



*Joint submission to the Universal Periodic Review of Spain by Freemuse,
PEN Català and PEN International*

For consideration at the 35th Session of the Working Group in January 2020

18 July 2019

Executive summary

Freemuse, PEN Català and PEN International welcome the opportunity to contribute to the third cycle of the Universal Periodic Review (UPR) of Spain. This submission evaluates the implementation of recommendations made in the previous UPR and assesses the Spanish authorities' compliance with international human rights obligations with respect to freedoms of expression, information and peaceful assembly, in particular concerns related to:

- The 2015 Law on Public Security and the reformed Criminal Code
- Attacks on the expression of political ideas
- Attacks on artistic freedoms
- Limitations on freedom of information
- Restrictions to the right to peaceful assembly

In 2015, the Spanish authorities accepted 169 recommendations out of 189, including some aimed at guaranteeing the rights to freedom of expression, information and peaceful assembly.¹ However, a crackdown on freedom of expression has been intensified since the review and civil society, including artists and journalists, has faced adversity from authorities.

The 2015 Law on the Protection of Public Security and the reformed Criminal Code: a threat to the rights to freedom of expression, information and peaceful assembly

In 2015, Spain accepted to revise existing laws and refrain from adopting new legislation placing undue restrictions and deterrents on the exercise of the rights to freedom of expression, information and

¹ UN Human Rights Council (2015), *Report of the Working Group on the Universal Periodic Review and addendum – Spain, A/HRC/29/8*

peaceful assembly.² Yet the Basic Law on the Protection of Public Security³ and the reforms introduced to the Criminal Code,⁴ published in the Official State Gazette on 31 March 2015, jeopardize the lawful exercise of these fundamental rights.⁵

1) The Basic Law on the Protection of Public Security

This Basic Law - usually referred to as *gag law* - has been enacted in a context of growing social movements that do not justify the necessity of adopting such a norm focused on repression of protest and dissent.

As stated by public institutions specialized in human rights, it establishes an administrative control model that '*privileges the presumption of veracity of law-enforcement officials over the presumption of innocence*'⁶. In addition, this norm presents broad and vague definitions that concede excessive leeway to the executive powers of the State whilst restricting individual freedoms. Furthermore, the penalty system established by this basic law entails a broad catalogue of economic sanctions of excessive amounts that might deter people from exercising their fundamental rights.⁷

1.1) Main limitations on the rights to freedom of expression and information

Pursuant to Article 36, is considered a serious administrative offence '*the unauthorized use of images or personal or professional data of authorities or of law-enforcement authorities which could endanger their personal or family security, the protected facilities or jeopardize the success of an operation*'⁸. This administrative offence, especially in the event of possible police malpractice, represents '*an essential limit to the freedom of information as well as a source of self-censorship*'.⁹

Similar effects on the lawful exercise of the right to freedom of expression may be implied by the administrative offence established in the Article 37(4) of the *gag law*. According to this provision, '*disrespect and lack of consideration towards law-enforcement officials*' constitutes a minor offence. Such a wording entails a source of discretion to authorities for the expressions proffered, for example, in the course of a demonstration.

² UN Human Rights Council (2015), *Report of the Working Group on the Universal Periodic Review and addendum – Spain, A/HRC/29/8*, recommendations 131.109 (Serbia), 131.110 (Sweden), 131.111 (Chile), 131.112 (Costa Rica), 131.113 (Czech Republic) and 131.115 (Switzerland)

³ Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana

⁴ The reform of the Criminal Code was implemented through two basic laws: on one side, the *Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal* and, on the other, the *Ley Orgánica 2/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, en materia de delitos de terrorismo*

⁵ Human Rights Office of the High Commissioner (OHCHR), *Two legal reform projects undermine the rights of assembly and expression in Spain - UN experts*, 23 February 2015: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597&LangID=E> and

⁶ Catalan Ombudsman, *Síndic de Greuges*, (2017), *Retrocesos en materia de derechos humanos: libertad de expresión de los cargos electos y separación de poderes en el Reino de España*, http://www.sindic.cat/site/unitFiles/4402/Informe%20retrocesos_derechos_humanos.pdf. According to Article 52, law-enforcement officials enjoy a rebuttable presumption of veracity of the facts they have witnessed.

⁷ Sanctions range from 100 euros to 600,000 euros, depending on the severity of the infraction.

⁸ Article 36(23) of the Basic Law on the Protection of Public Security.

⁹ PEN Català (2019), *Informe: La Libertad de Expresión y el Discurso de Odio en España*, <https://pen-international.org/es/noticias/informe-la-libertad-de-expresion-y-el-discurso-del-odio-en-espana>.

1.2) Main limitations on the right to freedom of peaceful assembly

During the last UPR, Spain pledged to uphold the right to peaceful assembly.¹⁰ Yet existing Spanish legislation does not recognize the right to hold spontaneous demonstrations, as provided for in international standards.

Prior notification is still required, with the *gag law* notably imposing fines for the organizers and promoters that do not comply with this legal requirement.¹¹

In such cases, it establishes that those who could reasonably seem to be presiding over the demonstration or the meeting can be considered as their organizers.¹² Active participation in these forms of protest might thereby imply the likelihood of being held responsible for the very serious infringement envisaged by the *gag law* and therefore has an undeniable deterrent effect on its exercise.

The *gag law* allows competent authorities to adopt '*the necessary measures to protect the celebration of meetings and demonstrations by preventing the disruption of public security*'¹³. Thus, its purpose is not to dissolve meetings and demonstrations when disturbance of public order *occurs*¹⁴, but to enable the competent authorities to *prevent* the disruption of public safety. The introduction of this additional limit to the exercise of the right protected by Article 21 of Spain's Constitution entails the possibility of administratively sanctioning conduct under a pretext of prevention.

This perspective collides with what the *Tribunal Constitucional* (henceforth, Constitutional Court) pointed out in its ruling 301/2006 where it is stated that '*in a democratic society the urban space is not only a sphere of circulation, but also a sphere of participation*'.¹⁵

Furthermore, the current legislation - drafted in such vague terms - grants to the competent authorities broad discretion to decide on the dissolution of a meeting or a demonstration, a decision that may even be taken orally.¹⁶ The *gag law* thereby punishes by means of hefty fines¹⁷ protests in front of Congress, the Senate or regional legislative assemblies, even if not reunited in session, when they imply a '*serious disruption of public safety*'. Such administrative penalties are prompting concerns that the measure intends to discourage all forms of protests targeting political institutions.¹⁸

¹⁰ UN Human Rights Council (2015), *Report of the Working Group on the Universal Periodic Review and addendum – Spain, A/HRC/29/8*, recommendations 131.109 (Serbia), 131.111. (Chile), 131.112 (Costa Rica) and 131.115. (Switzerland).

¹¹ Articles 35(1) and 37(1) of the Basic Law on the Protection of Public Security.

¹² Article 30(3) of the Basic Law on the Protection of Public Security.

¹³ Article 23(1) of the Basic Law on the Protection of Public Security.

¹⁴ This is the approach sustained by the Basic Law 9/1983, of 15 July, regulating the right of assembly. Pursuant its Article 5, '*meetings and demonstrations may be dissolved when: [...] disturbances of public order occur, endangering persons or property*'.

¹⁵ Constitutional Court (2006), *STC 301/2006*, 23 October, <https://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-2006-20651.pdf>.

¹⁶ Article 23(3) of the Basic Law on the Protection of Public Security.

¹⁷ From 601 to 30,000 euros.

¹⁸ Amnesty International (2014), *Spain: the right to protest under threat*, https://www.amnesty.org.uk/files/spain_-_the_right_to_protest_under_threat_0.pdf

The same applies to prohibited or non-notified demonstrations celebrated in *critical infrastructures*¹⁹ or their surroundings when a *'risk to life or people's physical integrity'* has been produced by demonstrators. The *gag law* equates, thereby, non-notified meetings or demonstrations to forbidden ones.

2) The 2015 Reform of the Criminal Code

The reform of the Criminal Code was implemented through a legislative package composed of two basic laws: the Basic Law 1/2015 and the Basic Law 2/2015, both of 30 March 2015 (henceforth, the 2015 Reform).

The Basic Law 2/2015 introduced several modifications to 'glorification of terrorism' criminal offences.

It broadened the scope of Article 578 of the Spanish Criminal Code and increased penalties²⁰ for *'public glorification or justification'* of terrorism offences,²¹ or of *'those who participated in their execution'*. It also proscribes *'the performance of acts involving the discrediting, disparagement or humiliation of the victims of terrorist offences or their families'*. These penalties are raised if the punished expressions or facts are conveyed or carried out through electronic means.²²

Furthermore, Article 579 of the Criminal Code criminalizes *'public dissemination of messages or slogans which have the purpose or which, because of their content, are suitable for inciting others to commit any of the offences in this Chapter'*²³; chapter concerning terrorism. Public incitement to commit these offences is also punished by this provision.

The effects of these provisions on freedom of expression have given rise to concerns among non-governmental organisations²⁴ and international organisations²⁵. The current drafting of these Articles and their application by the courts are *'far from in line with international standards on freedom of expression'*²⁶ and have been used by authorities to target political speech -especially when conveyed through social media- and artistic speech. UN experts have also stated that the definition of these offenses *'are too broad and vague'* and that *'as drafted, the anti-terror law could criminalise behaviours*

¹⁹ Article 35(1). This Article targets *'unreported or prohibited meetings or demonstrations in infrastructure or facilities in which basic services are provided for the community or in its vicinity, as well as intrusion into their premises, including overflight'*. The sixth additional provision of this Basic Law details what types of infrastructures are concerned.

²⁰ Without prejudice to aggravating circumstances and other security measures, this provision punishes the referred conducts by imprisonment for a term of one to three years and a fine of twelve months to eighteen months.

²¹ Namely, the public glorification or justification of the terrorism offences described in Articles 572 to 577 of the Criminal Code.

²² In such cases, the provided penalties shall be imposed in the upper half.

²³ These conducts shall be punished by a penalty one or two degrees lower than that prescribed for the concerned offence.

²⁴ Amnesty International (2018), *Tweet... if you dare. How counter-terrorism laws restrict freedom of expression in Spain*, <https://www.amnesty.org/download/Documents/EUR4179242018ENGLISH.PDF>

²⁵ Council of Europe (2018), *Misuse of anti-terror legislation threatens freedom of expression*, <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression>.

²⁶ Amnesty International (2018), *Sal a la calle... si te atreves. Tres años de la aplicación de la Ley Orgánica de Seguridad Ciudadana*, <https://doc.es.amnesty.org/ms-opac/recordmedia/1@000030148/object/38826/raw>.

that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise of freedom of expression'.²⁷

According to the Constitutional Court, '*public glorification or justification of terrorism*' can be considered as a '*form of hate speech for promoting or encouraging, even indirectly, a situation of risk to persons or rights of third parties or to the system of freedoms itself*'²⁸. This connects '*public glorification or justification of terrorism*' with the other main criminal offence reviewed by the 2015 Reform: hate speech.²⁹

Under Article 510 of the Criminal Code³⁰, the harshest penalties are reserved to *direct or indirect public incitation to hatred or violence against groups or their members*³¹. On the same grounds, this provision also punishes the *production or distribution of writings or materials that, due to their content, are suitable to directly or indirectly incite to hate or violence towards groups or their members*.³²

Moreover, Article 510 criminalizes the *negation, apology or serious trivialization* of the most heinous crimes committed against groups or its members on the basis of their personal characteristics or status, provided that this conduct '*promotes or fosters a climate of violence, hostility, hatred or discrimination against them*'.³³

Aside from punishing the previous conducts, Article 510 also penalizes - although with more lenient penalties - those who by means of '*humiliation, contempt or discredit undermine the dignity of a group or its members*' on the basis of one the listed motives.³⁴

²⁷ United Nations (2015), '*Two legal reform projects undermine the rights of assembly and expression in Spain*' – UN experts, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597>.

²⁸ Constitutional Court (2016), STC 112/2016, 20 June, <http://hj.tribunalconstitucional.es/es/Resolucion/Show/25026>

²⁹ Hate speech crimes, according to European and international standards, were mainly sought to protect historically discriminated or vulnerable groups or their members. Thus, and although there is no consensus on its definition, the Council of Europe has broadly conceptualized hate speech as 'all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin'. A criminal response to hate speech was fostered by the Council of the European Union, and on this basis, Spain reviewed its criminal legislation on hate speech by the 2015 Reform. Thus, the reformed Article 510 of the Spanish Criminal Code punishes a wide range of conducts - even broader than those defined by the EU Council. See: Committee of Ministers of the Council of Europe (1997), *Recommendation no. R(97)20 on Hate Speech*. Also see: European Commission against Racism and Intolerance (2015), *ECRI General Policy Recommendation no. 15 On combating hate speech*, December 2015, CRI(2016)15.

³⁰ As reformed by the Basic Law 1/2015 of 30 march.

³¹ According to Article 510(1)(a), public encouragement, promotion or direct or indirect incitation of hatred, hostility, discrimination or violence must be motivated for racist, anti-Semitic or other grounds related to ideology, religion or belief, family status, membership of an ethnic group, race or nation, national origin, sex, sexual orientation or identity, gender, disease or disability.

³² Article 510(1)(b).

³³ According to Article 510(1)(c), these crimes include genocide, crimes against humanity or against protected people or goods in case of armed conflict, or the glorification of its authors.

³⁴ Article 510(2)(a) also punishes the *production or distribution of materials that, due to their content, are suitable for injuring the dignity of individuals*, provided these acts represent a serious humiliation, contempt or discredit for such groups or its members.

Finally, Article 510 punishes '*public glorification or justification of crimes*' committed against a group or its members by means of '*public expression or dissemination*' on the basis of their personal characteristics or status.³⁵

Punishments for all the previous criminal offences may be increased when they are committed through '*means of social communication, Internet or information technologies in such a way access is granted to a large number of persons*'³⁶. Furthermore, Article 510 also enshrines aggravating circumstances when the punished conduct is '*suitable for disturbing the public peace or creating a serious feeling of insecurity or fear among the members of the group*'.³⁷

As evidenced by the cases referred to in this report, the current legal interpretation of Article 510 by the Spanish judicial authorities is distorting the *ratio legis* of the notion of hate speech to extend its application to critical or dissenting political discourses, often expressed on social networks and also arising from the artistic community. This application is contrary to international human rights standards and to the very *raison d'être* of the norm.

Furthermore, punishing even indirect incitement might criminalize, not the incitement to perform an unlawful action, but an idea itself, which results in an excessive curtailment of the essential content of freedom of expression: the right to convey an idea or an opinion.³⁸

The current wording of Article 510 of the Spanish Criminal Code as well as its denatured application by judicial authorities is used to penalize ideas.³⁹

Attacks on the expression of political ideas

The aforementioned criminal offences have in many cases been applied to condemn the expression of political ideas, criticism and protest.

As affirmed by the Council of Europe, the offence of '*public glorification or justification of terrorism*' enshrined in Article 578 of the Spanish Criminal Code '*has increasingly been used since 2015, with a reported chilling effect on freedom of expression*'. Amnesty International has detected a marked

³⁵ Article 510(2)(b). This criminal offence also covers public glorification or justification of those who have participated in the executions of these crimes. For conducts covered by Article 510(2)(b), *aggravating circumstances* may be applied when they *promote or foster a climate of violence, hostility, hatred or discrimination against those groups*.

³⁶ Article 510(3).

³⁷ Article 510(4).

³⁸ Thus, the Council of the European Union's Framework Decision of 2008 urges states to punish '*publicly inciting to violence or hatred directed against a group of persons or a member of such a group [...]*'. However, the criminal offence of '*publicly inciting to violence or hatred*' does not necessarily compel States to provide limitations on freedom of expression only when such expressions directly lead to an unlawful action. As it has already been put forward in the ECRI's no. 15 Recommendation, *incitement* shall be construed as '*statements about groups of persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them*'.

³⁹ As the European Commission against Racism and Intolerance (ECRI) recalls in the preamble of its Recommendation no. 15: '*aware of the grave dangers posed by hate speech for the cohesion of a democratic society, the protection of human rights and the rule of law but conscious of the need to ensure that restrictions on hate speech are not misused to silence minorities and to suppress criticism of official policies, political opposition or religious beliefs*'.

increase in the application of this Article: while during the period 2011-2013 only 23 people had been convicted on this ground, during the period 2015-2017, 84 people have been convicted.⁴⁰

In 2016 the Constitutional Court refused to protect the right to freedom of expression of **Tasio Erkizia**, a Basque politician, reasoning that his conduct should be categorized as hate speech⁴¹. Tasio Erkizia was sentenced for '*public glorification or justification of terrorism*' by the *Audiencia Nacional* (henceforth, the Spanish National Court) for participating in a tribute to a member of Spain's armed Basque group, ETA, killed in 1978. Placing a red carnation in front of his photo, Erkizia had asked for '*a reflection to choose the most suitable path, the path that does the most damage to the State, that leads this people to a new democratic scenario*'.

The Constitutional Court considered that '*public glorification or justification of terrorism*' is a '*form of hate speech for promoting or encouraging, even indirectly, a situation of risk to persons or rights of third parties or to the system of freedoms itself*', and dismissed his *amparo* appeal on this ground. It added that such forms of expression '*create a certain breeding ground, an atmosphere or a social environment prone to terrorist actions, a prelude to the crime itself*'.

This decision implies that some ideologies are *per se* illegitimate and shall be categorized as intolerant or hostile ideas by their mere expression. Thus, the diffusion of such ideas can be considered as an incitation to commit criminal offences in so far as they create an atmosphere or a social environment that, contingently, leads someone to commit a crime. Here, hate speech is used to penalize ideas and not expressions that lead to an imminent risk of discrimination or violence.

Another example where Article 578 of the Spanish Criminal Code has been applied concerned **César Strawberry** (real name, César Montaña Lehmann), a singer of the rap-metal group *Def con Dos*. Although he was initially acquitted in 2016 by the Spanish National Court, on January 2017 the Supreme Court accepted the prosecutor's indictment and sentenced César Strawberry for glorifying terrorism and humiliating its victims.⁴² The artist had tweeted laudatory messages for the now defunct *Grupos de Resistencia Antifascista Primero de Octubre* (GRAPO) organization. The Supreme Court states that such expressions '*feed hate speech, legitimize terrorism as a formula for solving social conflicts*'.

Another example of the judiciary's misuse of the provisions on hate speech occurred in 2015 when the Constitutional Court decided to curb the right to freedom of expression of **Jaume Roura Capellera** and **Enric Stern Taulats**⁴³. The Constitutional Court dismissed their *amparo* appeal and confirmed the judgment delivered by the Appeals Chamber of the Spanish National Court. They had been convicted of the crime of lèse-majesté (*delito de injurias a la Corona*) for burning an upside-down photograph of the King and Queen of Spain during an antimonarchical and pro-independence gathering. This gathering was produced on the occasion of the King's visit to the city of Girona in Catalonia, and was preceded by a demonstration led by a banner that read '*300 years of Bourbons, 300 years fighting the Spanish occupation*'. The Constitutional Court accepted that their performance '*is not only an offensive act but*

⁴⁰ Amnesty International (2018), *Sal a la calle... si te atreves. Tres años de la aplicación de la Ley Orgánica de Seguridad Ciudadana*, <https://doc.es.amnesty.org/ms-opac/recordmedia/1@000030148/object/38826/raw>.

⁴¹ Constitutional Court (2016), *STC 112/2016*, 20 June, <http://hj.tribunalconstitucional.es/es/Resolucion/Show/25026>

⁴² PEN International (2018), *The PEN International Case List 2018*, <https://pen-international.org/app/uploads/PEN-Case-List-FULL-Web-2018.pdf>

⁴³ Constitutional Court (2015), *STC 177/2015*, 22 July, <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24578>

also an incitement to hatred, insofar as the burning of their physical image expresses, in a way that is hardly surmountable, that they [the King and the Queen] are worthy of exclusion and hatred'.

Thus, hate speech legislation is being used to exclude from freedom of speech, not expressions that incite imminent actions of violence, but ideas that might provoke hatred against the King and the Queen of Spain, that is to say, the expression of specific ideologies. Such a construction has been denied by the European Court of Human Rights as a form of political criticism on a matter of public interest⁴⁴: *'the inclusion in hate speech of an act which [...] is the symbolic expression of the rejection and political criticism of an institution and the resulting exclusion from the scope of protection guaranteed by freedom of expression would imply an overly broad interpretation of the exception allowed by the Court's case-law -which could harm pluralism, tolerance and broadmindedness without which there is no "democratic society"'*.

Attacks on artistic freedoms

In 2017, Freemuse documented 13 imprisonments in Spain; all of which were against rappers and filed on the grounds of glorification of terrorism and/or insulting the crown.⁴⁵ In 2018, one sentence was upheld and 12 were reduced, meaning that they are suspended sentences. Given this, if another charge is brought against them they will be sent to prison. These sentences have created a dangerous precedent in Spain where freedom of expression violations transcends into unlawful restrictions on peaceful political engagement.

This is evident in the case of **Valtònyc** (real name Josep Miquel Arenas Beltrán) who was sentenced to three years and six months in prison, a fine of 3,000 euros and a ban from holding public office for eight years on 20 February 2018. The artist was initially sentenced on 21 February 2017 by the Spanish National Court for songs posted on YouTube, MySpace and hip-hop music portal HHGroups that were considered to have insulted and directly threatened politicians, prominent public figures and most of the Royal family members in his lyrics. Valtònyc appealed the sentencing delivered by the Spanish National Court but the *Tribunal Supremo* (henceforth, the Supreme Court) subsequently upheld the judgement on 15 February 2018. Following this, the artist lodged an *amparo* appeal for the protection of his fundamental rights in May 2018 to the Constitutional Court on the grounds of protected speech and freedom of expression but this was rejected. In response, the rapper fled to Belgium some days before his period of voluntary entry to prison expired.

In 2018, the Spanish National Court subsequently issued national, European and international arrest warrants against the rapper. However, in September 2018 a court in Ghent ruled that Valtònyc should not be extradited to Spain because 'glorification of terrorism' and 'insulting the royal family'⁴⁶ do not constitute offences under Belgian law. At present, he remains in Belgium and whilst awaiting the judgement of the European Court of Human Rights he released his third album on 23 May 2019.

In a similar case, the 14-member rap group **La Insurgencia** were summoned to court in 2017 after a street performance and prosecuted for lyrics of their songs alleged to express support for the now

⁴⁴ European Court of Human Rights (2018), *Stern Taulats et Roura Capellera c. Espagne*, 51168/15 and 51186/15, march 2018, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-181719%22%5D%7D>.

⁴⁵ Freemuse (2018), *The State of Artistic Freedom 2018*, <https://freemuse.org/wp-content/uploads/2018/05/FreeMuse-The-state-of-artistic-freedom-2018-online-version.pdf>

⁴⁶ Article 490(3) of the Spanish Criminal Code criminalizes the false accusation of a crime (*calumnia*) or the defamation (*injuria*) to the Crown members *"in exercise of their functions or on the occasion thereof"*.

defunct *Grupos de Resistencia Antifascista Primero de Octubre* (GRAPO) organization. La Insurgencia's reference of GRAPO's 'unjust imprisonment' by the 'true terrorists - fascist Spanish State' for the 84 assassinations undertaken in the 1970s and 1980s was used by Spain's Public Prosecutor as justification for their imprisonment. Following their trial, 12 members of the group were sentenced in December 2017 by the Spanish National Court to two years and one day in prison, a fine of 4,500 euros and a ban from standing for public office for nine years each on the charge of glorification and justification of terrorism in their song and video lyrics. One minor in the group was directed to a separate prosecution and the 14th member was acquitted due of a lack of evidence associating him with the songs and videos on trial.

In a positive development, on 19 September 2018 the Appeals Chamber of the National Court in Madrid reduced La Insurgencia's original sentence from two years to six months on the basis that GRAPO were inactive when the band referenced them in their song lyrics. The Public Prosecutors office in Spain has continued to demand that the original sentence is upheld. However, the reduction mandates that anyone sentenced to imprisonment for under two years do not need to physically go to prison.⁴⁷ La Insurgencia have announced their decision to appeal this judgement.

On 2 March 2018, rapper **Pablo Hasél** (real name Pablo Rivadulla) was found guilty of praising terrorism and insulting the Spanish state and royal institutions. The charges related to a series of social media messages that Hasél had posted on Twitter about members of a now dissolved terrorist organisation⁴⁸ and a song he posted on YouTube⁴⁹ where he criticised the Spanish royal family. In September 2018, Hasél's sentence of two years and one day imprisonment and 24,300 euros was reduced by the Appeals Chamber of the Spanish National Court to nine months on the basis that the rappers' social media messages did not pose a 'threat' to people reading the content.⁵⁰ Given the reduction in sentencing Hasél would have been able to evade imprisonment. However, in 2015 he was already given a two-year suspended prison sentence for glorifying terrorism which means that the rapper is expected to be sent to prison.

Beyond charges related to terrorism, but with similar effects on the freedom of expression, the 2015 Basic Law on the Protection of Public Security has also been used to penalize expressions made by artists. Thus, in 2018 a singer (**Evaristo Páramos**) was reported to the authorities because of an insulting statement against the police made immediately after finishing a concert. The artist was reported on the basis of Article 37(4) which punishes '*disrespect and the lack of consideration*' towards law-enforcement authorities⁵¹.

⁴⁷ Gascon Bernabeu (2018). *Suspension of sentence in Spain for convictions of two years or less*, <https://www.gbabogados.co.uk/suspension-sentence-spain-convictions-two-years-less/>

⁴⁸ Read more here: <https://www.politico.eu/article/spains-real-rap-battles-catalonia-pablo-hasel-josep-valtonyc/>

⁴⁹ Pablo Hasél (2016), *Pablo Hasél,,, Juan Carlos el Bobón*, <https://www.youtube.com/watch?v=S6VcZidg66Q>

⁵⁰ Catalan News (2018), *Court sentences Catalan rapper to 2 years in prison for lyrics and tweets*, <http://www.catalannews.com/society-science/item/court-sentences-catalan-rapper-to-2-years-in-prison-for-lyrics-and-tweets>

⁵¹ Freemuse (2018), *Spain: Iconic punk Singer charged during performance*, <https://freemuse.org/news/spain-iconic-punk-singer-charged-during-performance/>; *Estructura de Drets Humans de Catalunya* (2019), working paper for the drafting of the Human Rights Plan of Catalonia with the participation of the Catalan Ombudsman (*Síndic de Greuges*). *Dret a la llibertat d'expressió, informació i comunicació*, http://www.sindic.cat/site/files/480/Llibertat%20d%27expressi%F3_dret%20a%20la%20informaci%F3%20i%20comunicaci%F3.pdf.

Limitations on freedom of information

The *gag law* has been used against journalists for their reporting on police actions taken in the context of ongoing protests against Spanish politics.⁵² As well as facing administrative fines and charges under the law, journalists have reportedly been placed under pressure by both sides to the Catalonia independence movement and have been subject to varying forms of intimidation by non-state and state actors on social media, and in person, for their reporting.⁵³

Since 2017, Reporters Without Borders noted 40 cases where abusive behaviour was targeted at journalists in Catalonia, with the incidents ranging from direct violence to verbal insults as well as fines.⁵⁴

In December 2018, the Spanish police attempted to identify the source of a leak used to report on a high-profile corruption case involving a discotheque chain owner. **Blanca Pou** from *Europa Press* and **Kiko Mestre** from the *Diario de Mallorca* who specialise in reporting on crime and legal cases had been researching the case of corruption in the Balearic Islands. During the investigation of this case a report protected by judicial confidentiality was leaked and the judge ordered the seizure of the laptops, mobile phones and files of the two journalists as well as to obtain their lists of calls and ge positioning.⁵⁵ The judge investigating the leak authorised the police to examine Pou and Mestre's emails, WhatsApp and social media messages.

In 2017, **Mercè Alcocer**, a journalist from Catalunya Radio was fined 601 euros for disobeying a police order to stay behind an unmarked police line outside a Madrid Court during the testimonial from Jordi Pujol, former prime minister of Catalonia, in a corruption case. Security camera footage substantiated her compliance with police orders to step back once she had been made aware of the line and her lawyers have filed an appeal. The *Defensor del Pueblo* (henceforth, Spanish Ombudsman) suggested the authorities to repeal this sanction.⁵⁶

On the basis of this Basic Law, a journalist of the Basque magazine *Argia* was fined in 2016 for publishing on his Twitter account images of a detention. The journalist was punished because the authorities considered that publication as an unauthorised use of images of law-enforcement authorities.⁵⁷

Freedom House suggests that those working in the media have imposed forms of self-censorship in response to pressure from domestic businesses, government policies – especially the *gag law* and because of continuing tensions in relation to the calls for Catalanian independence.⁵⁸

⁵² Amnesty International, *Spain 2017/2018*, <https://www.amnesty.org/en/countries/europe-and-central-asia/spain/report-spain/>

⁵³ PEN International (2018), *PEN International concerned about deteriorating climate for freedom of expression in Catalonia*, <http://pen-international.org/news/pen-international-concerned-about-deteriorating-climate-for-freedom-of-expression-in-catalonia>

⁵⁴ Reporters Without Borders (2019), *Spain*, <https://rsf.org/en/spain>.

⁵⁵ *Ibid.*

⁵⁶ Defensor del Pueblo (2017), *Letter in procedure n. 16007085*, <http://libertadinformacion.cc/wp-content/uploads/2017/11/Carta-Defensor-23102017.pdf>

⁵⁷ Defensor del Pueblo (2017). *Informe anual 2016*, https://www.defensordelpueblo.es/wp-content/uploads/2017/02/Informe_anual_2016.pdf

⁵⁸ Freedom House (2018), *Terrorism Laws Are Threatening Freedom of Expression in Spain*, <https://freedomhouse.org/blog/terrorism-laws-are-threatening-freedom-expression-spain>

During the last UPR, Spain rejected a recommendation to decriminalise defamation⁵⁹ which remains a criminal offence in the Spanish Criminal Code and carries a 14 months fine.⁶⁰ Journalists continued to be the targets of criminal defamation claims in the period under review, including in cases of corruption.⁶¹

Restrictions to the right to peaceful assembly: events in Catalonia

On 1 October 2017 the Government of Catalonia held a referendum on the autonomous region's independence, despite several constitutional court rulings that such an act was unlawful.⁶²

During the course of the movement, some authorities in Spain disproportionately restricted the rights to freedom of expression and peaceful assembly. Courts in both Madrid and Vitoria prohibited two public assemblies which were expected to be held in support of the referendum. One Catalan municipality enforced a blanket ban on the use of public spaces for groups supporting or opposing the referendum.⁶³

Writers and Catalan civil society leaders **Jordi Sànchez** and **Jordi Cuixart** were taken into custody on 16 October 2017 on charges of sedition and were subsequently charged with rebellion in March 2018, in what amount to excessive restrictions of their rights to freedom of expression and peaceful assembly.⁶⁴ In May 2019, the UN Working Group on Arbitrary Detention condemned their prolonged detention as arbitrary and called for their immediate release.⁶⁵ They face up to 17 years in prison if convicted; trial was ongoing at the time of writing.

Although in 2015 Spain accepted recommendations on the use of force and other forms of ill-treatment by its law-enforcement officials,⁶⁶ reports of excessive use of force by law enforcement agencies against journalists and photographers continued to be documented in the period under review, including during

⁵⁹ UN Human Rights Council (2015), *Report of the Working Group on the Universal Periodic Review and addendum – Spain*, A/HRC/29/8, recommendation 131.108 (Estonia)

⁶⁰ Under Article 209 of the Spanish Criminal Code, 'which remains a criminal offence in the Spanish Criminal Code 'severe defamation perpetrated with publicity shall be punished with the penalty of a fine from six to 14 months and, otherwise, with that of three to seven months'.

⁶¹ International Press Institute, In Spain, journalists covering corruption are targeted in court, 29 May 2018, available at: <https://ipi.media/in-spain-journalists-covering-corruption-are-targeted-in-court/>

⁶² On 17 October, the Constitutional Court confirmed previous measures passed one month prior in September that aimed at preventing the referendum, and reiterated its position that the vote was unconstitutional. Ten days later, pro-independence groups in the Catalan regional parliament unilaterally declared the region's independence. In response to this move, the Senate authorised the Spanish Government to adopt measures pursuant to Article 155 of the constitution, which effectively intervened on the region's political autonomy from the 27 October 2017 until the 2 June 2018 by, among other measures, removing the members of the Catalan Government, dissolving the Catalan Parliament and calling for elections.

⁶³ Amnesty International (2018), *Spain 2017/2018*, <https://www.amnesty.org/en/countries/europe-and-central-asia/spain/report-spain/>

⁶⁴ PEN International (2019), *Spain: Excessive charges against Jordi Sànchez and Jordi Cuixart must be dropped*, <http://pen-international.org/news/spain-excessive-charges-against-jordi-sanchez-and-jordi-cuixart-must-be-dropped>

⁶⁵ Working Group on Arbitrary Detention, Opinion No. 6/2019 concerning Jordi Cuixart I Navarro, Jordi Sànchez I Picanyol and Oriol Junqueras I Vies (Spain), A/HRC/WGAD/2019 (2019), para. 146

⁶⁶ UN Human Rights Council (2015), *Report of the Working Group on the Universal Periodic Review and addendum – Spain*, A/HRC/29/8, recommendations 131.114 (Russian Federation), 131.115 (Switzerland), 131.52 (Netherlands), 131.53 (Australia), 131.56 (Poland), 131.57 (Germany) and 131.58 (Hungary)

referendum-related demonstrations in Catalonia. ⁶⁷No police officer has been convicted to date. ⁶⁸The Department of Health reported⁶⁹ that 893 people required medical assistance from professionals of the Emergency Medical Service related to the raids carried out by the police forces, two of them in serious condition. The Catalan Ombudsman (*Síndic de Greuges*) also stated⁷⁰ that Examining Court (*Juzgado de Instrucción*) No. 7 of Barcelona is already investigating more than two hundred complaints for injuries caused by these police forces on 1 October.

Recommendations

We recommend that Spain undertake the following actions:

- Develop programmes to increase dialogue and create awareness between political groups and artists to prevent artists from any form of harassment or violation based on support for certain political ideologies and expressions;
- Review the Basic Laws 1/2015 and 2/2015 in order to comply with the international standards for freedoms of expression, information and peaceful assembly as provided in the European Convention on Human Rights as construed by the European Court on Human Rights and the International Covenant on Civil and Political Rights. In particular:
 - Repeal Articles 578 and 579 of the Spanish Criminal Code and draft a precise definition of ‘*public glorification or justification*’ or other forms of incitement to commit terrorist acts. Such provisions shall not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition and shall not lead to unnecessary or disproportionate interference with freedoms of expression or information. These offences may only be applied to expressions which: (a) necessarily and directly imply the imminent use of terrorist violence; (b) are likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.
 - Repeal Article 510 of the Spanish Criminal Code and draft a precise definition of ‘hate speech’ or expressions that incite to discrimination, violence or hostility towards minorities or vulnerable groups. This provision should only apply to the most severe form of opprobrium and should take into consideration: (a) the context; (b) the speaker’s identity or status; (c) intent to incite or advocate; (d) content and form; (e) extent and magnitude of the speech; (f) likelihood of discrimination, hostility or violence occurring as a direct and imminent consequence of the incitement.

⁶⁷ Human Rights Watch (2017), Spain: *Police Used Excessive Force in Catalonia*, <https://www.hrw.org/news/2017/10/12/spain-police-used-excessive-force-catalonia>

⁶⁸ *Ibid.*

⁶⁹ Departament de Salut (2017), <https://govern.cat/gov/notes-premsa/303473/actualitzacio-del-departament-salut-relacio-persones-que-han-rebut-assistencia-sanitaria-durant-referendum-2-octubre-10-hores>

Generalitat de Catalunya (2017), <https://govern.cat/govern/docs/2018/10/17/09/51/dbcf0e00-d63f-4546-b268-f78b517b8893.pdf>

Iridia (2017), *Violación de derechos civiles y políticos. Cataluña. Septiembre y Octubre 2017*, http://iridia.cat/wp-content/uploads/Informe-DDHH_1OCT.pdf

⁷⁰ Síndic de Greuges (2017), *Informe-Síntesi de les actuacions dels Síndic de Greuges al voltant de l'1-O*, http://www.sindic.cat/site/unitFiles/4819/Informe%20sintesi%201octubre_catala.pdf

- All persons imprisoned because of the legitimate criticism they have expressed should be freed and the criminal records of those who have been convicted for such reports should be cleared.
- Review current legislation, in particular the Basic Law 4/2015 or *gag law*, to ensure that journalists can perform their job without undue interference or any form of censorship, granting an adequate atmosphere to freely carry their '*watch dog*' role;
- Amend all criminal defamation laws and allow issues of reputation to be addressed as civil law matters where the government has no role;
- Amend legislation that disproportionately limits the exercise of the right to freedom of assembly, particularly the *gag law*, and guarantee the right to spontaneous peaceful assemblies. Any restrictions should be strictly necessary and proportionate as stipulated under Article 19 of the International Covenant on Civil and Political Rights;
- Ensure that law-enforcement agencies and officials manage public order according to relevant international law and standards, in particular the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and promptly investigate allegations of excessive use of force.