

# Briefing paper for the Expert Dialogue on freedom of expression and ‘hate speech’ in Spain

October 2020

## Introduction

This ARTICLE 19 briefing paper aims to inform the discussion of the Expert Dialogue on freedom of expression and ‘hate speech’ in Spain organised at the end of the month. It also seeks to illustrate the potential for incorporating international freedom of expression standards into the review, implementation and interpretation of Article 510 of the Penal Code of Spain. It outlines applicable principles and standards on freedom of expression and non-discrimination that should guide the Spanish courts in their decision-making and includes examples of decisions of Spanish courts in speech related cases.

Additionally, ARTICLE 19 analysed the provisions of Article 510 of the Penal Code for their compliance with international human rights standards. In our analysis, we underlined the problems associated to its scope and criminal elements for the purposes of limiting opinions and expression. We raised concerns about prohibitions on a broad range of conducts that go beyond the permissible restrictions on the right to freedom of opinion and expression under Articles 19 and 20 para 2 of the International Covenant on Civil and Political Rights (ICCPR).<sup>1</sup> The legal analysis also highlights *inter alia* that the Penal Code does not provide a test for assessing incitement cases nor does it provide protection to a broad range of expression that should be safeguarded from restriction according to international human rights law, including political and artistic expression. ARTICLE 19 recommended a thorough and comprehensive revision of Article 510 to bring it in line with Spain’s international freedom of expression obligations, as well as developing a comprehensive plan on the implementation of the Rabat Plan of Action.<sup>2</sup>

ARTICLE 19 then examined how provisions of Article 510 of the Penal Code have been interpreted by the Spanish courts in a list of non-exhaustive emblematic cases. It appears that – in addition to the guidance from the Supreme Court which is problematic from free speech perspective (see more below):

- Interpretation of these provisions does not follow a uniform and consistent test and the scope of and punishment for the different conducts prohibited under Article 510 differs in individual cases;
- The courts do not elaborate on how they reached conclusions that the severity of ‘hate speech’ reached the criteria under Article 510; it is not clear how the courts assess when a high threshold for criminal prosecution is met and when it is not met;
- The courts do not seem to assess the intent of perpetrators and whether there is a likelihood of speech resulting in prohibited action;
- There is no sufficient distinction made between ‘glorification of terrorism, ‘hate speech’ and ‘hate crimes’ and these are often conflated;

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<sup>1</sup> ARTICLE 19, [Spain: Speech related offences of the Penal Code](#), March 2020.

<sup>2</sup> *Ibid.* p. 20-23.

- The list of protected characteristics under Article 510 includes a factor of “ideology” that is subjective and open to broad interpretation.

## Applicable freedom of expression 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),<sup>3</sup> and given legal force through Article 19 of the ICCPR<sup>4</sup> and on regional level by Article 10 of the European Convention on Human Rights (European Convention);<sup>5</sup> and further affirmed in Article 11 of the Charter of Fundamental Rights of the European Union.<sup>6</sup>

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.<sup>7</sup>

Importantly, in General Comment No 34,<sup>8</sup> 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.<sup>9</sup>

Under these standards, the right to freedom of expression includes, *inter alia*, political discourse, commentary on one’s own and on public affairs, journalism, and expression that may be regarded as deeply offensive<sup>10</sup> or that “shock or disturb the State or any sector of the population.”<sup>11</sup>

### *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 and Article 10 para 2 of the European Convention. The

<sup>3</sup> Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> circuit).

<sup>4</sup> International Covenant on Civil and Political Rights, 16 December 1966, [UN Doc. A/6316](#). Spain ratified the ICCPR on 27 April 1977.

<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.

<sup>6</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

<sup>7</sup> Human Rights Committee, [General Comment No. 34](#) 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.

<sup>8</sup> Human Rights Committee (HR Committee), General Comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34.

<sup>9</sup> *Ibid*, para 12.

<sup>10</sup> *Ibid*, para 11.

<sup>11</sup> European Court of Human Rights (European Court), *Handyside v. United Kingdom*, [App. no. 5493/72](#), 7 December 1976, para 49.

restrictions may be legitimate only under specific circumstances (the so-called “three-part test”), requiring that limitations must:

- **Be provided for by 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.<sup>12</sup>

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).

### ***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:<sup>13</sup>

- 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.

This tiered response is recognised as a general principle in the Rabat Plan of Action which provides guidance on what constitutes incitement under Article 20(2) of the ICCPR.<sup>14</sup> It states that at national level, “a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal,

<sup>12</sup> *Ibid.*, para 22.

<sup>13</sup> For a full explanation of ARTICLE 19’s policy on ‘hate speech,’ see ARTICLE 19, [“Hate Speech” Explained: A Tool Kit](#), 2015, p. 8.

<sup>14</sup> 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.

civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.”<sup>15</sup>

The Rabat Plan of Action establishes 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,<sup>16</sup> 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.

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.<sup>17</sup> The European Court has also exercised particularly strict supervision in cases where criminal sanctions have been

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<sup>15</sup> *Ibid.*, para 20.

<sup>16</sup> General Comment 34, *op.cit.*, para 11. See also European Court, *Handyside v. the UK*, App. No. 5493/72, 7 December 1976.

<sup>17</sup> European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para 56; or *Gündüz v. Turkey*, App.No. 35071/97 (2004), para 22.

imposed by the State, and in many instances it has found that the imposition of a criminal conviction violated the proportionality principle.<sup>18</sup> Although the European Court has not explicitly endorsed the six part test of the Rabat Pan, its jurisprudence includes a number of aspects included in the Rabat plan test. For instance, it considered the context of expression and the likelihood of impugned statements to stir up violence, hatred or intolerance or to lead to harmful consequences,<sup>19</sup> and the impact of the speech on the audience.<sup>20</sup> The European Court also said that recourse to criminal law should 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."<sup>21</sup> 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.<sup>22</sup> Efforts at the national level to transpose the Framework Decision into penal codes consequently produce a potential conflict with States' obligations under the ICCPR.

## Interpretative criteria

### ***Scope of Article 510 of the Penal Code***

The Supreme Court of Spain interpreted the scope of Article 510 of the Penal Code in the decision 72/2018;<sup>23</sup> in which it elaborated the criteria for meeting the threshold for criminal liability:

- In general, offences under the Penal Code may fall under two categories of *risk* of harm - either *abstract* or *real* and effective danger. The Supreme Court established that Article 510 is an offence of *abstract danger* in which the main prohibited conduct is the expression of 'hate,' e.g. in form of epithets, qualifiers or other forms of 'hateful' messages;
- The risk of causing harm under Article 510 is met when a message contains 'hate speech' and referred to the requirements under the Framework Decision 2008/913/JHA of the Council of the European Union;

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<sup>18</sup> European Court, *Jersild v. Denmark*, App. No 15890/89 (1992), para 35.

<sup>19</sup> European Court, *Perinçek v. Switzerland*, Grand Chamber, No. 27510/09, 15 October 2015, paras. 204-208.

<sup>20</sup> *Ibid.*, para. 218.

<sup>21</sup> [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.

<sup>22</sup> See, e.g. ARTICLE 19, [Submission to the Consultations on the European Union's Justice Policy](#), December 2013.

<sup>23</sup> Supreme Court of Spain, Sentence [72/2018](#), Criminal Chamber, 9 February 2018, , (Legal Basis *Único*), p. 4.

- The requirement of risk caused by ‘hate speech’ is satisfied when the content of a ‘harmful’ expression goes against social coexistence;
- Mere uttering of hateful statement – containing “offensive expression or insults” - reaches the level of *illegality*. The Supreme Court concluded that such statements alone “imply a conduct that provoke, direct or indirectly, feelings of hate, violence or of discrimination;”
- The criminal element of *intent* is satisfied when the prohibited act is (a) voluntary, and (b) not an uncontrolled situation or a momentary reaction, even emotional, to a something that the subject is not able to control. Two types of intent exist under Spanish criminal system, *basic* and *specific*<sup>24</sup> intent. Article 510 is satisfied with the basic type of intent.<sup>25</sup>

This guidance is followed by the lower courts and the Office of the General Prosecutor. They established that apart of Article 510.2(a)<sup>26</sup>, Article 510 prohibits an *abstract danger* and does not require a likelihood of “real and effective risk of producing acts against groups in situation of vulnerability.”<sup>27</sup>

ARTICLE 19 notes that these criteria do not follow the recommendations of the six-part test set in the Rabat Plan. That the Supreme Court interpretation sets a far lower threshold of criminal sanctions that envisioned in Article 20(2) as well as Article 19(3) of the ICCPR. In particular:

- The Supreme Court, in its Sentence 72/2018 and other ‘hate speech’ cases under Article 510, failed to recognise that freedom of expression standards also afford protection to offensive and insulting speech.<sup>28</sup>
- The Supreme Court guidance does not acknowledge that the threshold for “offence” can be highly subjective and based on an emotional state of opinion, rather than the imminent and likely risk of a prohibited action. Further, the subjective nature of what is established as *illegal* expression and its vague interpretative criteria raises questions of *legal certainty*.
- The Supreme Court guidance fails to recognise that international human rights law requires *specific intent* as a crucial and distinguishing element of incitement.<sup>29</sup> Article 20(2) of the ICCPR provides for “advocacy” and “incitement” rather the mere distribution of circulation of material, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.<sup>30</sup>
- The requirement of considering whether it is likely that the speech will result in certain serious harm is missing. The Supreme Court did not require to determine a reasonable probability that the speech would succeed in inciting direct and actual actions against a

<sup>24</sup> This type of intent requires additional factors to be considered such as intensity and other elements.

<sup>25</sup> Supreme Court of Spain, Sentence [72/2018](#), *op.cit.*

<sup>26</sup> Article 510.2 (a) requires harm to dignity.

<sup>27</sup> General Prosecutor Office, Circular 07/2019 Guidelines to interpret hate offences under Article 510 of the Penal Code; Provincial Court of Madrid, Section 17, Sentence [132/2020](#), 2 March 2020. Provincial Court of Barcelona, Sentence [607/2018](#), 7 December 2018; Provincial Court of Barcelona, Sentence [702/2018](#), 8 November 2018; Nacional Court, Sentence [6/2018](#), 1 March 2018; Provincial Court of Madrid, Sentence [676/2017](#), 30 October 2017.

<sup>28</sup> The Supreme Court has made clearer distinctions of different types of speech to protect the freedom of expression as a fundamental right on cases under Article 578 on ‘glorification of terrorism’. See section below on “terrorism and ‘hate speech’ “.

<sup>29</sup> As prohibited by Article 20 para 2 of the ICCPR and Article 4(a) of the International Covenant on Elimination of Racial Discrimination (ICERD).

<sup>30</sup> Rabat Plan of Action, para 29 (c).

group or individual.<sup>31</sup> We reiterate that the Rabat Plan six-part test sets that there should be a concrete and clear connection between the degree of risk and potential *result* – that is that it is likely that the expression will lead to violence, hostility or discrimination based on protected characteristics.

- Although some provisions under Article 510 refer to other forms of “hate speech” than “incitement” (as provided in Article 20(2) of the ICCPR), the restrictions should be still assessed under Article 19(3) of the ICCPR and Article 10(2) of the European Convention. In most of these cases, the test of necessity and proportionality should be carefully applied.

In respect to the Framework Decision 2008/913/JHA (Framework Decision), ARTICLE 19 notes:

- The Supreme Court makes a reference to the Framework Decision as the international convention that Article 510 is compliant with after the transposition of the Decision into the Penal Code. It does not, however, take into account other human rights instruments that domestic courts must observe when examining restrictions to the freedom of expression.<sup>32</sup>
- ARTICLE 19 has previously raised concerns that the Framework Decision fails to comply with international standards on the right to freedom of expression.<sup>33</sup> However, it establishes in Article 7 that it “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty on European Union”, nor “have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression[...]”.

### **Severity test**

ARTICLE 19 notes that despite the Supreme Court Guidance, some lower courts have sought to apply the requirements provided for international human rights standards.

For instance, **the Provincial Court of Barcelona** has clarified and narrowed the interpretation of the abstract danger and recognised the usefulness of the Rabat Plan of Action.<sup>34</sup> Although it confirms some of the Supreme Court elements concerning the abstract danger of Article 510, it clearly establishes that:

- The aim of restrictions should be to protect the right of vulnerable groups to non-discrimination;
- The likelihood of speech leading to danger should be examined; and

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<sup>31</sup> *Ibid.*, para 29 (f).

<sup>32</sup> Article 10 para 2 of the Constitution of Spain.

<sup>33</sup> Article 19, [EU: European Commission’s Code of Conduct for Countering Illegal Hate Speech online and the Framework Decision](#), June 2016; Bukovská, Barbora, [The European Commission’s Code of Conduct for Countering Illegal Hate Speech Online, An analysis of freedom of expression implications](#), Transatlantic Working Group, 7 May 2019, p. 4.

<sup>34</sup> Provincial Court of Barcelona, [Sentence 782/2018](#), 12 December 2018; Provincial Court of Barcelona, [Sentence 702/2018](#), 8 November 2018

- In order to protect certain groups against the dissemination of hateful ideas and doctrines, it should not only be a matter of mere distribution of the statement but of diffusion in conditions that create a real danger for the legal aim protected.<sup>35</sup>

The Provincial Court explicitly refers to the usefulness of the severity test set out by the Rabat Plan of Action to establish an objective standard on “provocation” and to determine the conditions that create *danger*. Among the criteria that the Court examined when assessing whether the speech reached the level of severity under Article 510, it included:

- The tone and content of the impugned statements – in the case in question, the Court considered them to be “unequivocally discriminatory and highly aggressive;”
- The medium used to distribute the impugned messages of the authors, and the suitability of the medium both to disseminate them and also “publicly consolidate the message as to be replicated;”
- The ability of the message to reach the audience;<sup>36</sup>
- Context of the message: The Court analysed the extent in which the expression interacted with the social context.<sup>37</sup>

At the same time, the Provincial Court did not consider the rest of the Rabat Plan of Action test, namely the requirement of intent and likelihood of harm.

### ***Terrorism and ‘hate speech’***

ARTICLE 19 notes that, for the purposes of compliance with international freedom of expression standards, Spanish courts often fail to make a clear distinction between ‘hate speech’ offences and other forms of prohibited expression.

In particular, they use the concepts of ‘hate speech’ and ‘terrorism’ related offences interchangeably and fail to differentiate between different aims and scopes of each offence. For instance, Article 510’s aim is to protect vulnerable groups from discrimination targeted through serious ‘hateful’ expression, while the purpose of terrorism-speech related offences may be *inter alia* to prevent the repetition of terrorist attacks against the population or parts of the population. ARTICLE 19 notes that from a freedom of expression perspective, it is crucial to make a distinction between the different legitimate aims that motivates prohibitions on expression and the necessity of such restrictions in compliance with Article 19(3) of the ICCPR, Article 10 of the European Convention and Article 20 of the ICCPR.

The conflation between terrorism and ‘hate speech’ offences is also the case for the jurisprudence of both the Constitutional Court and the Supreme Court, which they stipulated that “glorification of terrorism”, prohibited under Article 578 of the Penal Code, is a form of ‘hate speech’.<sup>38</sup>

ARTICLE 19 has previously raised concerns about the provisions of Article 578 as the terminology employed is vague, thus, likely to subjective interpretation. The analysis also

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<sup>35</sup> Provincial Court of Barcelona, [Sentence 702/2018](#), 8 November 2018, Legal Basis no. 9.2 (*FJ 9.2*), p. 21 - 22.

<sup>36</sup> *Ibid.*, p. 22.

<sup>37</sup> *Idem.*

<sup>38</sup> Constitutional Court, [Decision 112/2016](#), 10 June 2016, Legal basis no. 3 & 4 (*FFJJ 3 and 4*), page 4. See, e.g. Supreme Court, [Sentence 185/2019](#), 2 April 2019, Legal basis no. 3.2 (*FJ 3.2*)



highlights that Article 578 falls short of the incitement threshold required under international human rights law.<sup>39</sup>

For instance, the Constitutional Court conflated ‘glorification of terrorism’ and ‘hate speech’ in the Decision 35/2020.<sup>40</sup> At the same time, it restricted the scope of ‘glorification of terrorism’ offences and highlighted the importance of considering freedom of expression aspects in these cases. The Court stated that other measures should be used to restrict freedom of speech than criminal sanctions and the criminal law should be the last resort when restricting freedom of expression. The criminal law sanctions should not be used to restrict ‘mere hate’, and only if ‘hate’ can lead to other serious prohibited conduct.<sup>41</sup>

The Constitutional Court further stated that when assessing cases of glorification of terrorism, courts should consider intent, circumstance and context of expression in order to protect the freedom of expression as a fundamental right.<sup>42</sup> Despite this positive guidance, ARTICLE 19 notes that these considerations are not uniformly applied to all speech related offences of the Penal Code.

Additionally, the Supreme Court also found that Articles 578 (glorification of terrorism), 579 (incitement to terrorism) and 510 are form of “hate speech” offences as well as “hate crimes” proscribed under the Spanish criminal system.<sup>43</sup> The main distinction the Court makes is that the threshold for criminal liability for Article 510 is met under a basic type of risk and terrorism related offences require an element of likelihood of risk.

### **Protected characteristics under Article 510**

Protected characteristics under Article 510 of the Penal Code are broad and include any group or person on the basis or 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. Hence, Article 510 covers a broad group of individuals corresponding to the range of protected characteristics under international human rights law.

Expansive scope of protected characteristics under Article 510 is positive. However, ARTICLE 19 is concerned that the category of ‘ideology’ should not be a subject of broad interpretation. For instance, ARTICLE 19 identified two cases in which the Prosecutor's Office considered that police forces are protected from ‘hate speech’. In one case, law enforcement prosecuted politicians who published messages against police and national civil guard forces.<sup>44</sup> In the second case, civil guards were attacked in a restaurant as civilians, and the Prosecutor's Office tried to argue that this was a case of hate speech based “ideological” identity and the “ideological motivation” on the side of the attackers.<sup>45</sup>

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<sup>39</sup> ARTICLE 19, Spain: Speech related offences of the Penal Code, *op.cit.*, p. 13 - 14.

<sup>40</sup> Constitutional Court, [Decision 35/2020](#), 25 June 2020.

<sup>41</sup> *Ibid.* See also Supreme Court, Sentence 646/2018, 14 December 2018, Legal basis number one (*FJ Único*). Supreme Court, 4/2017, 18 January 2017, Legal basis number two (*FJ 2*).

<sup>42</sup> Constitutional Court, Decision 35/2020, *op.cit.* p. 5.

<sup>43</sup> Supreme Court, [Sentence 646/2018](#), 14 December 2018, Legal basis no. 1 (*FJ Único*) p. 3 - 4.

<sup>44</sup> High Court of Justice of Catalonia, [Sentence 72/2018](#), 28 June 2018,

<sup>45</sup> This case was brought under Article 20.4 (aggravating circumstance on the basis of discrimination) but the scope of Article 510 was included in the examination of the case. Supreme Court, [458/2019](#), 9 October 2019.

On a positive side, the Provincial Court of Barcelona, the High Court of Justice of Catalonia and the Supreme Court consistently established that the protection against 'hate speech' is limited to vulnerable groups or groups historically discriminated in a specific context in which the speech is disseminated.<sup>46</sup>

Despite this guidance, ARTICLE 19 is concerned that this interpretation has not sufficiently influenced the criteria set out by the Office of the General Prosecutor. In its Guidelines to interpret Article 510 of the Penal Code (Circular 07/2019), the General Prosecutor addressed the characteristic of ideology by referring to the concept of "vulnerability". It stated that although the purpose of the offence is to protect 'vulnerable groups,' the element of 'vulnerability' of a particular group did not have to be considered. For instance, "an attack on a person with Nazi ideology or incitement to hatred to such a group" could be prosecuted under provisions of Article 510 of the Penal Code.<sup>47</sup>

Although ARTICLE 19 did not identify cases in which this broad interpretation has been applied, it is an area that is worth careful examination and strict limitation. Particularly to prevent the application of Article 510 against the groups and individuals it intends to protect.

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<sup>46</sup> Provincial Court of Barcelona, Sentence [787/2018](#), 12 December 2018. The High Court of Justice of Catalonia adopts a similar approach to state that victims of "hate speech" under Article 510 are limited to vulnerable groups that identify as such on the basis of a personal or social condition, Sentence 72/2018, *op.cit.*; Supreme Court, 458/2019, *op.cit.*

<sup>47</sup> General Prosecutor Office, *op. cit.*, pages 55665 and 55666.