years' imprisonment for "serious" offences, and a fine of six to twelve months. The fines system under the Penal Code sets a minimum and maximum amount of money per day. In this case, according to Article 50, the amount per day can vary between two and 400 Euros for individuals and 30 to 5.000 Euros for legal entities.
[58] The offence is punishable with a fine of four to twenty months.
[59] The offence is punishable with a fine of six to twenty-four month.
[60] General Comment No. 34, *op. cit.*, para 38.
[61] See, e.g. OHCHR, Thailand: UN rights expert concerned by the continued used of lèse-majesté prosecutions, 7 February 2017.
[62] The applicable penalty is a fine of twelve to eighteen months. Those charged under Article 496 are exempt of punishment if the circumstances foreseen in Article 210 concur.
[63] The applicable penalty is a fine of twelve to eighteen months. Those charged under these provisions are exempt from punishment if the circumstances foreseen in Articles 207 and 210 concur.
[64] The applicable penalty is a fine of twelve to eighteen months. Those charged under these provisions are exempt from punishment if the circumstances foreseen in Article 210 concur.
[65] The applicable penalty is a fine of seven to twelve months.
[66] *C.f.* also Defining Defamation, *op. cit.*, Principle 2(b) (ii) and (iii); and Johannesburg Principles, *op. cit.*, Principle 7(b).
[67] The punishment is six to twelve months' imprisonment or a fine of 12 to 24 months. The same penalties apply to those who publicly disparage, verbally or in writing, those who do not profess any religion or belief.

[68] The punishment is a fine of eight to 12 months. Under Article 525(2); similar penalties apply to "any public derision, in word or in writing, of those who do not profess any religion or belief."
[69] HR Committee, General Comment No. 34, *op. cit.*, para 48.
[70] In 2011, the HRC Resolution 16/18 moved past the divisive concept of "defamation of religions" to agree a package of measures to address religious intolerance without reference to this concept, with limitations on expression restricted to the incitement of imminent violence on the basis of religion or belief; see RTICLE 19, New Guide on Implementing UN HRC Resolution 16-18, 27 February 2017.
[71] Rabat Plan of Action, *op. cit.* The Rabat Plan of Action notes that blasphemy laws should be repealed as they have a stifling impact on freedom of religion or belief, and healthy dialogue and debate about religion.
[72] Report of the Special Rapporteur on freedom of religion or belief, A/HRC/34/50, 17 January 2017; Report of the Special Rapporteur on freedom of expression, A/71/33, 6 September 2016; Report of the Special Rapporteur on minority issues, A/HRC/28/64, 2 January 2015; UN Working Group on Arbitrary Detention, Opinion No. 35/2008 (Egypt), 6 December 2008, para 38. The UN Human Rights Council special procedures have also been supported by regional mandates, see: Joint Declaration on defamation of religions, and anti-terrorism, and anti-extremism legislation, 9 December 2008.
[73] The European Commission for Democracy through Law (the Venice Commission), The relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, October 2008, para 89.
[74] Council of Europe Recommendation 1805 (2007), Blasphemy, religious insults, and hate speech against persons on grounds of their religion, 29 June 2007.
[75] EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief, 2013.
[76] For example, within the European context, the United Kingdom, Iceland, Norway, and Malta, have all recently repealed criminal prohibitions on blasphemy.
[77] The penalty is a sentence of imprisonment from one to three years and a fine from six to twelve months. The penalty is six months to two years' imprisonment. Under Article 510(3), the penalties provided will be imposed in the upper half when the acts were committed through social media, the Internet or through the use of information technologies. Article 510(4) states that when the facts, in view of their circumstances, are suitable to alter the public peace or create a serious feeling of insecurity or fear among the members of the group, the penalty will be imposed in its upper half, which may rise to the upper half in grade.
[78] Article 4(a) of the ICERD of the International Convention on the Elimination of All Forms of Racial Discrimination New York, adopted on 7 March 1966, entered into force on 4 January 1969.
[79] In particular, this includes all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and any assistance of racist activities, including the financing of them.
[80] Vienna Convention on the Law of Treaties, 1969, Articles 31 and 32.
[81] *Ibid.,* Article 31 para 1.
[82] The expression inciting others to commit acts of genocide must be "public," indicating there must be a communication in a public place, or to the public or a section of the public, for example through mass media and digital technologies.
[83] The expression must be "direct," i.e. the communication must be sufficiently specific as a call for action, showing a close relationship between the expression and the danger of an act of genocide occurring. However, direct does not mean explicit, as implicit expression may also directly incite genocide if in its linguistic and cultural context it is sufficiently clear to its audience.
[84] The speaker must specifically intend to incite genocide, and intend for genocide to occur. This requires the speaker to specifically intend to engage in the communication calling for genocide, and either specifically intend to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, or at least be aware of the substantial likelihood that the commission of genocide would be a probable consequence of his or her acts.
[85] International Criminal Tribunal for Rwanda, *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor*, Case ICTR-99-52-A, Judgment of the Appeals Chamber of 28 November 2007, para 677, 692.
[86] *Ibid.*, paras 698-715.
[87] The penalty is six months to two years' imprisonment. Provisions of Article 510(3) and (4) also apply.