

ARTICLE 19

# Spain: Circular 7/2019 on the interpretation of hate speech offences

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December 2020

Legal analysis



## Executive summary

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In 2020, ARTICLE 19 analysed the Guidelines on the interpretation of hate offences under Article 510 of the Penal Code, issued by the Office of the Spanish Attorney General (the Circular 7/2019). Article 510 prohibits various forms of hate speech.

Although circulars (internal documents of the public authorities) are not legally binding, they provide interpretative guidelines for law enforcement authorities on how to assess cases that fall under the respective provisions of the Penal Code. Hence, ARTICLE 19 reviews how this Guideline follows international freedom of expression standards applicable to ‘hate speech.’

ARTICLE 19 welcomes the references to both international and regional human rights law instruments and recommendations in the Circular. We also appreciate that the Circular aims to provide a high threshold of severity under certain provisions of Article 510. At the same time, we find that many criteria laid out by the Circular are extremely broad, inconsistent and can facilitate illegitimate restrictions on freedom of expression. In particular:

- The Circular fails to provide prosecutors with a clear guidance on how to properly balance the aims of Article 510 of the Penal Code with the right to freedom of expression. In particular, it is inconsistent in its approach to severity thresholds and, where stipulated, it sets lower standards than those required in international and regional freedom of expression standards. The six-part test of the Rabat Plan of Action has not been fully included as criteria on incitement related cases.
- The Circular requires prosecutors to investigate and prosecute “offensive and insulting expressions that hurt the feelings of protected groups categories and individuals under Article 510;” while purely offensive speech is protected under international and regional standards.
- The guidance on the discriminatory motivation for offences under Article 510 is confusing.
- The Circular fails to elaborate why groups and individuals that fail to meet the characteristics of “groups in situation of discrimination, inequality and vulnerability” fall under the protected characteristics of Article 510. This allows for prosecution of individuals under hate speech offences who are critical of public authorities or police.
- It instructs prosecutors to consider “the republication of content on social media” as an aggravating circumstance under Article 510.

ARTICLE 19 concludes that the Circular should be comprehensively reviewed and should better incorporate recommendations set in international and regional standards. This would also ensure that restrictions on freedom of expression under criminal law are applied as a last resort and only in exceptional circumstances. This analysis provides specific recommendations in this respect.

### Key recommendations:

- The aim of the Circular should be revised. Its main aim should be to provide comprehensive guidance on how to balance the protection of freedom of opinion and expression with other legitimate interests and ensure that only the cases with high severity threshold are subject to criminal prosecutions. It should also seek to ensure that law enforcement authorities are familiar with applicable freedom of expression and human rights standards applicable to ‘hate speech’ cases;
- The structure of the Circular should be improved. The criteria for assessing cases should be clearly and concisely organised in order to avoid confusion over various aspects of the guidance;
- The Circular should clarify that international law requires different approaches to different types of hate speech based on their severity. The speech that offends or hurts feelings, but does not amount to incitement to discrimination, violence or hostility, should not be criminalised;
- The references to the case law of the European Court of Human Rights related to hate speech in the Circular should be revised and the European Court standards should be properly and fully reflected in the Circular;
- The Circular should explicitly embrace the six-part test of the Rabat Plan of Action and instruct law enforcement to use it when starting the investigation stage under Article 510 of the Penal Code. Alternatively, elements of the Rabat test should be included in the Circular, in particular the specific intent, context of expression and likelihood of harm occurring. The criteria for assessing intent should be further elaborated on, in particular the requirement to assess intent from the conduct of speaker on social media;
- Law enforcement should be required to consider the situation of discrimination, or risk of discrimination inequality as a decisive factor in determining whether a certain group falls under a protected group category under Article 510. Provisions of Article 510 of the Penal Code are not used to shield police and security forces from criticism;
- Law enforcement authorities should ensure that victims of incitement or organisations representing targeted groups are included in the criminal proceedings. However, the perspective of the victim should not be used to determine the intent of the speaker;
- Law enforcement authorities should be required to make sure that the application of Article 510.2. a) is limited to humiliating statements or materials that amount to direct incitement to discrimination, violence and hostility. The application of Article 510.2. b) should be strictly limited to cases that amount to direct incitement to violence, hostility and discrimination;
- The Circular should provide guidance about what exaltation or justification means for the purposes of investigation cases of incitement to violence, hostility and discrimination;
- The Circular should recommend that law enforcement apply the provisions of Article 510.3 of the Penal Code only to cases that amount to direct incitement to discrimination, hostility and violence that complies with the six-part test of the Rabat Plan of Action.



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# Introduction

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In this analysis, ARTICLE 19 reviews the Circular 7/2019, the Guidelines on the interpretation of hate offences under Article 510 of the Penal Code (the Circular), issued by the General Prosecutor's Office (General Prosecutor) on 24 May 2019. The Circular provides a set of recommendations on how to assess cases under provisions of Article 510 of the Penal Code, that criminalise various forms of hate speech. These provisions were amended in 2015<sup>1</sup> in order to incorporate the 2017 decision of the Spanish Supreme Court on the crime of genocide denial and to transpose the EU Framework Decision 2008/913/JAI into the Spanish law.<sup>2</sup>

The analysis is a part of a broader work of ARTICLE 19 in Spain related to hate speech. In March 2020, ARTICLE 19 analysed the underlying legislation of the Circular - provisions of Article 510 of the Penal Code - for their compliance with international human rights standards. In the analysis, we raised concerns that the scope of Article 510 as it contains 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>3</sup> We also highlighted that Spain did not have any uniform test for assessing incitement cases under these provisions.

In 2020, ARTICLE 19 also conducted research into the judicial practices of the Spanish courts<sup>4</sup> to examine how these provisions have been interpreted in practice. We also held an expert dialogue on freedom of expression and hate speech in Spain to gain more insight into the implementation of this legislation.<sup>5</sup> In both instances, it was clear that Spanish law enforcement and courts implement and interpret the criminal provisions on hate speech inconsistently, fail to provide clarity on how they make their conclusions that criteria of Article 510 were met and apply lower criminal liability thresholds than the one provided in international human rights standards. In these circumstances, it is positive that the Prosecutor General's Office decided to provide such needed guidance for law enforcement and issued the Circular.

ARTICLE 19 believes that since the Circular provides guidance on interpretation of the provisions of the Penal Code, it should be informed by international human rights law and standards. Also, according to Article 3 of the Statute of the Public Prosecutor, read in conjunction with Article 10.2 of the Spanish Constitution, prosecutorial actions must conform with both domestic legal norms and international human rights standards.<sup>6</sup> ARTICLE 19 therefore reviews how the key aspects of the guidance follow the standards provided in international and regional freedom of expression standards and jurisprudence. ARTICLE 19 believes that the Circular should be improved in this respect and hopes that this analysis and its recommendations will lead to its revision. We stand ready to provide further support in the process.

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<sup>1</sup> Spanish Penal Code, Organic Act 10/1995 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.](#)

<sup>2</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>3</sup> ARTICLE 19, [Spain: Speech related offences of the Penal Code](#), March 2020.

<sup>4</sup> ARTICLE 19, [Briefing paper for the Expert Dialogue on freedom of expression and 'hate speech' in Spain](#), October 2020.

<sup>5</sup> ARTICLE 19, Report of the Expert Dialogue on freedom of expression and 'hate speech' in Spain, November 2020.

<sup>6</sup> Prosecutor General Office, [Statute of the Public Prosecutor](#), Chapter III, Article 6, principles of legality and impartiality.



# Applicable international freedom of expression standards

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## 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>7</sup> and given legal force through Article 19 of the ICCPR<sup>8</sup> and on regional level by Article 10 of the European Convention on Human Rights (European Convention);<sup>9</sup> and further affirmed in Article 11 of the Charter of Fundamental Rights of the European Union.<sup>10</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>11</sup>

Importantly, in General Comment No 34,<sup>12</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>13</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>14</sup> or that "shock or disturb the State or any sector of the population."<sup>15</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 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

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<sup>7</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>8</sup> International Covenant on Civil and Political Rights, 16 December 1966, [UN Doc. A/6316](#). Spain ratified the ICCPR on 27 April 1977.

<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.

<sup>10</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

<sup>11</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>12</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>13</sup> *Ibid*, para 12.

<sup>14</sup> *Ibid*, para 11.

<sup>15</sup> European Court, *Handyside v. United Kingdom*, App. No. 5493/72 (1976), para 49.



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>16</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>17</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>18</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, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.”<sup>19</sup>

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<sup>16</sup> *Ibid.*, para 22.

<sup>17</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>18</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.

<sup>19</sup> *Ibid.*, para 20.



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>20</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>21</sup> 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

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<sup>20</sup> General Comment 34, *op.cit.*, para 11. See also European Court, *Handyside v. United Kingdom*, *op.cit.*

<sup>21</sup> European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para 56; or European Court, *Gündüz v. Turkey*, App. No. 35071/97 (2004), para 22.



violated the proportionality principle.<sup>22</sup> Although the European Court has not explicitly endorsed the six-part test of the Rabat Plan, its jurisprudence includes a number of aspects of it. For instance, it considered the context of expression and the likelihood of impugned statements to stir up violence, hatred or intolerance or lead to harmful consequences,<sup>23</sup> and the impact of the speech on the audience.<sup>24</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 requires States to sanction racism and xenophobia through "effective, proportionate and dissuasive criminal penalties."<sup>25</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>26</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.

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<sup>22</sup> European Court, *Jersild v. Denmark*, App. No 15890/89 (1992), para 35.

<sup>23</sup> European Court, *Perinçek v. Switzerland* [GC], App. No. 27510/09 (2015), paras 204-208.

<sup>24</sup> *Ibid.*, para 218.

<sup>25</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>26</sup> See, e.g. ARTICLE 19, [Submission to the Consultations on the European Union's Justice Policy](#), December 2013.

# Analysis of the Circular

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The Circular outlines various tests and criteria that the law enforcement authorities should apply to all offences under Article 510 (namely 510.1.a), b) and c); 510.2.a) and b); 510.3, 510.4, 510.5 and 510.6). ARTICLE 19's analysis follows this structure of the Circular and includes the key issues concerning the protection of freedom of expression under international and regional human rights law.

## Common characteristics and applicable criteria to all offences in Article 510

### *Aim and legal basis of Article 510*

The Prosecutor General starts the Circular with outlining the aim and legal basis of Article 510 of the Penal Code. He asks the prosecutors to rely on these legal bases when identifying what types of conducts are punishable under respective provisions:

- First, it states that the aim of Article 510 of the Penal Code is to provide protection from “intolerance that causes exclusion” (*intolerancia excluyente*). This includes a wide range of conducts that must be criminalised. It refers to the decision of the Spanish Constitutional Court that was challenged at the European Court of Human Rights and where the European Court found a violation of the right to freedom of expression.<sup>27</sup>
- Second, it states that since Article 510 is one of the “offences committed by the exercise of fundamental rights and public freedoms enshrined in the Constitution,” it aims (i) to promote the *correct or proper* exercise of fundamental rights in a democratic society, such as the freedoms of opinion and expression, freedom of assembly, association and protest; and (ii) to prohibit discrimination and ensure the right to equality (as guaranteed in Article 14 of the Spanish Constitution).
- Third, it refers to several international human rights instruments, *inter alia*, the European Convention, the ICCPR, ECRI recommendations, the European Court jurisprudence, to demonstrate that “equality has a position of superiority throughout the Spanish legal system” and the aim of Article 510 is to protect the right to non-discrimination and equality.” The Circular states that these rights protect human dignity.
- Finally, it concludes that the primary aim of Article 510 is to protect human dignity.

Subsequently, the Circular instructs prosecutors in all cases under Article 510 to determine whether the speech was “an expression of intolerance incompatible with social coexistence and whether it was an attack to human dignity as a form of intolerance that goes against the constitutional order.” To identify these expressions, prosecutors should determine whether the statements are forms of “disregard to human dignity.” The concept of disregard to human

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<sup>27</sup> European Court, *Stern Taulats and Roura Capellera v. Spain*, App. No. 51168 (2018). The Spanish Minister of Justice published a translated version of the [ruling](#). The Constitutional Court used the concept of intolerance that causes exclusion as a parameter to declare the photo burning of Spanish monarchs as an act of incitement to violence in the form of political intolerance. The European Court of Human Rights held that the act in question had not constituted incitement to violence and that photo burning was a form of political expression protected under Article 10 of the Convention.



dignity involves attacks against things, persons or groups targeted because potential perpetrators consider them "different."

ARTICLE 19 finds that the references to protection of dignity are positive as human dignity is a foundational element that underpins international human rights protection.<sup>28</sup> Almost all main human rights treaties expressly include dignity as an overarching principle: fulfilment of each human right enables the recognition of dignity as inherent to all human beings.<sup>29</sup> At the same time, we suggest that this section could be further improved based on the following considerations:

- The Circular should refer to the decision of the European Court in *Stern Taulats and Roura Capellera v. Spain* that dealt with the issue of intolerance.<sup>30</sup> It could include the reasoning of the European Court in this case and should underline that international and regional human rights standards require authorities to carefully balance the right to freedom of expression with other legitimate interests, in particular the right to non-discrimination/equality.
- The Circular should state that its aim is to provide proper instructions on how to balance the protection of the right to freedom of expression with the aims of Article 510. It should underline that freedom of expression and equality are mutually supporting and reinforcing human rights. It is only when coordinated and focused action is taken to promote both freedom of expression and equality that either can effectively be realised. Hence, there is no superiority of other interests over freedom of expression.

#### Recommendations:

- The aim of the Circular should be revised. Its main aim should be to provide comprehensive guidance on how to balance the protection of freedom of opinion and expression with other legitimate interests and ensure that only the cases with a high severity threshold are subject to criminal prosecution. It should also seek to ensure that law enforcement authorities are familiar with applicable freedom of expression and human rights standards and apply them in 'hate speech' cases.

#### *The right to freedom of expression and hate speech*

The Circular elaborates in detail the relationship between freedom of expression and 'hate speech.'

ARTICLE 19 welcomes that the Circular recognises the importance of the right to freedom of expression and refers to a number of decisions of the European Court, the Spanish Constitutional and Supreme Court in 'hate speech' cases. It highlights that the protection of freedom of expression is broad under the Spanish jurisprudence, including critical views and opinions that may disturb or cause discomfort and dislike from those at whom the expression is directed at. It recognises that opinions deemed as dangerous or mistaken are protected under the freedom of opinion protection.

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<sup>28</sup> See, e.g. A. Chaskalson, [Dignity as a Constitutional Value: A South African Perspective](#), American University International Law Review. Volume 26, Issue 5, 2011, p. 1382.

<sup>29</sup> C. McCrudden, [Human Dignity and Judicial Interpretation of Human Rights](#), The European Journal of International Law, Volume 19, Issues 4, 2008.

<sup>30</sup> See European Court, *Stern Taulats and Roura Capellera v. Spain*, *op.cit.*

It is also positive that the Circular obliges law enforcement to undertake a balancing exercise on a case by case basis and eliminate the risk of a chilling effect of the criminal law on the right to freedom of expression. It recommends that the principle of *favor libertatis* should be applied in cases of doubt.

At the same time, ARTICLE 19 is concerned that the Prosecutor General's instructions do not recommend using the Rabat Plan of Action test for assessing incitement cases. The six-part test outlined in the Rabat Plan of Action has been developed precisely to provide guidance on how to implement State obligations under Article 20 para 2 of the ICCPR. Although the Circular recognises that there is not a unique and uniform definition of 'hate speech', it emphasises that in Spain "the dissemination of ideas and doctrines that cause exclusion" can be prosecuted. Such expression does not have to directly incite violence; it also covers cases that involve instances where there is "an actual risk of causing a hostile environment prone to producing concrete acts of violence, hatred or discrimination against individuals and groups."

Referring to the case law of the European Court,<sup>31</sup> the Circular states that intolerance and attacks in the form of ridicule, slandering and insults justify authorities' intervention to combat racist speech resulting from an irresponsible exercise of the freedom of expression. It also refers to the case of the Spanish Supreme Court which stated that "offensive statements, in the context of 'hate speech', provoke, directly or indirectly, feelings of hatred, violence and discrimination."<sup>32</sup> Hence, according to the Circular, offensive expressions hurt feelings and should fall under offences of the Penal Code. ARTICLE 19 finds this approach problematic:

- Firstly, the Circular does not acknowledge realise that not all 'hate speech' should be restricted through criminal law and that some forms of 'hate speech' are protected expression. This is a major problem that can lead to limitations of protected speech.
- Secondly, the Circular presents the European Court's case law on 'hate speech' as uniform and disregards a diverging jurisprudence of the Court on this subject. Hence, the Circular is very selective on the cases and even excerpts from cited cases, leaving out crucial elements. In particular, the Circular uses this selective approach to justify its claims that offensive expressions satisfy the criminal liability threshold under the European Convention and, therefore, fall under Article 510. It fails however to include that, in the referenced cases, the European Court uses "can" or "may" to recognise a degree of possibility to restrict offensive expression. In fact, the European Court has taken several factors into consideration that the Circular fails to include. In *Feret v. Belgium*, the European Court made the conclusion that the impugned discourse clearly incited to violence and discrimination based on decisive factors: the electoral context in which the speaker disseminated the messages, the position of the candidate, and the potential impact on the electorate.<sup>33</sup> In *Vejdeland v. Sweden*, the European Court took into account the content and context of the statements, the seriousness of the allegations against a specific group and the characteristics of the target audience.<sup>34</sup> In both cases, the European Court found non-criminal sanctions to be proportionate. Instead, the Circular recommends broader criminalisation of offensive speech.

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<sup>31</sup> See European Court, [Feret v. Belgium](#) App. No. 15615/07 (2009); European Court, [Vejdeland v. Sweden](#), App. No. 1813/07, (2012).

<sup>32</sup> Decision of the Supreme Court, 72/2018.

<sup>33</sup> See European Court, [Feret v. Belgium](#), *op. cit.*, para 76.

<sup>34</sup> See European Court, [Vejdeland v. Sweden](#), *op. cit.*, para 54.

Thirdly, the Circular inaccurately states that according to the European Court “freedom of expression does not protect ‘hate speech’ in any circumstance.” It overlooks that, in the cases used to base its statement,<sup>35</sup> the European Court held that insulting speech and statements of intransigent attitude could not be regarded as ‘hate speech’ based on religious intolerance. The Court also stated that these forms of expression did not amount to calls and incitement to violence to sufficiently reach the necessity threshold to restrict them.<sup>36</sup> Hence, the Circular fails to instruct prosecutors that insulting and offensive expression alone is not sufficient to warrant the attention of criminal liability.

After stating that offensive expression is punishable under the Penal Code, the Circular provides three general guidelines for prosecutors, based on decisions of the Supreme and Constitutional Courts, on how to determine whether the prohibited behaviours contained in Article 510 should be investigated. It emphasises three issues:

- **Hate speech can manifest in different forms**, including the promotion and dissemination of ideas and opinions; expressions and acts of disregard or humiliation, or acts that incite to physical or psychological violence; glorification of these acts or of their authors;
- **Degree of importance of the conduct**: ideas and opinions alone are not prosecutable, only the conducts that infringe the protected interests under Article 510 (i.e. protection against feelings of harm or harmful feelings, protection from humiliation, incitement and intolerance) or are likely to create a risk against them;
- **The discriminatory motivation** is an essential element of these offences.

The Circular mentions the test of Recommendation no. 15 of the ECRI, stating that it is similar to the six-part test of the Rabat Plan of Action, but does not instruct prosecutors to apply any of them. Instead, the Circular concludes that the Supreme Court provides the elements that should be observed when balancing the right to freedom of expression with “expressions that create hatred.” The prosecutors could assess cases considering the following criteria:<sup>37</sup>

- **The perpetrator** selected their victims on the basis of intolerance against the groups outlined in Article 510;
- The **conduct intimidated not only the targeted individual but the whole group** the person belongs to, creating or causing feelings of harm to their dignity, insecurity and threat;
- The **expression attacked the basic norms of social coexistence**: it goes against respect and tolerance, contrary to the legal system created to impose social control, opinions about public figures and individuals subject to public scrutiny may not fall under this category;
- Statements reach a level of **severity** and the level of seriousness to incite terrorists acts or cause feelings of hatred, they should have the characteristics and seriousness to classify them as harmful feelings against dignity;

<sup>35</sup> European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006); European Court, *Gündüz v. Turkey*, App. No. 35071/97 (2004); and European Court, *Ergogdu e Ince v Turkey*, App. No. 25067/94 and 25068/94, (1999).

<sup>36</sup> See European Court, *Gündüz v. Turkey*, *op.cit.*, p. 48, 49 & 51; European Court, *Erbakan v. Turkey*, *op. cit.*, para 68; European Court, *Ergogdu e Ince v. Turkey*, *op. cit.*, paras 52 & 54

<sup>37</sup> These instructions are based on the decision No. 646/2018 of the Supreme Court.



- The **intention** of the perpetrator is to attack, which may enable the exclusion of humorous forms of expression and those practiced on the basis of vengeance.

While ARTICLE 19 finds positive that these criteria reflect some parts of the six-part test of the Rabat Plan of Action, they do not limit the scope of Article 510 only to incitement cases. As ARTICLE 19 outlined in the legal analysis of the Penal Code, the provisions of Article 510 go way beyond permitted restrictions under Article 20 para. 2 of the ICCPR. The General Prosecutor should provide an authoritative guidance in this respect and ensure that only the most serious cases of incitement fall under the scope of these provisions. In practice, limiting the scope of Article 510 would also prevent unnecessary investigations and prosecutions that can later be challenged at higher courts or the European Court of Human Rights.

#### Recommendations:

- Make sure that law enforcement authorities understand that international law requires different approaches to different types of ‘hate speech’ based on their severity. Speech that offends or hurts feelings, but does not amount to incitement to discrimination, violence or hostility, should not be criminalised;
- Revise the references to the case law of the European Court of Human Rights related to ‘hate speech’ and ensure that the European Court standards are properly and fully reflected in the Circular;
- Ensure that the Circular includes the six-part test of the Rabat Plan of Action in its entirety and instruct law enforcement to use this test when starting the investigation stage under Article 510 of the Penal Code;
- Expressly require prosecutors to observe the principle requiring authorities to restrain in resorting to criminal proceedings against expressions.

#### *Legal nature of hate speech offences under Article 510: abstract danger*

The Circular classifies the various offences under Article 510 as punishable conducts of *abstract danger* that does not require “a real or effective risk of harm.” Aside from Article 510.2 a), the Prosecutor General establishes that prosecutors must observe that conducts “do not require the element of promotion of a specific act but rather the aptitude or suitability to create a climate of hatred or discrimination that, in each case, is likely to provoke actions against a group or its members, as an expression of an exclusive intolerance – or intolerance that cause exclusion – towards those that are different.”

ARTICLE 19 previously analysed the decision of the Supreme Court that set these risk-based standards and found that that they do not follow the recommendations of the Rabat Plan of Action’s six-part test and set a far lower threshold for criminal liability than envisioned in Article 20 para 2 as well as Article 19 para 3 of the ICCPR.<sup>38</sup> In practice, the Circular instructs prosecutors to start investigations over offensive expression eliminating any requirement of likelihood to cause a specific harm. This goes in the opposite direction as that of the Rabat Plan of Action, there should be a concrete and clear connection between the degree of risk of harm and the potential *result*. The assessment should determine whether it is likely that the expression will lead to violence, hostility or discrimination and succeed in inciting these prohibited behaviours against the targeted group or individuals.

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<sup>38</sup> See Briefing paper for the Expert Dialogue, *op. cit.*, p. 5-8.



Under the standard of *abstract danger* prosecutors may leave out the context – e.g. the position of targeted groups, historical and discrimination factors, political events or social tensions – from their assessment to demonstrate whether the likelihood of harm or prohibited result is sufficiently serious to be investigated and prosecuted. The Spanish criminal framework has other risk-based standards (e.g. concrete danger) that can properly square the gravity of a criminal offence with the severity requirements of international and regional freedom of expression standards.

#### Recommendations:

- Require prosecutors to apply the standard of concrete danger to all offences under Article 510;
- Incorporate in the Circular the description of likelihood and context provided in the Rabat Plan of Action as guidance in determining the degree of risk of an expression to cause violence, discrimination and hostility against targeted groups and individuals.

#### *Protected groups and individuals*

The Circular adopts a broad approach to the question of who are protected groups and individuals under ‘hate speech’ provisions. It states that any group is protected under Article 510 (including those propagating Nazi ideology). Law enforcement does not need to assess if a targeted group is in a position of vulnerability.

ARTICLE 19 appreciates that the Circular wants to provide protection to a broad range of groups that might be targeted by ‘hate speech’. However, ARTICLE 19 notes that in practice, the provisions of Article 510 have been used to prosecute individuals that expressed distasteful opinions and statements against police forces. These included politicians who published messages against police and national civil guard forces;<sup>39</sup> and attacks against civil guards.<sup>40</sup> In these cases, the Prosecutor's Office tried to argue they were targeted due to their “ideological” identity.

ARTICLE 19 notes that the grounds for protection from discriminatory hate should include all those protected characteristics which appear under the broader non-discrimination provisions of international human rights law. This interpretation has been also recognised in domestic case law that establishes 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>41</sup>

Additionally, we note that the European Court has previously stated that the police, as part of public security forces, are not protected from insults, ridicule and slander.<sup>42</sup>

#### Recommendations:

- Require prosecutors to consider the situation of discrimination, or risk of discrimination inequality as a decisive factor in determining whether a certain group falls under a protected group category under Article 510;

<sup>39</sup> High Court of Justice of Catalonia, [Sentence 72/2018](#), 28 June 2018,

<sup>40</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.

<sup>41</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>42</sup> See European Court, [Sawa Terentyev v. Russia](#), [GC] App. No. 10692/09, (2019).



- Ensure that provisions of Article 510 of the Penal Code are not used to shield police and security forces from criticism.

### *Intent*

As for the intent to commit a crime under Article 510, the Circular states that “basic intent” is sufficient and provides a number of criteria on how to assess it. This includes “a mere voluntariness of the speaker to disseminate” the content, the ability to “control and pre-meditate their messages” prior to their dissemination and the context of the speaker’s action, particularly through the use of social media; awareness of the possible reach of the content on social media and the fact that “expressions of hate and discrimination result from humiliation, hostility and harmful messages. It states that “motivation” is an additional element of intent; this criterion is satisfied when “the speaker disseminates hateful or discriminatory statements against a group or individual pertaining to it because the speaker considers them different.”

ARTICLE 19 appreciates that the Circular provides specific guidelines on how to assess intent. However, we believe that the requirement of basic rather than specific intent to commit the crime is problematic. We understand that this guidance derives from the case law of the Spanish Supreme Court; however, we believe that “specific intent” should be required for crimes under Article 510. From a comparative perspective, the following standards have heavily relied upon a high threshold of intent in incitement and other ‘hate speech’-based restrictions:

- The European Court's jurisprudence indicates that intent of the speaker should be a decisive element in incitement cases. For instance, in *Jersild v. Denmark*, the Court held that the speaker did not have “the intention to aid and abet the dissemination of racist offensive speech but rather to present it as a documentary.”<sup>43</sup> In *Gunduz v. Turkey*, the Court has come close to requiring specific intent to call to violence - among other elements – in order to satisfy the threshold of necessity to impose criminal liability for the speech.<sup>44</sup>
- Similarly, the Special Rapporteur on Freedom of Expression for the Inter-American Commission on Human Rights recommended specific intent in incitement cases: the speaker should have “the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective.”<sup>45</sup>
- The UK Crown Prosecutor establishes that for incitement related cases, “[t]he prosecution must show that the person accused of incitement intended or believed that the person incited would, if acted as incited to do so, do so with the *mens rea* appropriate to the offence.”<sup>46</sup>
- In Austria, the standard of intent in incitement cases requires that “the intent must attach to each and all of the objective elements of the crime (i.e. the perpetrator must intend to commit each element), such as the public nature of the statement, and its capacity to endanger public order.” The intent is also derived from “deliberateness:” the perpetrator must purposefully make the group contemptible, must be consciously aware of it, and must know that the statement may be received by a broader public. According to jurisprudence,

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<sup>43</sup> European Court, *Jersild v. Denmark*, App. No. 15890/89 (1994).

<sup>44</sup> European Court, *Gündüz v. Turkey*, *op. cit.*, para 51.

<sup>45</sup> Special Rapporteur on Freedom of Expression, [The Inter-American Legal Framework regarding the right to freedom of expression](#), Inter-American Commission on Human Rights, 31 October 2018, para 58.

<sup>46</sup> UK Crown Prosecutor Service, [Legal guidance. inchoate offences: incitement](#), updated on 18 December 2018.

the intent of the perpetrator cannot be deduced from the mere fact that the targeted person belongs to a protected group.<sup>47</sup>

Additionally, ARTICLE 19 finds the recommendation to derive the intent of the speaker from “awareness of the possible reach of the content on social media” confusing. For instance, some users might not be aware that the content they post to small group of friends on social media might be retweeted or reused more broadly; or how flippant or spontaneous reactions might be reused. Instead, we recommend that the criteria also include the position of the speaker and their role in the society.

### Recommendations

- Require specific intent for crimes under Article 510 of the Penal Code;
- Elaborate further on the criteria on assessing intent from the conduct of speaker on social media.

### *Guidelines to determine whether there exists a hateful motive*

In this section, the Circular further elaborates on the guidelines in preceding sections. It provides “indicators of hate or extreme polarisation parameters” to identify whether the conduct falls under the respective provisions. These indicators are:

- **Victim:** the testimony of the victim should be “central to determine the level of harm” and the victim's perception “decisive for identifying the illegal behaviour as well as the origins or motive of the conduct.” Prosecutors should also consider “indirect or unexpressed perceptions” and consider the group the victim belongs to and its personal, familiar and other relationships;
- **Speaker:** to determine “hateful or discriminatory motivation,” the Circular recommends considering i) criminal or police records on similar conducts, including sanctions under the Citizen Security Law originated from “ultra” demonstrations or violence in the context of sport; ii) the speaker’s online communications and interactions before and after the incident, as well as the communications of their followers; iii) the speaker’s statements or gestures expressed during the incident; iv) the speaker's membership or belonging to hateful groups or groups that promote violence against specific groups or ideas (Nazi, xenophobic or homophobic ideology, religious extremism, anti-system groups, “bandas latinas”) and the speaker’s position of public relevance or leadership in these groups; v) the instruments and symbols used in speaker's communications, including flags, scarves, placards associated to the mentioned groups;
- **Context of the expression:** these can include i) an apparent irrationality or lack of justification of the acts; ii) the lack of relationship between the perpetrator and the victim before the incident; iii) historical or existing enmity between the groups that the speaker and the victim belong to, and iii) the date and place of the facts as that may have a symbolic or emblematic meaning for a group.

ARTICLE 19 appreciates that these criteria reflect the recommendations of the Rabat Plan of Action’s six-part test, even if the Circular does not refer to it or does not acknowledge it. However, we observe that these guidelines overlap with previous sections such as the one on intent and discriminatory motivation. We find this somewhat confusing and recommend that it

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<sup>47</sup> C.f. ARTICLE 19, [Austria: Responding to 'hate speech,'](#) 2018.

would be far clearer if the recommendations on each element of the crime (e.g. intent, context and etc) were presented in one place.

Further, we find **determining the motive/intent from the victim's perception** of harm to be problematic. ARTICLE 19 believes that the perspective of victims is crucial and we have been advocating that law enforcement authorities should involve victims in the proceedings through various channels, e.g. as witnesses or be invited to submit third party interventions in the form of amicus briefs by representatives of various groups concerned in the case. Allowing this would strengthen the intellectual, legal and practical pursuit of justice. However, while the impact of the speech on well-being of victims is important, we do not believe this should not be a criterion for assessing the perpetrator's intent. The intent should be demonstrated with proof and derived from actions of the perpetrator, not from how it is perceived by groups targeted by incitement.

We also find the recommendations on **context of expression** inadequate. We believe that a thorough assessment of the context of the expression should be the starting point when determining whether a particular statement meets the threshold of criminal sanctions. The context of the communication may have a direct bearing both on the intent of the speaker and/or on the possibility of the prohibited conduct occurring. Ideally, any analysis of the context should place key issues and elements of speech within the social and political context prevalent at the time the speech was made and disseminated.<sup>48</sup>

At one end of the spectrum, the context may be characterised by frequent acts of violence against individuals or groups based on prohibited grounds; regular and frequently negative media reports against/on particular groups; violent conflicts where groups or the police oppose other groups; reports raising levels of insecurity and unrest within the population. At the other end of the spectrum, the climate may be one of relative peace and prosperity, with little or no indication of any conflict and potential for discrimination, hostility or violence occurring. In this respect, an important aspect of the context would be the degree to which opposing or alternative ideas are present and available.

Overall, a context analysis should include considerations of the following elements:<sup>49</sup>

- **Existence of conflicts within society:** Issues to be examined include the existence of previous conflicts between relevant groups; outbreaks of violence following other examples of incitement; the presence of other risk factors for mass violence, such as weak democratic structures and rule of law.
- **Existence and history of institutionalised discrimination:** Are there structural inequalities and discrimination against a group or groups? What is the reaction to hateful statements targeting the group/groups? Is there broad social condemnation of such statements?
- **History of clashes and conflicts over resources between the audience to whom the speech is targeted and the targeted groups:** Was the audience suffering economic insecurity, e.g. lacking in food, shelter, employment, especially in comparison with its recent past? The issue of whether the audience was fearful of further clashes should also

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<sup>48</sup> *C.f.* T. Mendel, Study on International Standards Relating to Incitement to Genocide or Racial Hatred (2006).

<sup>49</sup> *C.f.* S. Benesh, Vile Crime or Inalienable Right: Defining Incitement to Genocide, Virginia Journal of International Law, Vol. 48, No.3, 2008

be examined. Fear might be objectively reasonable or not; its impact may be equally large and equally well exploited by a compelling speaker.

- The **media landscape, in particular the diversity and pluralism of the media in the country**: Issues to be examined include censorship; the existence of barriers to establishing media outlets; limits to the independence of the media or journalists; broad and unclear restrictions on the content of what may be published or broadcast; evidence of bias in the application of these restrictions. Other issues may include whether there is an absence of criticism of government or wide-ranging policy debate in the media and other forms of communication; and whether the audience has access to a range of alternative and easily accessible views and speeches.

#### Recommendations:

- The structure of the Circular should be improved. The criteria for assessing cases should be clearly and concisely organised in order to avoid confusion over various aspects of the guidance.
- The Circular should clearly refer to the six-part test of the Rabat Plan of Action as a guiding and authoritative recommendation on compliance with international freedom of expression standards.
- Law enforcement authorities should ensure that victims of incitement or organisations representing targeted groups are included in the criminal proceedings. However, the perspective of the victim should not be used to determine the intent of speaker.
- The recommendations on context of expression should be further explained in the Circular.

#### Considerations on individual offences under Article 510

##### *Article 510.1 a): publicly encouraging, promoting or inciting directly or indirectly to hatred, discrimination, hostility or violence against groups or a part thereof*

In this section, the Circular offers definitions of the concepts of discrimination, hostility and violence. It refers to the 2015 amendment of this Article, motivated by the implementation of the EU Framework Decision.<sup>50</sup> It points out some diverging standards under the Decision and the Spanish law and concludes that the interpretative guidelines should follow the Spanish legislators aim and disregard the differences with the Framework Decision.

In particular, it states that “hateful ideas alone” do not on their own reach the level of severity under these provisions of the Penal Code. This Article does not require that the speaker or the expression incite to a prohibited conduct or promote others to carry out a specific action. Incitement can be also “indirect” and all incitement must occur in public.

ARTICLE 19 notes that the criteria in this section resemble some aspects of the guidance on incitement in the Rabat Plan of Action. However, we believe that omission of likelihood of the harm occurring is a serious omission. The probability of the harm advocated by the speaker occurring must also be established in order to measure the level of severity. The aim here should be to assess the causality in the link between the communication and how it is received by the audience and then potentially acted upon.

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<sup>50</sup> The Framework decision 2008/913/JHA, *op.cit.*

The criteria for assessing the probability or risk of discrimination, hostility or violence occurring will have to be established on a case-by-case basis. However, prosecutors should consider criteria including the following:<sup>51</sup>

- Was the speech understood by its audience to be a call to acts of discrimination, violence or hostility?
- Was the speaker able to influence the audience?
- Did the audience have the means to resort to the advocated action, and commit acts of discrimination, violence or hostility?
- Had the targeted victim group suffered or recently been the target of discrimination, violence or hostility?

In terms of the audience, ARTICLE 19 suggests that “the test is whether the ordinary, reasonable viewer would understand from the public act that they are being incited to hatred.”<sup>52</sup> The conclusion, then should be that there must be at least a certain and specific level of possibility that the communication or messages will gain some credence, with the attendant result of discrimination, hostility or even violence, against the protected group in society.<sup>53</sup>

Moreover, ARTICLE 19 argues that the possibility of harm should be imminent. The immediacy with which the acts (discrimination, hostility or violence) called for by the speech are intended to be committed should be deemed relevant. ARTICLE 19 does not suggest a specific time limit for this aspect of the test, since the imminence will always have to be established on a case-by-case basis.

#### Recommendations:

- Ensure that the likelihood of the harm occurring is included as an applicable standard of severity to determine whether the criminal elements of Article 510. 1. a) are satisfied.
- Consider including the criteria of probability or risk of discrimination, hostility and violence, imminence and the audience.

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<sup>51</sup> Adapted from Susan Benesh, *op.cit.*

<sup>52</sup> *Ekeremawi v Network Ten Pty Ltd*, [2008] NSWADT 334, 18 November 2008, 16 December 2008.

<sup>53</sup> The European Court found a series of ‘hate speech’ cases to be inadmissible based on the lack of likelihood/impact of the communication. Although most provided little in the way of reasoning to substantiate their claims of impact, most made reference to either Article 14, or Article 17 of the Convention. **The Court concluded that “from the perspective of freedom of expression, causality in this sense is very important... If certain statements are not likely to cause a proscribed result – whether it be genocide, other forms of violence, discrimination or hatred – penalising them will not help avoid that result and hence cannot be said to be effective. If on the other hand, a sufficient degree of causal link or risk of the result occurring can be established between the statements and the proscribed result, penalising them may be justifiable;”** see T. Mendel, *op.cit.*, p.50. In at least one case involving allegations of hate speech, the European Court found that there was, in fact, a breach of the right to freedom of expression on the basis that the impugned statements did not create an actual risk of harm. In *Erbakan v. Turkey*, the European Court found that it “was not established that at the time of the prosecution of the applicant, the impugned statements created an “actual risk” and an “imminent” danger for society ... or that they were likely to do so;” *op.cit.*



***Article 510.1.b): producing, developing, possessing and disseminating any material or media suitable for encouraging, promoting, or inciting direct or indirectly to hatred, hostility, discrimination or violence***

When interpreting Article 510.1.b), the Circular asks law enforcement to assess the content of the material; it should be able to directly or indirectly incite hatred, hostility discrimination and violence against the protected groups or part of a group. As for suitability, it means that the material is ideal to publicly promote, encourage or incite hatred, violence, discrimination or hostility,” even if the proscribed action does not materialise. Law enforcement should consider if material is produced for “artistic, scientific or similar purposes.” The Circular states that artistic or satirical content may not be excluded from criminal liability on the grounds of protecting freedom of expression.

ARTICLE 19 previously raised concerns about this offence<sup>54</sup> in terms of compliance with international freedom of expression standards and notes that the guidelines both replicate existing problems and go beyond the provision of Article 20 (2) of the ICCPR.

Similar to the recommendations on Article 510.1 a), these criteria should require prosecutors to start investigations only in those cases of direct forms of incitement and apply the six-part test of the Rabat Plan of Action. They should additionally provide clarity about the reasons and situations in which artistic and satiric expressions are excepted from protection. These recommendations apply to the guidelines on Article 510.1.c).

***Article 510.2.a) humiliation, disregard or discredit of groups or individuals***

As for the interpretation of Article 510.2.a), the Circular states that this offence protects against the result of harming the dignity of the targeted group or individual by humiliating, disregarding or discrediting acts. It adds that under this article, the protection of freedom of expression is inadmissible to avert criminal liability.

Further, the Circular explains to prosecutors that Article 510.2. a) includes an additional element based on the prohibition of producing, developing, distributing or disseminating material. When evaluating whether this second element is met, prosecutors should apply the criteria provided in Article 510.1. - i.e. prosecutors should assess the suitability of the material to cause the prohibited harm. The proscribed contents under this offence are grave representations of humiliation, disregard or discredit. The Prosecutor General acknowledges that these criteria are subjective and reiterates the need to conduct and assessment on a case-by-case basis.

ARTICLE 19 has raised concerns on the content, scope and criminal elements of this offence previously.<sup>55</sup> It notes that these guidelines attempt to set a higher bar on the seriousness of humiliation and disregard related expressions. However, ARTICLE 19 still finds concerning that the Circular eliminates the exercise of the right to freedom of expression as an argument to confront criminal liability based on humiliation or disregard related expressions.

**Recommendations:**

- Make sure that the application of Article 510.2. a) is limited to humiliating statements or materials that amount to direct incitement to discrimination, violence and hostility.

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<sup>54</sup> See ARTICLE 19, Spain: Speech related offences of the Penal Code, *op. cit.*, p. 20-21.

<sup>55</sup> *Ibid.*



### ***Article 510.2.b) exalting or justifying hate crimes***

ARTICLE 19 appreciates that the Prosecutor General recognises in the Circular that this offence is overly broad and fails to require that the expressions incite and create a climate of hostility, hate, discrimination and violence. We have previously criticised a broad scope of these provisions.

However, ARTICLE 19 is concerned that the Circular states that the elements of these offences are satisfied with the “mere exaltation or justification” while failing to provide any clarity about what exaltation or justification entails for the purposes of determining criminal liability. We find these concepts are overly broad, and prosecutors are not required to meet any severity threshold than those provided for all offences under Article 510.

Hence, we believe the Circular should amend this section in its entirety in order to limit the application of this Article to the most serious forms of “exaltation” that amount to incitement to violence, hostility and discrimination.

#### **Recommendations:**

- Ensure that the application of Article 510.2. b) is strictly limited to cases that amount to direct incitement to violence, hostility and discrimination.
- Provide guidance about what exaltation or justification means for the purposes of investigation cases of incitement to violence, hostility and discrimination.

### ***Aggravating circumstance under Article 510.3: dissemination in media***

This section aims to provide guidance on how to apply the aggravating circumstances under Article 510.3. The Circular underlines the importance of the use technology and other media and communication means for the right to freedom of expression, in particular for political and social participation. It also notes that technological mediums of communication are new mechanisms to commit crimes and they have an enormous and expansive potential to increase the damage of victims. Based on a Supreme Court decision, the Circular says that when a message is put online and reaches the recipient, the effect multiplies.

Prosecutors should consider the following guidelines to determine whether an aggravating circumstance should be relied upon:

- Offences under articles 510.1 and 510.2 already require conducts to be of public nature, the aggravating circumstance refers exclusively to the use of mass media as suitable systems to reach an undetermined number of people;
- Sharing and republication of materials of which the users are not the authors can fall under aggravating circumstances (e.g. retweeting or sharing existing material in social media);
- Bear in mind that the purpose of aggravating circumstances is the increasing potential to cause harm to the victims through the use of massive means of communication. Hence, the requirement is that the message had real possibility of being accessed through massive dissemination and not to persecute spontaneous messages or temporary reactions that may be based on individual interests or unable to reach further audiences given the technical characteristics of technology.



ARTICLE 19 welcomes the importance placed on the fact that reactionary and spontaneous messages should not be prosecuted and the balanced description concerning the use of technology for freedom of expression and the risk that technology poses for other fundamental rights.

However, aggravated penalties for sharing or republishing third-party content raise concerns from the perspective of the proportionality of sanctions. This guideline should be withdrawn and specify that the aggravating circumstances under Article 510.3 should be strictly limited to cases of direct incitement to discrimination, hostility and violence that complies with the six-part test of the Rabat Plan of Action.

**Recommendations:**

- Withdraw from the approach and criterion that considers the republication of content on social media an aggravating circumstance under Article 510.3;
- Ensure that Article 510.3 applies only to cases that amount to direct incitement to discrimination, hostility and violence that complies with the six-part test of the Rabat Plan of Action.





## About ARTICLE 19

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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 and Policy team, you can contact us by email at: [legal@article19.org](mailto:legal@article19.org) For more information about the work of ARTICLE 19 in Spain, please contact the Europe and Central Asia team at [europe@article19.org](mailto:europe@article19.org).