



**Submission to the Universal Periodic Review of Spain by ARTICLE 19 and the European Centre for Press and Media Freedom (ECPMF)**

**For consideration at the 35<sup>th</sup> Session of the Working Group in January 2020**

**18 July 2019**

## Executive Summary

- ARTICLE 19 and the European Centre for Press and Media Freedom (ECPMF) welcome the opportunity to contribute to the third cycle of the Universal Periodic Review (UPR) of Spain. This submission focuses on Spain's compliance with its international human rights obligations with respect to freedom of expression and freedom of information.<sup>1</sup> In particular, it details our organisations' concerns relating to legislative restrictions on freedom of expression and their implementation, including:
  - "Insult"
    - "Lèse majesté"
    - "Insult" of the State, public bodies and State symbols
    - "Insult" of persons
  - Insulting religious feelings
  - Terrorism offences
    - Incitement and glorification of terrorism
  - Hate speech
- During its last review in 2014, Spain supported 4 recommendations regarding freedom of expression and information.<sup>2</sup> It further noted one recommendation, which recommended defamation be decriminalised and replaced with appropriate civil law provisions, in line with international standards.<sup>3</sup>
- In the period under review, there has been a concerning increase in the use of the criminal code to prosecute acts against the right to freedom of expression.

## Insult

- The Spanish Penal Code contains numerous provisions criminalising "insult" (*insulto*) against various persons, objects and concepts.<sup>4</sup>

## "Lèse majesté"

- The Human Rights Committee is clear that "lèse majesté" offences, which aim to provide heightened protections for the feelings of members of the Royal Family from insult in the criminal law, do not comply with the ICCPR.<sup>5</sup> There are broad concerns under international human rights law regarding the necessity and proportionality of criminal defamation provisions,<sup>6</sup> and it is clear that greater protections should not be provided in law to the reputations or feelings of public figures, since they should be expected to withstand a greater degree of criticism than others.
- The Spanish Penal Code contains three different "lèse majesté" provisions:
  - Article 490(3)** criminalises "slandering" or "insulting" the King, the Queen, any of their ascendants or descendants, or any of the other members of the Spanish Royal Family mentioned therein, in connection with the exercise of their official functions. For "serious" offences, defined throughout as those committed by means of the media (print and broadcasting or other "similarly effective means"), the applicable penalty is a sentence of six months to two years' imprisonment.<sup>7</sup> For less "serious" (those not committed through the means of the media) offences are punishable by a fine<sup>8</sup> of six to twelve months.
  - Article 491(1)** criminalises "slandering" or "insulting" the King, the Queen, or any of the other subjects mentioned in Article 490(3), on any other occasion not already covered by this provision. The applicable penalty is a fine of four to twenty months.

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<sup>1</sup> Spain has ratified the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), both of which provide broad protection to the right to freedom of expression in Article 19(2) and 10(1) respectively, including for opinions and ideas that others may find deeply offensive.

<sup>2</sup> 131.109. Strengthen the Government's commitment to ensuring fundamental rights of freedom of expression, peaceful assembly and association, and continue its cooperation with civil society, particularly with human rights defenders, by investing further efforts in creating a favourable environment for the members of the civil society organizations (Serbia); 131.111. Ensure the adjustment of the Public Safety Act, in order not to limit freedom of expression and the right to peaceful assembly (Chile); 131.113. Ensure the full enjoyment of the rights to freedom of assembly and freedom of expression, facilitate the holding of peaceful rallies and revise existing laws or refrain from adopting new laws placing undue restrictions and deterrents on the exercise of freedom of assembly and freedom of expression (Czech Republic).

<sup>3</sup> 131.108. Decriminalize defamation and place it within the civil code in accordance with international standards (Estonia).

<sup>4</sup> 'Spanish Penal Code', (Organic Law No. 10/1995 of November 23, 1995, as amended up to Organic Law No. 2/2019 of March 1, 2019); Available at: <https://wipolex.wipo.int/en/legislation/details/18760>

<sup>5</sup> 'General Comment No. 34 on freedom of expression and opinion, CCPR/C/GC/34', Human Rights Committee, 12 September 2011, para. 38; Available at: <http://bit.ly/2yarCdl>.

<sup>6</sup> *Ibid.*, para. 47.

<sup>7</sup> Defamation and Insult Laws in the OSCE Region: A Comparative Study, p 216; Available at: <https://www.osce.org/fom/303181?download=true>.

<sup>8</sup> According to Article 50 of the Penal Code, fines are calculated *per day*. The daily applicable fine ranges between 2 to 400 Euro, if the defendant is a natural person, and between 30 and 5,000 Euro, if the defendant is a legal person. The minimum and maximum duration of the fine is provided by each individual crime, usually in terms of months or years. The total value of the applicable fine is calculated by multiplying its daily value, set within the range provided by Article 50, and the specific duration of the fine, set within the range provided by each individual criminal offence. Article 52 provides the criteria that the competent judge or court must take into consideration in setting the daily level and the total duration of the fine.

- **Article 491(2)**, broadly criminalises the “use of images” of the King, the Queen, or any of the other subjects mentioned in Article 490(3), “in any way that could damage the prestige of the Crown”. The applicable penalty is a fine of six to twenty-four months.
7. In recent years, the Spanish authorities have increasingly applied the “insult provisions,” in conjunction with glorification of terrorism charges (Article 578) to prosecute dissenting voices and artistic expression, as outlined in para 29 of this submission.

### “Insult” of the State, State symbols, and public institutions

8. Four provisions of the Spanish Penal Code criminalise “insult” directed against the State, against any of its Autonomous Communities or symbols, or against some of its public institutions.
- **Article 543** criminalises any “offense or insult, by parole, in writing or through actions, against Spain, its Autonomous Communities, or their symbols or emblems when made publicly”. The applicable penalty is a fine of seven to twelve months.
  - **Article 496** makes it a criminal offense to “seriously insult” 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. The applicable penalty is a fine of twelve to eighteen months.
  - **Article 504(1)** makes it a criminal offense to “slander” or “insult” the National Government, the Constitutional Tribunal, the Supreme Tribunal, or the government (*‘Consejo de Gobierno’*) or Supreme Tribunal of any of the Autonomous Communities. The applicable penalty is a fine of twelve to eighteen months.
  - **Article 504(2)** makes it a criminal offense to “seriously insult” the Armed Forces, the National Guard (*‘Guardia Civil’*) or the National Police (*‘Cuerpo Nacional de Policía’*). The applicable penalty is a fine of twelve to eighteen months.
9. The 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 abstract entities, such as the “State”, its “symbols” or public institutions.<sup>9</sup> Neither States nor public bodies are rights-holders under international human rights law: they are only the subject of obligations. They should, therefore, not have legally actionable reputational interests.

### “Insult” and defamation against persons

10. Two provisions of the Penal Code make “insult” against persons, without reference to their status as a public official or otherwise, a criminal offence:
11. **Article 209** criminalises “serious insults” (*‘injurias graves’*) directed against persons. “Insults” are defined in **Article 208** as “action or expression that injures the dignity of another person, undermining their reputation or attacking their own estimation.” Article 208 also provides that only “insults that, by their nature, effects or circumstances, are deemed in the public perception as serious” shall be punishable. Article 208 further adds that “insult consisting in the imputations of facts shall not be deemed serious, except when made in full knowledge of their falsehood or with reckless disregard for the truth”. Where the crime is committed by means of the media (print and broadcasting or other “similarly effective means”), the applicable penalty is a sentence of six months to two years’ imprisonment. For less “serious” (those not committed through the media) offences are punishable by a fine<sup>10</sup> of six to twelve months.
- **Article 206** criminalises ‘*calumnia*’, defined in Article 205 as “the imputation of a crime made in full knowledge of its falsehood or with reckless disregard for the truth”. If committed by means of the media, the penalty provided for this offence is a sentence of six months to two years’ imprisonment, if or a fine of six to twelve months’, if not.
12. International human rights standards support the decriminalisation of defamation.<sup>11</sup> In particular, the imposition of severe criminal penalties, especially of a custodial nature, is considered a disproportionate restriction on freedom of expression. UN and regional special procedures on freedom of expression have repeatedly called for the decriminalisation of defamation, explaining that reputational interests can adequately protected through use of the civil law.<sup>12</sup>
13. The definition of “insult” under Article 208, by including protection for a person’s subjective feelings about themselves and their sense of “honour”, rather than providing protection for their reputation (i.e. how others view them) is too ambiguous, and does not serve a legitimate aim under international human rights law.<sup>13</sup>

### Recommendation

<sup>9</sup> ‘General Comment No. 34’, *op. cit.*, para. 38.

<sup>10</sup> According to Article 50 of the Penal Code, fines are calculated *per day*. The daily applicable fine ranges between 2 to 400 Euro, if the defendant is a natural person, and between 30 and 5,000 Euro, if the defendant is a legal person. The minimum and maximum duration of the fine is provided by each individual crime, usually in terms of months or years. The total value of the applicable fine is calculated by multiplying its daily value, set within the range provided by Article 50, and the specific duration of the fine, set within the range provided by each individual criminal offence. Article 52 provides the criteria that the competent judge or court must take into consideration in setting the daily level and the total duration of the fine.

<sup>11</sup> *Ibid.*, para. 47.

<sup>12</sup> ‘Joint declarations of the representatives of intergovernmental bodies to protect free media and expression’, OSCE, 2013; Available at: <http://bit.ly/2LGKjhr>.

<sup>13</sup> ‘Defining Defamation: Principles on Freedom of Expression and Protection of Reputation’, ARTICLE 19 (2017), Principle 2(b)(vi); Available at: <http://bit.ly/2YnMaOm>.

- Fully guarantee the right to freedom of expression in accordance with international human rights law, including by urgently reforming the Penal Code to repeal *lèse majesté* (Articles 490(3), 491(1), 491(2)), provisions on insult against the State, its symbols and institutions (articles 496, 504(1), and 504(2)), and repeal insult (Article 209) and *calumnia* (Article 206).

### Insulting religious feelings

14. Provisions in the penal code aim to protect the followers of a religion or belief from offence or insult, including by prohibiting insults against a religion, in contravention of international human rights law:
  - **Article 525** of the Criminal Code makes “offending the feelings of followers of a religious or other belief, or publicly disparaging their dogmas, beliefs, rites, or ceremonies” a criminal offence. The punishment is a fine of eight to 12 months.
  - **Article 524** prohibits broadly defined “profane acts” offensive to religious feelings that are performed in a religious setting. The punishment is a fine of 12 to 24 months or six months to one year in prison.
15. Under international human rights law, the right to freedom of expression includes the freedom to shock, offend, or disturb. Protecting individuals from offence is not a legitimate aim for limitations on expression under Article 19(3) of the ICCPR, and international human rights law does not afford protection to abstract religions or beliefs. The Human Rights Committee, the Venice Commission, and the Council of Europe, have all called for the repeal of blasphemy laws, including “religious insult.”<sup>14</sup> Numerous special procedures of the UN Human Rights Council have also advocated for their repeal.<sup>15</sup>
16. The Rabat Plan of Action notes that States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion. They were deemed “counterproductive, since they may result in de facto censure of all inter-religious or belief and intra-religious or belief dialogue, debate and criticism.” In addition, “many blasphemy laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner... Moreover, the right to freedom of religion ... does not include the right to have a religion or belief that is free from criticism or ridicule”.<sup>16</sup>

### **Recommendation:**

- Repeal articles 524 and 525 of the Penal Code to fully decriminalize “blasphemy”.

### Terrorism provisions

17. Numerous provisions of the Spanish Penal Code relating to terrorism raise serious freedom of expression concerns.
18. The definition of “terrorism” is set out in **Article 573** of the Penal Code, and is very broad. It includes any “serious crime” against vague national interests such as “liberty”, “moral integrity”, and “heritage”, for purposes as broad as “subverting” the Constitutional Order, to “destabilize the functioning of political institutions or the economic or social structures of the State” or “to force the public authorities to perform and act or refrain from doing so” or “seriously alter public peace.”
19. There is no definition of “terrorism” under international human rights law. However, for any restriction on freedom of expression to be considered to be in pursuit of the “legitimate aim” of protecting national security, for the purposes of Article 19(3) of the ICCPR, the government must show that:
 

*“[...] its genuine purpose and demonstrable effect 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.”*<sup>17</sup>
20. The definition of “terrorism” in Article 573 of the Penal Code feasibly captures expression that does not pose a genuine or imminent threat to national security. Offences that hang on this broad definition have repeatedly been enforced in the period under review to criminalise non-violent expression.

### **Glorification of and incitement to terrorism**

21. **Article 573(3)** widens the definition of acts of terrorism to include the “glorification” and the “incitement” of terrorism, as defined in Articles 578 and 589 of the Penal Code respectively.

<sup>14</sup> See: General Comment No. 34, *op cit.*, paras. 48-49; ‘Report on 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’, Venice Commission, October 2008, paras. 64, 68, 89; Available at: <http://bit.ly/30Z1K0y>; ‘Recommendation 1805 “Blasphemy, religious insults and hate speech against persons on grounds of their religion”’, Council of Europe, 29 June 2017, para. 15; Available at: <http://bit.ly/2LGjyN>.

<sup>15</sup> ‘Report of the Special Rapporteur on freedom of religion or belief, A/72/365’, General Assembly, 28 August 2017; Available at: <http://bit.ly/2McJlJb>; ‘Report of the Special Rapporteur on freedom of expression A/71/373’, General Assembly, 6 September 2016; Available at: <http://bit.ly/2GtCN5o>; ‘Report of the Special Rapporteur on minority issues, A/HRC/28/64’, General Assembly, 2 January 2015; Available at: <http://bit.ly/2yf3B4E>.

<sup>16</sup> ‘Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4’, United Nations, 5 October 2012; Available at: <http://bit.ly/2JP0EOW>.

<sup>17</sup> ‘Johannesburg Principles on National Security, Freedom of Expression and Access to Information’, ARTICLE 19, November 1996, Principle 2; Available at: <http://bit.ly/2Y5emWS>.

22. **Article 589** of the Criminal 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.”<sup>18</sup> International standards require that: (i) there be a direct and immediate causal connection between the expressive act of “incitement” and the actual (i.e. objective) risk of terrorist acts being committed as a result; (ii) the inclusion of the element of *intent* to incite terrorist acts; and (iii) must apply only to acts of a genuine ‘terrorist’ nature.
23. The broad definition of terrorist acts contained in Article 573, and failure to explicitly incorporate either the intent to incite, or risk of incitement, into Article 589, leaves this provision open to arbitrary application and abuse to restrict expression that is protected under international human rights law. The manner in which the provision has been applied in the period under review brings into question the extent to which the *intent* to incite, as well as the *risk* of inciting terrorist acts, is considered when applying the provision.
24. **Article 578(1)** of the Spanish Penal Code makes it a criminal offence to engage in “public praise or justification of the crimes [of terrorism] listed in Articles 572 to 577 [of the Penal Code], or of those who have participated in their execution, or the performance of acts that entail discredit, contempt or humiliation of the victims of terrorist crimes or their relatives.”
25. The offence is punishable with a sentence of one to three years’ imprisonment, or a fine (Article 578(1)), and several years’ mandatory disqualification from the public sector (which includes *inter alia* prohibitions on practising certain professions, holding public office, obtaining public scholarships). Further subsections of the same article specify circumstances in which sentence must be given within the upper half of this range. This includes where the offending conduct is committed online or using other electronic media (Article 578(2)), or where the expression, “in light of the circumstances, is suitable to seriously disturb the public peace or to create a serious feeling of insecurity or fear in society or a part thereof” (Article 578(3)). Offending materials may be destroyed, online copies deleted, and online hosts ordered to remove or prevent access, pursuant to a court order (Article 578(4)).
26. International human rights standards are clear that offences of “glorifying”, “praising”, or “justifying”, terrorism, short of *actual incitement* of terrorist acts, unjustifiably limit the right to freedom of expression.<sup>19</sup> Furthermore, the Committee has outlined that “it is not compatible with paragraph 3 [of Article 19 of the 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.”<sup>20</sup>
27. In relation to the second clause of Article 578(1), the concepts of “contempt”, “discrediting” or “humiliation” of victims is also impermissibly subjective, and does not serve a legitimate aim under international human rights law. It essentially amounts to the criminalisation of “insult”, raising the same concerns as Article 209. International human rights law is clear that the right to freedom of expression encompasses protection for deeply offensive, disrespectful, or disturbing opinions or ideas. To remove the possibility to criminalize such expression does not mean government officials cannot react to and condemn acts of expression that are deeply offensive, and call for greater consideration to be shown to victims of terrorist acts.
28. Although Article 578, known domestically as the “gag law”, was first introduced in 2000, it is only following the 2015 amendments to the Law on the Protection of Public Security – commonly known as the “gag law” (*ley mordaza*), that prosecutions and convictions under Article 578 have sharply risen. The Spanish authorities have pursued prosecutions against various persons for social media posts and for artistic performances considered to “glorify terrorism”, often in combination with other offenses.
29. In several cases, significant criminal penalties have been imposed, including to target expression the government considers embarrassing, inappropriate or offensive:
- **Pablo Rivadulla**, a rapper also known as Pablo Hásel, was sentenced in March 2018 to two years and one day of imprisonment and a fine of EUR 24,300, for glorifying the terrorist groups ETA and GRAPO (Article 578) and insulting the Crown and the Spanish State (Article 490(3) and 491(1)). The charges related to multiple Twitter posts and a song posted on YouTube. Following an appeal before the Audiencia Nacional (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.<sup>21</sup>
  - **Cassandra Vera**, a 21-year-old student who in April 2017 received a suspended one-year prison sentence and a seven-year ban from working in the public sector for a series of old jokes relating to the 1973 murder by Basque separatists of Spanish Prime Minister, and successor to Dictator Francisco Franco, Admiral Luis Carrero Blanco. She was found guilty under Article 578 for glorifying terrorism and humiliating victims of terrorism. Her sentence was ultimately overturned by the Supreme Court in February 2018, who considered criminal sanction disproportionate, and on the basis that the tweets were satirical jokes that had circulated for many years, and emphasised the lapse of time since the terrorist attacks to which the tweets referred.<sup>22</sup> Nevertheless, the fact she was prosecuted in the first place constituted an unwarranted interference with her freedom of expression.
  - **César Augusto Montaña Lehmann** (also known as César Strawberry), a rapper and leader of Def Con Dos, was among nineteen people arrested in 2015 for “glorifying terrorism” and “humiliating the victims of terrorism.” In January 2017, the Spanish Supreme

<sup>18</sup> 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”.

<sup>19</sup> General Comment No. 34., *op. cit.*, para. 46.

<sup>20</sup> *Ibid.* para. 35.

<sup>21</sup> Judgment No. 3/2018, Audiencia Nacional (2018); Available at: <https://tinyurl.com/yx9myh7y>

<sup>22</sup> Judgment No. 95/2018, Tribunal Supremo Sala de lo Penal (2018); Available at: <http://bit.ly/2JSr7eo>.

Court overturned an earlier acquittal, sentencing César to one-year in prison under Article 578, for tweets between 2013 and 2014, including one joke to send the King of Spain a “cake bomb” on his birthday.<sup>23</sup>

- **Alfonso Lazaro de la Fuente and Raul Garcia Perez**, two puppeteers, were detained for five days on suspicion of “glorifying terrorism” in relation to a February 2016 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.
- In February 2018, the Spanish Supreme Court confirmed the sentencing of the rapper Jose Miguel Arenas Beltrán, known as Valtòny, to three years and six months’ imprisonment for lese-majesté offences (Article 490(3)), offences under glorification of terrorism and humiliating victims of terrorism (Article 578), as well as threats.<sup>24</sup> The charges related to song lyrics, contained in audio and video files Valtòny made available for free download. The lyrics referred to ETA, GRAPO, and referred to the murder of members of the government and royal family. Valtòny was expected to surrender himself to the authorities voluntarily in May 2018 but he fled to Belgium. Spain has attempted to have him extradited from Belgium but on 17 September 2018 the Belgian Tribunal of Gand (Ghent) rejected the extradition request finding that Valtòny’s lyrics could not be considered as incitement to terrorism under Belgian law. The Public Prosecutor of Gand (Ghent) appealed this sentence, arguing that extradition should be granted. The appeal is still pending.

## Recommendation

- Repeal Article 578 and 589 of the Penal Code, and amend Articles 573(1) and 579 in line with international standards on freedom of expression.

## Hate Speech

30. **Article 510** of the Penal Code criminalises three categories of “hate speech.” The Organic Law (1/2015) of 30 March 2015 introduced broad provisions that go beyond what States are required to prohibit under Article 20(2) of the ICCPR, and which do not meet the requirements of Article 19(3) of the ICCPR. In recent years these widely drafted categories of hate speech have enabled an increased crackdown on freedom of expression, artistic expression, political speech and parody.
31. **Article 510(1)** criminalises “[t]hose who incite discrimination, hate or violence against groups or association due to racist, anti-Semitic reasons or any other related to ideology, religion or belief, family situation, belonging to an ethnic group or race, national origin, gender, sexual preference, illness or handicap” punishable by one to three years’ imprisonment and a fine from six to twelve months.
32. This provision imitates but does not fully capture Article 20(2) of the ICCPR, which requires States to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.
33. The absence of a specific intent requirement for the speaker to incite acts of discrimination or violence through advocacy of hatred, is a concern. Furthermore, it should not be a criminal offence to incite something that is not *per se* unlawful. While incitement to violence or discrimination may legitimately be proscribed, incitement to hatred, as such, should not be. The imposition of a mandatory minimum of one-year imprisonment removes from the judiciary the possibility to ensure proportionality in sentencing.
34. Article 510(1)(b) further criminalises anyone “who, with knowledge of its falseness or reckless disregard for the truth, were to distribute defamatory information or associations in relation to their ideology, religion or belief, belonging to an ethnic group or race, national origin, gender, sexual preference, illness or handicap, shall be punished with the same penalty. To the extent that Article 510(1)(b) prohibits expression that falls below the threshold of Article 20(2) of the ICCPR, it is not compatible with international human rights law standards.
35. Article 510(1)(c) criminalises individuals who “[p]ublicly deny, gravely trivialize or glorify 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, 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, orientation or sexual identity, 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.
36. International human rights law does not permit limitations on freedom of expression to protect truth claims around historical events or to limit the expression of opinions on those events, even if they are deeply offensive or discriminatory.<sup>25</sup> As the Special Rapporteur on freedom of opinion and expression has specified, “by demanding that writers, journalists and citizens give only a version of events that is approved by the Government, States are enabled to subjugate freedom of expression to official versions of events.”<sup>26</sup> Where

<sup>23</sup> Judgment No. 4/2017, Tribunal Supremo Sala de lo Penal (2017); Available at: <http://bit.ly/2LFVnvl>.

<sup>24</sup> Judgment No. 79/2018, Tribunal Supremo Sala de lo Penal (2018); Available at: <http://bit.ly/2LGrXNL>.

<sup>25</sup> General Comment No. 34, *op. cit.*, para 49.

<sup>26</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, General Assembly, 7 September 2012, para. 55; Available at: <http://bit.ly/2Mf7JKn>. The Grand Chamber of the European Court of Human Rights has also found “historical memory laws” to be unnecessary in a democratic society where there was no intent to incite hostility, discrimination or violence, and where such outcomes were not likely in the context. At the same time, the Grand Chamber affirmed that the denial or gross trivialization of the holocaust in particular “must invariably be seen as connoting an antidemocratic ideology and anti-Semitism”, though the historical context of a State, in particular its proximity to the historic crimes, will be determinative in any assessment of compatibility with the European Convention.

advocacy of hatred constituting incitement to violence or discrimination is appropriately prohibited, in line with Articles 19(3) and 20(2) of the ICCPR, it is unnecessary to create further offences to deal with the denial of atrocity crimes. Where denialism, revisionism, or glorification is used as a vehicle to incite violence or discrimination, a general incitement provision may be applied to sanction this behaviour.

### **Recommendation**

- Reform the penal code to ensure that provisions on incitement comply with international human rights law on freedom of expression, in particular by ensuring a specific intent requirement in Article 510(1)(a), and limiting the criminal offence to incitement to violence or discrimination, and by repealing Article 510(b) and (c).