Submission by Fair Trials to the United Nations Human Rights Council Universal Periodic Review: Spain

35th Session of the UPR Working Group January 2020

Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

In Europe, Fair Trials coordinate the Legal Experts Advisory Panel (LEAP) – the leading criminal justice network in Europe consisting of over 200 criminal defence law firms, academic institutions and civil society organisations. Through the LEAP network, Fair Trials conducts research and identifies emerging threats to the right to a fair trial across Europe.

Contact:

Laure Baudrihaye-Gérard
Senior Lawyer
Rue de la Pépinière 10A
1000 Bruxelles
laure.baudrihaye@fairtrials.net

Roseanne Burke
Legal and Policy Officer
5 Castle Road
London, NW1 8PR
roseanne.burke@fairtrials.net

Website: www.fairtrials.org

Executive Summary

Fair Trials welcomes the opportunity to contribute to the third cycle of the Universal Periodic Review (UPR) of Spain. This submission focusses on the ways in which broad counterterrorism laws are adversely impacting on human rights in Spain. In particular, counterterrorism laws have led to violations of freedom of expression, and pre-trial detention practice results in violations of the right to liberty, especially when combined with counterterrorism law. The excessive discretion that criminal law leaves to judges fundamentally undermines the rule of law in Spain.

Recommendations

I. Repeal Article 578 of the Criminal Code in line with Spain's obligations under international human rights law to protect freedom of expression.
II. Ensure that pre-trial decisions at all stages include specific reasoning tailored to the individual case to ensure judges engage with the personal circumstances of the defendant.
III. The law must provide for more alternative measures to pre-trial detention, and to ensure their use in practice, the Ministry of Justice should take responsibility for ensuring robust

accountability mechanisms are put in place that record data concerning pre-trial detention decision-making processes, such as outcomes of trials, usage of alternatives and violations of bail conditions.

IV. Whilst the amendment to reduce the length of investigation times is welcome, the law should be amended to include shorter maximum terms of duration of pre-trial detention, which may help accelerate investigations and pre-trial proceedings. There also needs to be meaningful review and oversight of the progress of investigations to help reduce the length of pre-trial detention periods.

Freedom of expression

1. Overly broad legislation for preventing the invocation of terrorist offences in Spain is being applied arbitrarily and in violation of the right to freedom of expression enshrined in international human rights law. Spain has failed to implement recommendations from the previous UPR cycle, during which it undertook several commitments to ensure the full enjoyment of the right to freedom of expression.[1]

2. In 2015, Spain amended Article 578 of the Criminal Code to broaden its scope to include the crime of 'glorification' or 'justification' of terrorism and 'humiliating the victims of terrorist crimes or their relatives'. The crime is punishable by up to three years in prison, fines and exclusion from the public sector. The UN Human Rights Committee, as well as 5 UN Special Rapporteurs, have raised concerns over the amendments and the potential impact on freedom of expression,[2] highlighting that such a broad or ambiguous definition could "pave the way for a disproportionate or discretionary enforcement of the law by authorities" and that it "could criminalise behaviours that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise of freedom of expression, amongst other limitations."

3. Although European Union Member States are required under Article 5 of EU Directive 2017/541 on combating terrorism[3] (**EU Directive**) to ensure that domestic legislation allows for the prosecution of the distribution of messages that advocate for the commission of a terrorist offence, including the 'glorification' or 'justification' of terrorist acts, Spanish legislation is overly broad, goes far beyond the EU Directive and lacks sufficient protections for free speech.

4. Crucially, the EU Directive requires states to criminalise communications that cause a danger that a terrorist offence will be committed, and are disseminated with the intent to incite a terrorist offence. The former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has previously provided guidance on how best to word criminal offences on incitement in order

---

[1] Recommendations 131.111 by Chile, 131.113 by Czech Republic, 131.109 by Serbia and 131.115 by Switzerland, UPR of Spain- Second Cycle, A/HRC/29/8/Add.1

[2] CCPR/C/ESP/CO/6, para 25; UN OHCHR '"Two legal reform projects undermine the rights of assembly and expression in Spain" - UN experts', February 2015, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597.

[3] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, available here.

to avoid human rights violations. 'Best practice' wording included both the element of intent and the danger that a terrorist offence would be committed as a result.[4]

5. These qualifications are absent from Article 578 of the Spanish Criminal Code, leaving authorities with overly broad discretion over the criminalisation of speech. In January 2017, the Supreme Court ruled that people could be found guilty of violating Article 578, even if there was no intent to actually glorify terrorism or humiliate victims of terrorism. Furthermore, domestic legislation has a separate criminal offence of incitement to terrorist acts under Article 579 of the Criminal Code, rendering Article 578 arbitrary as well as overly broad.

6. Since the amendment of Article 578 in 2015, Spanish authorities have prosecuted or attempted to prosecute magicians, puppeteers, students, journalists, videographers, lawyers and rappers under the offence.[5] Several cases were for speech that clearly constituted jokes, satire and artistic expression. As reported by Amnesty International, most prosecutions under Article 578 involve disbanded or non-active domestic armed groups. This is because international terrorist groups - which have carried out domestic terrorist attacks in the recent past and do pose a threat to national security - are prosecuted under more serious charges. This clearly demonstrates that authorities are equipped with other sufficient legislation to prosecute cases which genuinely pose a threat to national security, unlike the majority of those carried out under Article 578.

7. **Recommendation**: Repeal Article 578 of the Criminal Code in line with Spain's obligations under international human rights law to protect freedom of expression.

Right to liberty

8. There is no internationally accepted definition of terrorism, leaving a wide margin of discretion to states when enacting domestic legislation defining terrorist offences, as has been demonstrated above regarding the overreach of 'terrorist activities'. Where legislation allows for broad application of criminal law, the right to liberty is inevitably adversely impacted. Deprivation of liberty is one of the most severe sanctions available to the state, and must be exercised in accordance with the principles of international human rights law. Despite this, the overuse of pre-trial detention and lack of alternative measures remain systemic problems in Spain, which in some cases is further exacerbated by the misapplication of terrorism charges.

9. There have been no legislative or practical developments that would have any significant impact on the frequency with which pre-trial detention is applied in Spain since the last UPR, nor are there any future plans to introduce such legislation. In 2016, however, the maximum deadlines in which the courts must investigate a crime were reduced to 6 months for simpler cases and 18 months for more complex ones. Although the reform does not introduce a time limit for pre-trial detention as envisaged in the 2014 proposal, the reform nevertheless has

---

[4] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism, (December 2010), A/HRC/16/51 p.8.

[5] Amnesty International 'Tweet… If you dare: How Counter terrorism laws restrict freedom of expression in Spain', (2018).

the potential to reduce the time spent in pre-trial detention. However, to date, this is not reflected in the pre-trial detention figures.

10. The number of pre-trial detainees in Spain remains high overall. According to the World Prison Brief, the number of pre-trial detainees has increased since 2015. As at 3 May 2019, 15.3% of the prison population was made up of pre-trial detainees, as compared to an average of 12.6% in 2015.[6] The excessive use and duration of pre-trial detention in Spain is compounded in some cases by the misapplication of terrorism charges. Prosecuting offences as terrorist offences has a significant impact on fair trial rights in Spain, and in particular, on the potential abusive use of pre-trial detention. This is due to the existing tendency of the courts to order pre-trial detention on unlawful grounds such as the gravity of the offence, which has further negative consequences for those accused of terrorist offences. It also means that cases may be dealt with by the High Court- the Audiencia Nacional in Madrid, which has jurisdiction over terrorism cases. In Spain, terrorism charges have been applied to cases arbitrarily, violating the principles of necessity and proportionality, as well as the fair trials rights of the accused.

11. Such arbitrariness is flagrant in the case of the **Alsasua youths:**

    On the night of 15 October 2016, a group of young people between 19 and 24 years were in a bar in the town of Alsasua in Navarre, Spain, when a fight broke out with two other men, who it transpired were off-duty police officers (*Guardia Civil*). In the clash that followed, one of the officers suffered a broken ankle. Victims Association COVITE (*Colectivo de Víctimas del Terrorismo*) complained that the facts amounted to terrorism, and the Public Prosecutor and State Attorney brought terrorism charges against the suspects, alleging that some of the youths were members of the non-violent social movement called "*Alde Hemendik*", which supposedly had aims linked to the terrorist group ETA. In November 2016, 10 youths were arrested, and three[7] were placed in pre-trial detention in different prisons in Madrid, 400 km away from their homes, under a special supervision and control regime by prison services (*Ficheros de Internos de Especial Seguimiento*). Their pre-trial detention lasted over 2 and a half years – from November 2016 until they were sentenced in June 2018. Whilst they were not convicted on terrorist charges, 8 young adults were ultimately convicted and given sentences varying from 2 to 13 years in prison because of aggravating factors including 'ideological discrimination' in the case. The sentences are currently pending appeal before the Supreme Court, and seven of the youths are currently in detention. [8]

12. As is further explored below, the case is illustrative of the fundamental gaps in the Spanish legal system relating to pre-trial detention, which, combined with the broad reach of terrorism legislation, affords law enforcement and judicial authorities the scope to act arbitrarily, directly threatening the rule of law in Spain.

13. **First, pre-trial detention is, in practice, frequently ordered on the basis of unlawful grounds.** Under Article 503 of the Criminal Procedure Code, pre-trial detention can only be ordered in

[6] See: http://www.prisonstudies.org/country/spain.

[7] Adur Ramirez de Alda Pozueta, Jokin Unamuno Goikoetxea and Oihan Arnanz Ciordia were detained throughout the pre-trial proceedings from 14 and 16 November 2016 respectively until conviction on 1 June 2018, and remain in prison today, despite the conviction pending appeal.

[8] Adur Ramirez de Alda Pozueta, Jokin Unamuno Goikoetxea, Oihan Arnanz Ciordia, Iñaki Abad Olea, Aratz Urrizola Ortigosa, Jon Ander Cob Amilibia and Julen Goicoechea Larraza are currently in detention.

respect of crimes which carry a sentence of more than two years imprisonment, and its aim must be to ensure the presence of the accused during the hearing, or prevent the destruction of evidence, further criminal acts against the victim and other crimes from being committed. The case-law of the *Tribunal Constitucional* (Constitutional Court) reflects, in this respect, the European Court of Human Rights' interpretation of Article 5 of the European Convention of Human Rights, according to which detention may only be based upon a constitutionally sanctioned reason (to counter the risk of absconding or reoffending and/or to prevent interference with evidence), and must be proportionate, in accordance with international standards on the right to liberty.

14. However, in practice, particularly in the lower courts, pre-trial detention is the general rule, not the exception, and often based on unlawful grounds, in particular the severity of the offence. This emerges from the research that Fair Trials coordinated in ten EU Member States, including Spain (conducted with *Asociacion Pro Derechos Humanos de Espana*), where 64% of the surveyed lawyers (20 out of 31) agreed that they had observed unlawful grounds of detention being used, and three out of five of the judges interviewed admitted using the severity of the offence as a criterion for the imposition of pre-trial detention.[9] Using the seriousness of the offence has clear implications for people being prosecuted under counter terrorism laws.

15. The Alsasua case reveals the use of the severity of the offence as a ground for ordering pre-trial detention. The judge repeatedly rejected any requests for release for the three suspects held in pre-trial detention pending conviction, rejecting as many as seven requests for release.[10] The judge ruled that in view of the severity of the crime there was a high probability that the accused would abscond or reoffend. Despite the fact that, as argued by the defence, the youths had turned themselves in to the police, the judge continued to find a risk of absconding by relying exclusively on the seriousness of the alleged crime and the severity of the penalties faced by the accused if convicted. Moreover, the judge provided identical reasoning in respect of all three detainees, failing to address the specific personal circumstances for each of the accused.

16. **Recommendation:** Ensure that pre-trial decisions at all stages include specific reasoning tailored to the individual case to ensure judges engage with the personal circumstances.

17. **Second, there is a lack of alternative measures to pre-trial detention**. Given that pre-trial detention involves the deprivation of liberty of the individual under investigation and, therefore, a restriction on the fundamental right to liberty, the appropriateness of imposing

---

[9] See page 30 of the report produced by *Asociacion Pro Derechos Humanos de Espana* on the practice of pre-trial detention in Spain, which was produced under the coordination of Fair Trials and is available here: https://www.fairtrials.org/wp-content/uploads/18j.-Spain-Country-Report_English.pdf.

[10] In respect of Adur Ramirez de Alda Pozueta and Jokin Unamuno Goikoetxea, an initial appeal hearing against the pre-trial detention orders of 14 and 16 November 2016 was held on 19 December 2016, and dismissed. Subsequently, the defence made 6 further requests for release prior to sentencing (on 6 and 21 February 2017, 28 March 2017, 31 May 2017, 4 September 2017 and 23 November 2017), which were all dismissed. No hearings were held. In respect of OIhan Arnanz Ciordia, an initial appeal hearing against the pre-trial detention order of 14 November 2016 was held on 19 December 2016, and dismissed. Subsequently, the defence made 6 further requests for release prior to sentencing (on 22 December 2016, 13 January 2017, 25 March 2017, 6 April 2017, 29 May 2017 and 20 September 2017), which were all dismissed. No hearings were held.

other less onerous precautionary measures that infringe less on the right to freedom must be assessed. In this respect, international law states that pre-trial detention should only be imposed in exceptional circumstances. This is also applicable to Spanish case-law doctrine, where the application of pre-trial detention is governed by the basic principles of exceptionality and proportionality. As such, Article 502 of the Criminal Procedure Act requires the judge to order pre-trial detention only as a subsidiary measure when other less onerous measures do not exist.

18. However, the law in Spain limits the alternatives available to an exhaustive list: bail, compulsory appearance before the court, the prohibition to reside or visit certain places, or to approach or communicate with certain individuals. This has the effect of limiting innovation and case-specific solutions to individualised determinations of risk. Our research in Spain revealed that judges do not have confidence in alternative measures to pre-trial detention in cases of serious crimes. In the case analysis and hearing monitoring, (through which 55 case files were reviewed and 12 hearings monitored), judges decreed alternative measures in just 39% of cases.[11]

19. In the Alsasua case, the defence repeatedly put forward alternatives to detention, including an international travel ban, a bail bond, electronic monitoring or requiring defendants to appear before the court. The defence presented evidence to the court that the youths were studying, had fixed addresses, stable relationships and many family ties in the local area, such that there was no concern of the youths absconding. Further, any concerns over re-offending/interference with victim could be addressed by a prohibition from contacting the victims or going near them. The judge rejected all the defence's arguments and maintained pre-trial detention on the basis that the risk of absconding was high solely due to the seriousness of the charges and severity of the potential sentence. This is despite the fact that four of the other youths[12] in the case who were granted provisional freedom at the pre-trial stage complied with all of their required appearances before the court, which totalled over 120 from December 2016 to June 2018.

20. **Recommendation**: The law must provide for more alternative measures, and to ensure their use in practice, the Ministry of Justice should take on the responsibility of ensuring that robust accountability mechanisms are put in place that record data that concerns pre-trial detention decision-making processes, such as outcomes of trials, usage of alternatives and violations of bail conditions.

21. **The third area of concern is the potential length of pre-trial detention**. In Spain, pre-trial detention can be ordered for up to a maximum of four years, even though the European Court of Human Rights has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive.[13]

22. In practice, our research shows that renewal of detention orders after an initial two year period happened automatically, without interrogation as to the progress of the investigation

[11] See page 36 of the report produced by *Asociacion Pro Derechos Humanos de Espana* on the practice of pre-trial detention in Spain, which was produced under the coordination of Fair Trials and is available here: https://www.fairtrials.org/wp-content/uploads/18j.-Spain-Country-Report_English.pdf.

[12] Jon Ander Cob Amilibia, Julen Goicoechea Larraza, Iñaki Abad Olea and Aratz Urrizola Ortigosa

[13] *PB v France*, App 38781/97, 1 August 2000, para 34.

and usually on the same grounds as first ordered, though some reviews alluded (arguably unlawfully) to the “short time spent in prison in relation to the sentence that could be given to the detainee,”[14] thereby anticipating both a finding of guilt and the imposition of a lengthy sentence. Researchers noted that prosecutors and judges tended to refer only to the legal maximum lengths of detention, and not to any particular facts of the case. Accordingly, Spanish judges upheld detention in 85% of the cases Spanish researchers reviewed.[15]

23. In the Alsasua case, the three youths each spent over 2.5 years in pre-trial detention, from November 2016, throughout the duration of the investigation and up to sentencing in June 2018, and remain in prison today.

24. **Recommendation**: Whilst the amendment to reduce the length of investigation times is welcome, the law should be amended to include shorter maximum terms of duration of pre-trial detention, which may help accelerate investigations and pre-trial proceedings. There also needs to be meaningful review and oversight of the progress of investigations to help reduce the length of pre-trial detention periods.

25. In conclusion, the concerns expressed by the UN Human Rights Committee in 2015 that the overbroad definitions of terrorism-related offences could pave the way for a disproportionate or discretionary enforcement of the law by authorities have not been addressed by the Spanish State, leaving the door open to abusive use of criminal law in violation of the right to liberty and freedom of speech.

---

[14] See page 39 of the report produced by *Asociacion Pro Derechos Humanos de Espana* on the practice of pre-trial detention in Spain, which was produced under the coordination of Fair Trials and is available here: https://www.fairtrials.org/wp-content/uploads/18j.-Spain-Country-Report_English.pdf.

[15] See page 31 of the report produced by *Asociacion Pro Derechos Humanos de Espana* on the practice of pre-trial detention in Spain, which was produced under the coordination of Fair Trials and is available here: https://www.fairtrials.org/wp-content/uploads/18j.-Spain-Country-Report_English.pdf.