



MINISTERIO
DE JUSTICIA

ABOGACÍA GENERAL DEL ESTADO
DIRECCIÓN DEL SERVICIO JURÍDICO DEL ESTADO

SUBDIRECCIÓN GENERAL DE CONSTITUCIONAL Y
DERECHOS HUMANOS

ÁREA DE DERECHOS HUMANOS

TO THE EUROPEAN COURT OF HUMAN RIGHTS

FIRST OBSERVATIONS

APPLICATION No. 22604/18

ASOCIACIÓN ABOGADOS CRISTIANOS

v.

SPAIN

TO THE EUROPEAN COURT OF HUMAN RIGHTS

The *Asociación de Abogados Cristianos* [Christian Lawyers Association] has lodged an application against Spain on the grounds of a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The European Court of Human Rights (ECHR), in its communication of 21 July 2019 stated that the application had lent to a joint examination of admissibility and merits, and under Rule 54§2 (b) of Rules of Court, the Court decided that notice of the application should be given to the Government of Spain, inviting us to submit our written observations on the admissibility and merits of the case.

In particular, the following questions have been posed to the respondent State:

1. *Dans la mesure où, dans sa plainte, la requérante réserve l'action civile (article 112 code de procédure pénale), le classement de la plainte par les tribunaux internes constitue une « contestation » sur « un droit ou une obligation de caractère civil » (voir Pérez c. France [GC], no 47287/99, §§ 7 et ss, CEDH 2004-I). Dans l'affirmative, peut-on considérer que ce classement est-il compatible avec l'article 6 § 1 ?*
2. *L'autorisation de l'exposition litigieuse a-t-elle porté atteinte au droit de la requérante au respect de sa vie privée, au sens de l'article 8 de la Convention ? En particulier, les autorités internes se sont-elles acquittées de leurs obligations positives inhérentes à un respect effectif du droit garanti par cette disposition ?*
3. *Cette même circonstance emporte-t-elle violation du droit de la requérante au respect de ses convictions religieuses tel qu'il se trouve garanti par l'article 9 de la Convention (voir E.S. c. Autriche, no 38450/12, § 44, 25 octobre 2018) ?*
4. *La requérante est-elle fondée à soutenir qu'elle est victime d'une discrimination, contraire à l'article 14 de la Convention combiné avec l'article 9 de la Convention et/ou l'article 8 de la Convention (voir, mutatis mutandis, D.H. et autres c. République tchèque [GC], no 57325/00, CEDH 2007-IV) ?*

The Court has granted leave to submit written comments as third party interveners to the following States or entities concerned:

- Spanish Episcopal Conference and the European Center for Law and Justice (ECLJ)
- The Observatory on Intolerance and Discrimination against Christian in Europe
- *The Unione Giuristi Cattolici Italiani*
- The Agent of the Polish Government
- The Spanish Observatory of Freedom of Religion and Conscience
- *The Observatoire de la Christianophobie*

Within the prescribed time-limit, and on behalf of the respondent State, I thereby come to formulate the following:

FIRST OBSERVATIONS

FACTS

1. All the domestic procedure are described in the factual account presented by the applicants, it also includes many value judgements that render subjective what should be a factual account, absolutely objective and without any personal evaluation.
2. For instance, point 1 of the application notes that “1. *The Department of Culture of the City Council of Navarra organized the exhibition "Desenterrados" [Unearthed] in the municipal exhibition hall, opened on 20/11/2015 where Abel Azcona (the author) placed the photographs of himself naked next to the word "Pederastia" [Paedophilia] written with consecrated forms removed from 242 liturgies, **asserting that all priests are paedophiles***
3. The statement that the work of art generalizes that all priests are pederasts is a value judgement without any factual support, since the work of art was limited to forming the word “paedophilia” with hosts intended for communion by Catholics.
4. The proven facts were established in the investigate court. In this regard, the decision of the investigative court states literally:

“As can be seen, nowhere in the exhibition was any mention to the fact that the forms in which the word “paedophilia” had been formed were consecrated hosts. It is worth noting this last point, since the complaint filed by the Christian Lawyers Association states that, along with the images, also photos and details of how the defendant seized the hosts were also exhibited; a fact that has been proven not to be true. “

5. Similarly, paragraph 21 of the application states that *“for two months, a significant part of the Spanish society has been seriously assaulted by the public institutions, suffocating its more intimate convictions. This has persisted through a malfunctioning of the justice system preventing even the holding of a trial, which has led to the failure of the Association to defend itself against the arbitrary, unjustified and unnecessary interference in a democratic society.”*
6. It is somewhat surprising to read an assertion of this kind, which also ends the factual account of the application, when the previous 20 points have been devoted precisely to recounting in detail the legal proceedings initiated by the Association, which is now an applicant with this Court.
7. The assertion of defencelessness (prohibited by Article 24 of the Spanish Constitution) is even more striking when one realises that the applicants filed an appeal against the decision to close the case, followed by an *amparo* appeal, that was also closed, as discussed below, because it did not comply with the procedural requirement to justify, if only slightly, the constitutional significance of the appeal.

ON THE MERITS

Previous notice

Full respect for the right to freedom of religion in Spain

8. Spain is a country fully compromised with the respect for the right to freedom of religion.

-Since 1978, Article 16 of the Spanish Constitution guarantees the right for religious freedom:

“Article 16.

Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law”.

- Such essential right is regulated by the Organic Law no. 7/1980, of 5 July, on Religious Freedom¹:

“Article one.

One. The State guarantees the fundamental right to freedom of religion and worship, recognized in the Constitution, in accordance with the provisions of this Organic Law.

Two. Religious beliefs shall not constitute grounds for inequality or discrimination before the law. No religious grounds may be invoked to prevent anyone from exercising any work or activity or from holding public office or functions.

Three. No confession shall have a State character.

Article two.

One. The freedom of religion and worship guaranteed by the Constitution includes, with consequent immunity from coercion, the right of every person:

(a) To profess any religious belief which they freely choose or not professing any; to change their religion or to abandon it; to freely manifest their own religious beliefs or the absence thereof or to refrain from making any statement about them

(b) To perform acts of worship and receive religious assistance of their own denomination; to commemorate their holidays, to celebrate their marriage rites; to receive a dignified burial, without discrimination on religious grounds, and not to be forced to perform acts of worship or receive religious assistance contrary to their personal convictions.

(c) To receive and impart religious instruction and information of all kinds, whether orally, in writing or by any other means; to choose for themselves and for non-emancipated or disabled minors under their care, in and out of school, religious and moral education in conformity with their own convictions.

(d) To assemble or demonstrate publicly for religious purposes and to form associations to carry out their religious activities as a community in accordance with the general legal system and the provisions of this Organic Law.

Two. It also includes the right of churches, confessions and religious communities to establish places of worship or assembly for religious purposes, to appoint and train their ministers, to disseminate and propagate their own creed, and to

¹ <https://www.boe.es/buscar/act.php?id=BOE-A-1980-15955>

maintain relations with their own organizations or with other religious confessions, whether in national territory or abroad.

Three: For the real and effective implementation of these rights, the public authorities shall adopt the necessary measures to facilitate religious assistance in public, military, hospital, welfare, prison and other facilities under their control, as well as religious training in public schools.

Article three

One. The exercise of the rights arising from freedom of religion and worship is limited only by the protection of the right of others to exercise their public freedoms and fundamental rights and by the safeguarding of security, health and public morals, which are constitutive elements of the public order protected by law in a democratic society.

Two: The activities, purposes and entities related to the study and experimentation of psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar purposes unrelated to religious ones are outside the scope of protection of this Law.

Article four.

The rights recognized in this Law, exercised within the limits indicated therein, shall be protected by means of judicial protection before the ordinary courts and constitutional protection with the Constitutional Court in the terms established in its Organic Law”.

- Finally, as a proof of the commitment of the Spanish society with the protection of religious freedom, hate crimes and a **specific offence (Article 525) against religion** are regulated in the Criminal Code, which will be discussed below.

FIRST QUESTION

1. Dans la mesure où, dans sa plainte, la requérante réserve l'action civile (article 112 code de procédure pénale), le classement de la plainte par les tribunaux internes constitue une « contestation » sur « un droit ou une obligation de caractère civil » (voir Pérez c. France [GC], no 47287/99, §§ 7 et ss, CEDH 2004-I). Dans l'affirmative, peut-on considérer que ce classement est-il compatible avec l'article 6 § 1 ?

We will proceed according to the following order of presentation to answer the first question:

1.-European Convention on Human Rights

9. Article 6.1 of the Convention provides as follows:

“Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

2.- Domestic legislation

1- The Spanish Criminal Code in Title XXI of the Second Book entitled “Offences against the Constitution”, includes a chapter with the legislation of **offences committed against freedom of conscience, religious feelings and respect for the deceased.**

From a generic point of view, regulates hatred crimes:

“Article 510

1. A prison sentence of one to four years and a fine of six to twelve months shall be imposed on:

a) Those who, directly or indirectly, foster, promote or incite hatred, hostility, discrimination or violence against a group, or part thereof, or against a certain person for belonging to such a group, for reasons of racism, anti-Semitism or for other reasons related to ideology, religion or beliefs, family circumstances, the fact that the members belong to an ethnicity, race or nation, national origin, gender, sexual orientation or identity, or due to gender, illness or disability.”

From a specific point of view regarding the protection of religious feelings, Articles 524 and 525 provide as follows:

“Article 524

Whoever perpetrates profane acts that offend the feelings of a legally protected religious confession in a temple or place of worship, or at religious ceremonies, shall be punished with a sentence of imprisonment of six months to one year or a fine from twelve to twenty- four months.

Article 525

1. Whoever, in order to offend the feelings of the members of a religious confession, publicly disparages the dogmas, beliefs, rites or public ceremonies thereof, verbally or in writing, or insult, also publicly, those who profess or practice these, shall incur the punishment of a fine from eight to twelve months.

2. The same penalties shall be incurred by those who publicly disparage, verbally or in writing, those who do not profess any religion or belief whatsoever.”

2.- Procedural law

10. On the other hand, in order to fully answer the question posed by the Court, it is also necessary to know the domestic procedural rules that regulate the exercise of criminal actions as well as the exercise of civil actions derived from the crime.

11. The **Criminal Procedure Act** provides the following regarding the exercise of the civil actions in criminal proceedings:

“Article 111.

Actions arising from an offence or misdemeanour may be initiated together or separately, but while the criminal action is pending the civil action may not be initiated separately until a final decision has been passed, always with the exception of articles 4, 5 and 6 of this Code.

Article 112.

If only criminal proceedings are initiated, the civil action will also be understood to be included, unless the aggrieved or injured party waives it or expressly reserves it to initiate it after the criminal trial has ended, should it take place.

If only the civil proceedings which arise from an offence which may only be prosecuted in a private lawsuit, the criminal proceedings will be considered to be absolutely terminated.

Article 113.

The two actions may be taken by a single person or by several, but if they are two or more persons taking actions arising from an offence or misdemeanour this will be heard in a single proceedings and, if possible, under the same direction and representation, in the judgment of the Court.

Article 114.

Once a criminal trial to prove an offence or misdemeanour has been advocated, there can be no lawsuit for the same act; if one is underway, it shall be stayed, in the place where it is at the time, until a final decision is given in the criminal case.

This will not be necessary to initiate criminal proceedings which may have preceded the civil action arising from the same offence or misdemeanour.

The provisions of this article are without prejudice to the provisions of chapter II, title I of this book regarding pre-trial matters..

(...)

Article 116.

Termination of the criminal proceedings does not carry the civil action with it, unless the termination arises from a final decision stating that the act from which the civil action may have arisen did not exist.

In all other cases, the person entitled to take civil action may do so, before the appropriate civil jurisdiction and via the civil route, against whoever is under the obligation to reinstate the thing, repair the damage or compensate for the damages suffered.

Article 117

Termination of the civil action does not carry with it the criminal proceedings arising from the same offence or misdemeanour.

The absolute final decision passed in the lawsuit pursued in taking civil action will not be an obstacle to taking the relevant criminal action.

The provisions of this article are without prejudice to the provisions of chapter II of title I of this book and articles 106, 107, 110 and the second paragraph of article 112.”

On the other hand, Article 779 (1) of the Criminal Procedure Act provides that “once the relevant evidence has been taken without delay, the Judge will issue an order containing one of the following decisions: ” 1. If they consider that the act does not constitute a criminal offence or its perpetration is not sufficiently proven, they will order the relevant dismissal. If, although it is considered that the act may constitute a crime, there is no known perpetrator, they will order provisional dismissal and file the case.”

3.- Case-law of the Court regarding Article 6.1.

12. The judgment delivered in *Pérez v. France*, no. 47287/99, assesses the application of Article 6 to criminal complaints together with the civil complaint. The Grand Chamber held that Article 6.1 of the Convention had not been violated:

“80. The Court notes that the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see Artico v. Italy, judgment of 13 May 1980, Series A no. 37, p. 16, § 33), this right can only be seen to be effective if the observations are actually “heard”, that is duly considered by the trial court. In other words, the effect of Article 6 is, among others, to place the “tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant (see Van de Hurk v. the Netherlands, judgment of 19 April 1994, Series A no. 288, p. 19, § 59).

81. Moreover, while Article 6 § 1 does oblige the courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (ibid., p. 20, § 61, and Ruiz Torija v. Spain, judgment of 9 December 1994, Series A no. 303-A, p. 12, § 29; see also Jahnke and Lenoble v. France (dec.), no. 40490/98, ECHR 2000-IX).

82. Finally, the Court also notes that it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, inter alia, García Ruiz v. Spain, [GC], no. 30544/96, § 28, ECHR 1999-I). In any event it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of national legislation (see Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 115, ECHR 2000-VII).

83. The Court considers, in the light of the facts of the case, that the provisions of Article 6 § 1 of the Convention were not infringed.

Accordingly, there was no basis for the applicant's purely technical challenge to the effect that the Court of Cassation had neglected to mention all the domestic legislative provisions she had relied on. Besides, the Court agrees with the Government that some of those provisions were plainly inapplicable.

The Court further finds that the Court of Cassation took due account of and effectively addressed all of the applicant's grounds of appeal. The applicant's

allegation that the Court of Cassation had not given sufficient reasons for its decision was therefore misconceived.”

84. In conclusion, there has been no violation of Article 6 § 1 of the Convention.”

4.- Domestic case-law

- 13.** In accordance with the judgments of the Constitutional Court of 14 February and 16 November 1989, the respect for the right to a due process is not opposed to a reasoned decision from the investigative judge in order to terminate it in advance at the investigative stage, in accordance with the provisions of the law. That is, even though the investigative judge does not carry out an assessment of the evidence as regards to the innocence or guilt of the accused person, which obviously corresponds to the judge who sentences, the investigative judge has to assess the existence of sufficient and relevant evidence to keep criminal proceedings open against a specific person.

5.- Assessment of the present case

Exercise of civil actions

- 14.** In the instant case, when the applicants filed the complaint before the investigative court, they brought an action of criminal nature with civil effects. See, for this purpose, the complaint submitted by the applicants as Document 5, where the following was requested:

“FURTHERMORE

It is hereby stated that all criminal and civil actions deriving from the offence are exercised.”

Therefore, Article 112 of the Criminal Procedure Act was not applicable, but rather Article 111 cited above.

“Article 111.

Actions arising from an offence or misdemeanour may be initiated together or separately, but while the criminal action is pending the civil action may not be initiated separately until a final decision has been passed, always with the exception of articles 4, 5 and 6 of this Code”.

- 15.** Article 984.3 of the Criminal Procedure Act provides that:

“To enforce the judgment, in as far as it refers to the repair of damage caused and compensation for damages, the provisions set out in the Civil Procedure Act

will be applicable, although, at any event, it will be advocated ex officio by the Judge that passed it.”

16. Applying the broad interpretative criterion established by the Court in *Perez v. France* cited above, it would be admissible to consider that Article 6 of the Convention applies in the present case, since the issue clearly focuses on the right to a fair trial with due guarantees.
17. Applying precisely that case-law of the Court, **it cannot be concluded in any way that there has been a violation of Article 6 of the Convention.**
18. Had the applicants brought the civil action together with the criminal action, in the event that they had been convicted, they would have obtained civil compensation for their claim; however, having chosen to bring both actions together, without preserving the right to bring a civil action, the applicants voluntarily accepted the consequences of both actions.
19. In the present case, the applicants:
- (a)- Could have limited themselves to exercising civil actions;
 - (b).- Could have exercised the criminal actions with express reservation of the civil actions, in which case they would not had been conditioned in civil matters by an eventual filling of the complaint submitted;
 - (c)-notwithstanding the fact that they had exercised the civil actions in criminal proceedings, as they did, the procedure provided for in the Law on the Protection of the Right to Honour was open, although apparently it was not exercised.
20. In answering the second question, the assessment and outcome reached by the Spanish courts that examined the complaint filed by the applicants will be discussed in more detail.

II

SECOND QUESTION

L'autorisation de l'exposition litigieuse a-t-elle porté atteinte au droit de la requérante au respect de sa vie privée, au sens de l'article 8 de la Convention ? En particulier, les autorités internes se sont-elles acquittées de leurs obligations positives inhérentes à un respect effectif du droit garanti par cette disposition ?

(a) Right to respect for private and family life

Article 8 of the Convention.

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”

(b) Freedom of expression

Article 10 of the Convention

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

- Domestic rules

21. In Spain, as in any democratic legal system, the right to private and family life (and the right to religious beliefs) and freedom of expression are protected. Thus, the Spanish Constitution sets them out as fundamental rights, providing as follows:

“Article 18

1. The right to honour, to personal and family privacy and to the own image is guaranteed.

(...)

Article 20

1.- The following rights are recognised and protected:

(a) the right to freely express and disseminate thoughts, ideas and opinions through words, in writing or by any other means of communication;

(b) the right to literary, artistic, scientific and technical production and creation;

(c) the right to academic freedom;

(d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. The law shall regulate the right to invoke personal conscience and professional secrecy in the exercise of these freedoms.

2. The exercise of these rights may not be restricted by any form of prior censorship.

3. The law shall regulate the organisation and parliamentary control of the social communications media under the control of the State or any public agency and shall guarantee access to such media to the main social and political groups, respecting the pluralism of society and of the various languages of Spain.

4. These freedoms are limited by respect for the rights recognised in this Title, by the legal provisions implementing it, and especially by the right to honour, to privacy, to personal reputation and to the protection of youth and childhood.

5. The confiscation of publications and recordings and other information media may only be carried out by means of a court order.”

State’s positive obligations.

Article 8 of the Convention

22. The action of domestic authorities does not collide with Article 8 regarding the positive obligations on States.

For merely dialectical purposes, a potential violation of Article 8 could be admitted in the case of prior conflict between the parties concerned (namely, the Christian Lawyers Association and the artist), provided that the applicants had brought the case before the civil courts through the exercise of the right to honour, and that the Spanish judicial authorities had not examined and weighed up the claim in a proportionate manner.

However, given that the applicants had resorted directly to the criminal courts, whose sole purpose is assessing the existence of elements of each criminal type, the applicants

chose a separate procedure from the one that could give rise to positive obligations towards States in the event of disputes between individuals.

The European Court's case-law on States' positive obligations and the interference by public authorities with a right under the Convention.

23. With regard to Article 8 of the Convention, while its essential aim is to protect the individual against arbitrary interference by public authorities (negative aspect), this provision also imposes positive obligations on States parties aimed at ensuring respect for private life (positive aspect), even in the sphere of relationship between individuals. This kind of “passive” interference may be of a regulatory nature, due to the absence of adequate legal provisions for the protection of the right to private and family life, or of a material nature due to the lack of adequate means to deal with a given situation.
24. In order to admit the interference by a public authority in a right under the Convention, the European Court requires that such interference complies with the following cumulative conditions:
- (a) It is in accordance with the law
 - (b) It pursues a legitimated aim
 - (c) It is necessary in a democratic society
25. The first requirement is that interference is in accordance with the law. That is, the interference must have a legal ground in domestic law and it has to be understood in a material sense rather than a formal sense. The consequence is that the legal ground of interference must be valued from the perspective of the so-called “quality of the law”. The law that allows for the interference must offer some guarantees against arbitrary interference by the authorities, thus giving a protective nature to the “pre-eminence of the law “ which is expressly mentioned in the Preamble to the Convention (*Malone v. the United Kingdom*, 2 August 1984). Accessibility and predictability are among the requirements of “quality of the law”. On the one hand, the law must be sufficiently accessible: the citizen must have sufficient information, in the circumstances of the case, on the applicable legal rules. On the other hand, a rule can only be considered “law” if it is framed with sufficient precision to enable the citizen to regulate his conduct and to foresee to a reasonable degree the consequences that a given action may entail (*Sunday Times v. the United Kingdom*, 26 April 1979; ST. *Malone v. the United Kingdom*, 2 August 1984; *Leander c. Sweden*, 23 March 1987; ST. *Costello-Roberts v. the United Kingdom*, 25 March 1993).
26. Secondly, the interference provided for by domestic law must obey one of the legitimate purposes laid down in Article 8 (2): “national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of

health or morals, or for the protection of the rights and freedoms of others”. Previously, it was already possible to find out how some of these purposes are usually included in the interferences allowed by the Convention.

27. Thirdly, the interferences must not only serve to one of the above purposes, but must also be “necessary in a democratic society”. On this term, the Convention has pointed out some criteria to restrict it, considering that “necessary” is not synonymous with the more rigorous requirement of “indispensable”, even though the notion does not have the flexibility of such expressions as “admissible”, “useful”, “reasonable” or “desirable” (*Silver and others v. the United Kingdom*, 25 February 1983). The legal translation of the expression “pressing social need” commonly used by the Court correspond to the application of the principle of proportionality, as an unwritten rule, when assessing the legitimacy of interference with the rights recognised by the Convention, operating as a limit to the boundaries of those rights (*Fassbender*, 1998, page 52 et seq).

Limit to positive obligations on States. Freedom of expression

28. The limit to private life and to positive obligations on States is essentially freedom of expression, which is one of the rights enshrined in Article 10 of the Convention, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority, unless conditions very similar to those required for limiting the right to private life are met.

29. In *Mariya Alekhina and others v. Russia* (application no.38004/12) the Court stated that:

*“1. According to the Court’s well-established case-law, freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”. Moreover, Article 10 of the Convention protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see, among many other authorities, *Oberschlick v. Austria* (no. 1), 23 May 1991, § 57, Series A no. 204, and *Women On Waves and Others v. Portugal*, no. 31276/05, §§ 29 and 30, 3 February 2009).
2. As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Stoll v. Switzerland [GC]*, no. 69698/01, § 101, ECHR 2007-V).*

3. In order for an interference to be justified under Article 10, it must be “prescribed by law”, pursue one or more of the legitimate aims listed in the second paragraph of that provision and be “necessary in a democratic society” – that is to say, proportionate to the aim pursued (see, for example, *Steel and Others v. the United Kingdom*, 23 September 1998, § 89, Reports 1998-VII).

4. The test of “necessity in a democratic society” requires the Court to determine whether the interference complained of corresponded to a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V; *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII; and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, ECHR 2004-XI).”

The judgment expressly concludes as follows:

“(b) Existence of an interference

207. Having regard to the foregoing, **the Court considers that criminal proceedings against the applicants on account of the above actions, which resulted in a prison sentence, amounted to an interference with their right to freedom of expression.**”

In particular, an aspect of paramount importance to the outcome of the present application is pointed out:

“223. The Court further observes that according to international standards for the protection of freedom of expression, **restrictions on such freedom in the form of criminal sanctions are only acceptable in cases of incitement to hatred** (see *Report of the Venice Commission*, paragraph 101 above; *HRC Report 2006*, paragraph 105 above; and the joint submission made at the OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred, paragraph 109 above)”.

30. It should be remembered that in *Mariya Alekhina and others v. Russia*, the performance of the applicants (members of the group “Pussy Riots”) took place in the Cathedral of Christ the Saviour in Moscow, i.e. in a place of religious worship. Even in such a case, the Court did not consider that the State could punish such conduct with a custodial sentence.

However, unlike in the case of *Mariya Alekhina and others v. Russia*, the art exhibition that was the subject of the Christian Lawyers Association’s complaint,

which gave rise to this application, was not held in a place of worship but in a public place. This is an extremely important point, since the criminal type provided for in Article 524 of the Criminal Code requires it to be held in a place of worship in order to be considered an offence, which led the Spanish judges to exclude this type of offence.

31. There is also necessary to remind the Court of its recent judgment precisely because of a conviction as a hate crime. Thus, in *SternTaulats c. Spain*, concerning the conviction of citizens for the burning of portraits of the king of Spain, the Court decided that the intention of the applicants cannot be considered to be that of inciting the commission of acts of violence against the person of the king either, despite the fact that the burning of the image of the Head of the State was involved (see, *mutatis mutandis*, *Parti populaire démocrate-chrétien (no 2)*, cited above, § 27). The Court notes that such an act must be interpreted as a symbolic expression of dissatisfaction in protest. The *mise-en-scène* orchestrated by the applicants, even if it has led to the burning of an image, is a form of expression of an opinion in the context of a debate on a question of public interest, namely the institution of the monarchy. The Court recalls in this context that freedom of expression applies not only to “information” or “ideas” that are welcomed or considered harmless or indifferent, but also to those that hurt, offend or disturb: this is required by the pluralism, tolerance and spirit of openness without which there is no “democratic society” (paragraph 27 above).

So that the Court is not convinced that, in the above case as a whole, the actions taken can be considered an incitement to hatred or violence. Accordingly, if the burning of portraits of Heads of State cannot be considered as a hate crime, then it is difficult to consider the reported action as such.

32. In fact, in the complaint examined by the Spanish judges giving rise to the present application, the existence of a hate crime was ruled out from the outset.
33. It would be very difficult for Spain to understand why in the present case, in which the domestic courts did not consider that a hate crime existed and did not criminally condemn an artistic activity with a high degree of social criticism of the reprehensible conduct of certain members of the Catholic Church, in a public and notorious case recognised and condemned by Pope Francis himself, the Spanish State should be blamed for having followed the indications of the Court itself.

- Domestic case-law

34. The Spanish **Supreme Court** laid down the following in its judgment of 14 February 1984²:

“WHEREAS, the crime of mockery or outrage against a religious confession, whose protected legal right is freedom of conscience, recognized as a fundamental right in Article 16 of the Constitution, in accordance with the doctrine of this Chamber, according to judgments of 19 and 15 July 1982 and 25 January 1983, requires as conditions for its assessment: (a) As regards the criminal action or conduct, the scorn or outrage, as synonyms, the first of mockery or derision, and the second of insulting or despising, in a public way, the dogmas, rites or ceremonies, that is, fundamental truths, rules of worship and external acts on religious practices; (b) As for the unlawfulness, that in the action carried out the repulsion is appreciated, which is the fundamental basis of it, by the social entity, through the socio-cultural norm that governs the group in whose environment the crime is carried out, and with the result of an offense to the religious beliefs of the followers of a certain religious confession; (c) With regard to the element of guilt, not only the conduct and will of the action incriminated as an offence, but the capture of a specific spirit of insult, as synonymous with the deliberate intent to offend and treated by the criminal technique as a subjective element of the unjust. Second. That from the proven facts it is deduced that the fragments of the poem published by the weekly magazine "Interviú" in its issue number 78, corresponding to the week of the 10 to 17 of 1977, the phrases that are transcribed on the site of the centurion with Christ Crucified while the Mother and the Magdalene had gone to get white sheets to cover their nakedness, and the description of the feelings of the act performed, implies mockery of the essence of the purity contained in the Catholic religion, detaching itself from the narrative, not only the poetic character, of the writing, but a predominance, over it, of the spirit of undermining, ridiculing and insulting the Catholic religion, and this gives rise to the motive brought forward by the Public Prosecutor's Office being accepted or estimated as being articulated by the understanding that there is a legal infringement because Article 209 of the Criminal Code has not been applied, and this claim must be accepted for all that has been said. Especially if one takes into account that in Organic Law 7/80 of 5 July on religious freedom, the State guarantees this right as a fundamental right, as set out in the Constitution, which in accordance with Article 4 of the aforementioned Law, are protected by means of judicial protection, before the ordinary courts and the Constitutional Court”.

35. The **Constitutional Court** has also widely interpreted the right to freedom of expression:

² <https://supremo.vlex.es/vid/-77230096>

“Freedom of expression, as a citizens’ right, is made manifest in the realisation of the possibilities that the constitutional provision literally recognises: to express any thought, idea, belief, value judgement or opinion, that is, any subjective conception of the individual, and to disseminate it through any means, whether natural (word, gesture) or technical means of reproduction (in writing, through the airwaves,...) (CC judgment 12/1982, LG 3)”.

- 36.** Regarding the dissemination of opinions, the Constitutional Court has pointed out that freedom of expression protects not only the opinions that are *“harmless or indifferent, or that are welcomed, but also those that may disturb the State or a part of the population, as a result of the pluralism, tolerance and spirit of openness without which there is no democratic society”* (CC judgment 62/1982, LG 5 ; also CC judgment 85/1992, LG 4).
- 37.** The Court has consistently interpreted freedom of expression to cover criticism, for example of an individual holding public office, including annoying, harsh or hurtful criticism, but has warned that criticism of the person’s conduct does not allow the use of offensive or unnecessary expressions, which fall outside the scope of the protection of the freedom of expression (for all of them, CC judgment 336/1993).
- 38.** On the other hand, the **Note no. 7/2019, of 14 May, of the Attorney General’s Office, on guidelines for interpreting hate crimes under Article 510 of the Criminal Code, states that “the special consideration of freedom of expression as an essential element of democratic coexistence makes it necessary in each specific case to carry out an appropriate assessment that removes any risk of making the criminal law a deterrent to the exercise of freedom of expression, which is undoubtedly undesirable in a democratic State »** (CC judgment no. 112/2016, of 20 June, LG 2)”.

Action by the domestic authorities in the present case

Review and evaluation of the facts by the courts

Existence of procedural remedies in domestic law not exercised by the applicants.

Action taken by domestic authorities: criminal reproach as a last resort

- 39.** In deciding this application it is essential to take into account the principle of minimum interference in criminal law repeatedly stressed by the Spanish Constitutional Court. Thus, in its judgement of 7 October 2013, the Constitutional Court clearly states that this is the ultimate remedy under criminal law, in a case were the complaint has been dismissed:

“The decision, weighing up the circumstances in which the interference with the contents of the e-mail account recovered by the party took place, simply rules out, in a reasoned and reasonable manner, the need for criminal law to interfere with it, without prejudice to the possibility that there may be other alternative areas of protection and, where appropriate, reparation for the fundamental rights of the plaintiff, which may be affected, and over which there is nothing to limit” and “In our case, the substantive fundamental rights on which the complaint focuses the injury do not find their only area of protection in the exercise of the criminal action”. Therefore, the civil jurisdiction could have been used (Organic Law no. 1/1982, of 5 May, on civil protection of the right to honour, personal and family privacy and one’s own image)”.

40. The fact is that there is no right to a criminal conviction of a third party, but in any case to a due process and the right to be compensated for damages proven by a judgment.

41. Actually, Spain has been sentenced by the Court for precisely the opposite, namely for imposing a criminal reproach on an activity that should be protected by the right to freedom of expression, as provided for in *Jiménez Losantos v. Spain*, no. 53421/10, § 53-54:

*“ 53. Rien dans les circonstances de la présente espèce, dans laquelle les propos litigieux ont été tenus dans le contexte d’un débat sur une question présentant un intérêt public, n’était de nature à justifier l’imposition d’une telle peine. Par sa nature même, une telle sanction produit inmanquablement un effet dissuasif. Il faut également prendre en compte les retombées durables que toute inscription au casier judiciaire pourrait avoir sur la façon de travailler des professionnels des médias, notamment des journalistes (voir, mutatis mutandis, *Artun et Givener c. Turquie*, no. [75510/01](#), § 33, 26 juin 2007, *Otegi Mondragon*, précité, § 60).*

54. Eu égard à ce qui précède, à supposer même que les raisons invoquées par les juridictions internes puissent passer pour pertinentes, elles ne suffisent pas à démontrer que l’ingérence dénoncée était « nécessaire dans une société démocratique ». Nonobstant la marge d’appréciation des autorités nationales, la Cour considère que la condamnation du requérant en combinaison avec, en particulier, la sanction grave qui lui a été infligée, était disproportionnée au but visé ”.

Action taken by relevant authorities in the present case:

42. The complaint was filed because the relevant court did not consider the alleged facts to be an offence. However, this does not mean that the reported facts were neither subject to appeal in other procedural areas, nor the applicants were deprived of the exercise of other types of civil action, of a different nature from that exercised in conjunction with the criminal action.

43. In fact, Article 116 of the Criminal Procedure Act provides as follows:

“Termination of the criminal proceedings does not carry the civil action with it, unless the termination arises from a final decision stating that the act from which the civil action may have arisen did not exist”.

44. In the instant case, the complaint was filed not because of the absence of the alleged facts -which were proven- but because of the **lack of criminal relevance**.

45. In other words, the applicants could have brought another type of action of a different nature from the criminal one. **In fact, the civil procedure for the protection of the right to honour was open to the applicants but they preferred to take the criminal procedure, without preserving the civil actions.**

46. The **Organic Law no. 1/1982 of 5 May, on Civil Protection of the Right to Honour, Private and Family Life and One’s Own Image**, provides a specific mechanism within the Spanish legislation for the reparation of eventual damages, even for requesting the termination of disrespectful activities, within the framework of the civil jurisdiction, providing that:

“Article one

1. The fundamental right to honour, personal and family privacy and self-image, guaranteed in Article 18 of the Constitution, shall be protected in civil law against all forms of illegitimate interference, in accordance with the provisions of this Organic Law.

2. The criminal nature of the interference shall not prevent recourse to the procedure of judicial protection provided for in Article 9 of this law. In any case, the criteria of this law for determining civil liability arising from an offence shall be applicable.

3. The right to honour, to personal and family privacy and to one's own image is inalienable and imprescriptible. The renunciation of the protection provided for in this law shall be null and void, without prejudice to the cases of authorization or consent referred to in Article 2 of this law”.

Article 9 of the said law states that:

“One. Judicial protection against unlawful interference with the rights referred to in this Act may be sought through ordinary procedural channels or through the procedure provided for in Article 53.2 of the Constitution. The amparo appeal may also be sought before the Constitutional Court, where appropriate.

Two. Judicial protection shall include the adoption of all measures necessary to put an end to the unlawful interference in question and, in particular, those necessary for:

(a) The restoration of the injured party to full enjoyment of his rights, with the declaration of the interference suffered the immediate cessation of the interference and the restoration of the previous state. In the case of interference with the right to honour, the restoration of the violated right shall include, without prejudice to the right of reply through the legally established procedure, the total or partial publication of the sentence at the expense of the convicted person with at least the same public dissemination as the interference suffered.

(b) Preventing imminent or subsequent interference.

(c) Compensation for damages.

(d) The appropriation by the injured party of the profit obtained from the unlawful interference with his rights.

These measures shall be without prejudice to the precautionary protection required to ensure their effectiveness.

Three. The existence of damage will be presumed whenever the illegitimate interference is accredited. Compensation shall be extended to moral damage, which shall be assessed in the light of the circumstances of the case and the seriousness of the injury actually caused, account being taken, where appropriate, of the dissemination or audience of the medium through which it was produced.

Four. The amount of compensation for non-material damage, in the case of the first three paragraphs of Article 4, shall be borne by the persons referred to in paragraph 2 thereof and, failing that, by their successors in title, in the proportion which the judgment finds that they have been affected. In the cases referred to in Article 6, the compensation shall be deemed to be included in the injured party's estate.

In the case of Article 4(4), the compensation shall be paid to the injured parties who have brought the action. If the action has been brought by the Public Prosecutor's Office, the latter may request compensation for all injured parties who have been duly identified and have not expressly waived their right to compensation.

Five. Actions for protection against illegitimate interference will expire four years after the person entitled to them has been able to exercise them”.

47. Therefore, although **the applicants could have found a remedy in civil proceedings, they nonetheless decided to resort to the most severe form of punishment in the Spanish legal system: criminal proceedings were followed with the joint exercise of civil remedies**, waiving the exercise of other remedies available to them, such as the abovementioned action for the protection of the right to honour.
48. In other words, by resorting to the most forceful mechanism in the legal system -the criminal one- and jointly exercising the civil action in that procedure, such action was submitted to the analyses carried out by the criminal judge.
49. As stated in the judgment delivered by the Court in *Pérez v. France*: “*the effect of Article 6 is, among others, to place the “tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant (see Van de Hurk v. the Netherlands, judgment of 19 April 1994, Series A no. 288, p. 19, § 59)*”.

The above was undoubtedly fulfilled, since the Spanish criminal court examined all the evidence it considered necessary before taking its decision to close the case.

50. The statements made in the application concerning an alleged violation of Article 6 of the Convention are not well founded.

The applicants state that “*there was no fair trial by an independent and impartial judge, since both the investigative court and the provincial court failed to fulfil their obligation to justify the reasoning on objective grounds (the duty to substantiate the decision issued) by leaving this party unprotected. The principle of equality of arms has also been violated by constructing the facts in a biased manner*”.

51. Nothing could be further from the truth: an examination of the case file shows not only that all the courts were impartial and independent, but also that the applicants never questioned their independence, for example by raising an objection to any of the judges or magistrates involved, namely the head of the investigative court, the magistrates of the Navarra Provincial Court or the members of the Constitutional Court.
52. An assertion such as the above, lacking any evidence and stated in an absolute generic manner, not only constitutes a legally defective procedural action, in so far as it launches an accusation of lack of partiality for judges who cannot defend themselves since they are not parties to the proceedings, but also reveals the lack of reasoning behind the application, by exposing an undisguised animosity against the judges who did not comply with their claims.
53. A mere reading of the decision no. 429/16 issued by the Pamplona investigative court no. 2 on 10 November 2016 and of the decision no. 198/2017 issued by the Provincial Court of Navarra is enough to verify that the two judicial decisions have been fully

substantiated. There is no need to repeat its content here, since it can be compared both in the documentation provided by the applicants and in the translation furnished.

- 54.** The **investigative court of Pamplona** reasoned in a clear and sufficient manner why the reported performance of the artist did not meet the requirements to be included in any of the types of criminal offences provided for in the Spanish Criminal Code.
- 55.** In particular, the Court reasoned why it could not be included in the framework of **Article 524 of the Criminal Code**, since the performance was not carried out in a place intended for worship or a religious ceremony (see legal ground 2); why it could not be considered an offence under **Article 525 CC** given that *“in the present case, it seems clear that the action or work exhibited by the defendant would satisfy the requirement of the type that the typical action be carried out by means of any kind of document, since it is clear that photographs are so, for criminal purposes, in accordance with the broad concept of documentation contained in Article 26 of the Criminal Code. And there would also be the requirement of publicity, since the work of the person under investigation was exhibited in a public exhibition. However, in the opinion of this judge, the work exhibited does not constitute a mockery of the dogmas, beliefs, rites or ceremonies of the Catholic Church nor a humiliation of those who profess or practice such beliefs (...) Likewise, the court also found that the action carried out did not amount to a direct harassment of those who profess or practice the Catholic religion, but rather indirect harassment, which is not penalised in the Criminal Code in force in Spain, which concluded that acts of harassment towards persons who profess a particular religion must be direct on those persons, and not indirect. (Legal Ground 3).*
- 56.** Next, in its Legal Ground 4, the court explains how, even if the previous reasoning was not shared and the acts carried out by the applicants were deemed to fit the types of crime provided for in Article 525, **the subjective element of the unjust** which the legislator introduced in that provision and which is also included in the statement *to offend the feelings of the members of a religious confession*, would be lacking in order to assess the existence of such a criminal type. The judge explains why he considers that the subjective element of the offences has not been proven, and then cites judgements of some provincial courts and the Supreme Court in support of his interpretation.
- 57.** In addition (Legal Ground 5), the decision analyses the requirements of the type provided for in Article 510 CC, considering that in no way can the action reported be considered a hate crime, and finding that in no case can it be considered that the work executed by the applicant, both the work partially exposed through photographs in Pamplona or the original work carried out by the applicant outside the city, is suitable to promote or incite hatred, hostility, discrimination or violence against a group, namely the Catholic Church or its members, since not even in the work under examination does the author propose to visitors to take any action as regards the reality reported, beyond that of becoming aware of or taking a position on the evil of paedophilia.

58. Finally, by quoting the case in *Sysoyeva and others v. Letonia*, the applicants call for a review of the actions of judicial authorities arguing that there has been “*flagrant and obvious arbitrariness*” on their part. That finding is not only unfounded, since it lacks any evidentiary support, but the judgment quoted refers not to Article 6 of the Convention but to Articles 8, 18 and 34 of the Convention.
59. Arbitrariness is a concept that should not be blithely used, especially when it is attributed to judges and magistrates, who constitute an independent power in a democratic society, and whose decisions may be subject to review but whose independence must always be safeguarded.
60. Article 9.3 of the Spanish Constitution prohibits arbitrary action by public authorities. The Constitutional Court, in its judgement no. 71/1993, of 1st March, held that the right to equality in the application of the law, protected by Article 14 and in connection with the principle of prohibition of arbitrary action on the part of public authorities under Article 9.3 of the Constitution, means, in connection with the exercise of judicial power, that the same judge or court may not alter the meaning of its previously adopted decisions in substantially identical cases, unless they consciously depart from it by providing sufficient and reasonable grounds for the change in criterion; or, in the absence of such express reasoning, it is clear that the difference in treatment is based on an effective change in criterion as a result of the judicial decision itself, or because there are other elements of external judgment that so indicates. However, as is well known, public authorities and courts are generally not bound by precedent.
61. None of the judicial acts of the domestic authorities can be regarded as arbitrary in any way, since they are supported by evidence, are sufficiently well-founded, do not depart from any precedent relied on by the applicants (on the contrary, they quote extensive case-law in support of their findings) and no difference in treatment with similar situations has been established.
- 62. The criminal reproach of a conduct must be, always and by definition, the last resort as a form of response to the most serious attacks against a society.**
63. In the judgment delivered in *Toranzo Gómez v. Spain*, no. 26922/14, § 62, on 20 November 2018, the Court decided as follows:

“5. As regards the penalty imposed, while it is perfectly legitimate for the institutions of the State, as guarantors of institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings (see Otegi Mondragon v. Spain, no. 2034/07, § 58, ECHR 2011, and, mutatis mutandis, Castells, cited above, § 46). The Court observes in that regard that the nature and severity of the penalties imposed are also factors to be taken into consideration in assessing the “proportionality” of the interference”.

64. The domestic authorities, through the judges of the criminal jurisdiction who examined the case, applied precisely that case-law considering that the conduct did not merit reproach in the criminal jurisdiction, and therefore they struck the complaint out.
65. That decision was taken in accordance not only with Spanish law, but also with the abovementioned Court's case-law and with all the case-law cited below in reply to the remaining questions.
66. The authorisation granted by the local authorities to carry out the art exhibition in which the reported events took place was subject to review by domestic judges.
67. The domestic authorities acted in a balanced and proportionated manner with regard to the rights and freedoms at stake, especially since this was a criminal investigation involving the commission of alleged offences. After weighing up the rights and freedoms in question, they found that the exhibition so-called "Amén", performed by Mr Abel Azcona, could not be included in any of the offences under Spanish law.
68. The **Pamplona investigative court no. 2**, after conducting the enquiries it deemed appropriate, found that the actions reported should be closed³ :

"FIRST: The first thing necessary in these proceedings to establish which of the resolutions provided for in Article 779 of the Law on Criminal Procedure is a precedent is to determine exactly which of the facts have been duly accredited following the investigation carried out; and this is because the social reactions that the exhibition organised by the Pamplona City Council, in which the person under investigation placed the allegedly criminal work, have favoured a certain dispersion of the facts subject to judicial assessment.

In fact, after the proceedings agreed upon by this judge, it has been noted that what was exhibited in the chamber in Liberty Sq. were four photographs in which the defendant, Abel Azcona, was seen forming on a surface placed on the floor the word "PAEDOPHILIA" with some white and round objects of small dimensions, accompanying these four photographs with a bowl placed on a column located in front of those that contained forms such as those used to form the word mentioned above. The contents of this bowl were taken by an unknown person some days after the exhibition was opened to the public.

The photographs referred to were accompanied by a poster explaining the artistic project designed and managed by the defendant Abel Azcona called "La Sombra"[The Shadow], the content of which has been sent to this court by the Pamplona City Council and which was used in the proceedings.

³ A courtesy translation into English is provided as ANNEX 2 to the present written observations

As can be seen, nowhere in the exhibition was any mention to the fact that the forms in which the word "PAEDOPHILIA" had been formed were consecrated hosts. It is worth noting this last point, since the complaint filed by the Christian Lawyers Association states that, along with the images, also photos and details of how the defendant seized the hosts were also exhibited; a fact that has been proven not to be true.

However, the defendant did explain in social networks the origin of the forms with which he had formed the word " PAEDOPHILIA ", publishing photos and videos in which he is seen going to communion".

69. The investigative court then devotes the remaining legal basis to an individual examination of the alleged offences committed according to the applicants, assessing in great detail why the elements of the type of each offence, as established in the Spanish Criminal Code, do not concur.
70. The applicants could have appealed that judgment. The **Navarra Provincial Court**, in a decision dated 28 April 2017, upheld the dismissal agreed by the Pamplona criminal court, confirming that the actions reported did not constitute an offence⁴:

"FOURTH. The processing of these preliminary proceedings does not lead irretrievably to the admission of the claims that are requested in the complaints and/or allegations, nor to the substantiation of the proceedings until the delivery of the judgment, since the "ius ut procedatur" held by those offended by the offence "does not contain an absolute right to the opening and full substantiation of the criminal process, but only the right to a reasoned judicial decision; on the pretensions deduced, which may well be the file of the proceedings" (Judgments of the Constitutional Court 191/1992 and 111/1995), the assessments that have been made in the contested decision on the subjective element of the unjust and the existence or not of indications that prove in sufficient form the concurrence of animus demanded by the criminal type, does not therefore exceed the competences of the Investigating Judge, nor does it generate defenselessness for the plaintiffs, since after the investigation carried out by the Magistrate of the Examining Court and the necessary diligences have been carried out, it has been exhaustively argued that it is not duly justified that the facts object of the case involve the perpetration of a fact constituting a criminal offence, so that it can legitimately without infringing or violating fundamental rights, decree the dismissal as allowed by Article 779 of the Criminal Procedure Act, especially considering that in this case the issue discussed is not so much the facts that have occurred, which have been sufficiently proven, but the scope that legally could have the same to be considered a criminal offense.

⁴ See Annex 3

The action that motivates the beginning of the present previous diligences and the resources that now are examined, consisted of a performance titled "Amen" that was staged with the formation of the word paedophilia with consecrated forms and the posing of the author, later an exhibition was carried out with photographs of the author and they were exposed together with the placement of some of the mentioned forms consecrated in a bowl, finally diverse reactions took place that as consequence of the work were produced in part of the citizenship. The defendant states that the consecrated forms were obtained without being seen, going to communion and keeping the host, which was taken with him in a hidden form.

Article 524 of the Criminal Code punishes anyone who in a temple, place of worship or religious ceremonies performs acts of profanation in offense of legally protected religious feelings. In the facts that are the subject of the complaint, it can only be concluded that Mr. Azcona received the consecrated forms at the time of receiving communion and, without being seen, quietly concealed them, not exteriorizing in the religious ceremony, nor in the place of worship any action that could offend the religious feelings, without it being possible an extensive application of the provision, to whom in a place of worship or religious ceremony carried out an action that, by the form in which it was carried out, did not generate offense to the religious feelings in that place or ceremony, as happened in the facts at issue, in which no person even noticed the subtractions. With regard to this type of criminal offence, it cannot even be assumed that the criminal offence it contains has been perpetrated.

In addition, Article 525 of the Criminal Code punishes those who, in order to offend the feelings of members of a religious confession, publicly mock their dogmas, beliefs, rites and ceremonies in writing or in any form of document, or publicly vex those who profess or practise them.

Typical behaviors are therefore to publicly mock dogmas, beliefs, rites and ceremonies and on the other hand to publicly vex those who profess or practice them.

As referred by the challenged auto, scorn is literally understood as "the tenacious mockery that is done for the purpose of confrontation", with the intention in this case of offending the feelings of a religious confession, making mockery of dogmas, beliefs, rites and ceremonies, or "a rude and insulting expression of contempt, or mockery, teasing or disrespect" (STS 13 October 1980; 26 November 1990). By vexation we must understand an insult of special severity, related to religious belief or practice, referring to the religious choice of persons seeking protection.

In any of these actions, Article 525 requires a subjective element of unjust, consisting of the intention to offend the feelings of the members of a religious confession (to offend the feelings), so the case-law has been demanding an animus iniuriandi, denying the typical character of expressions that involve another purpose, such as criticism or the provocation of a polemic.

The Supreme Court in its Judgment of 25 March 1993 states that the subjective element of the offence "is constituted, according to unanimous doctrinal opinion, by the specific malice or deliberate intention of offending the legally protected religious feelings, this Court having always declared in a constant manner, that since intention is something that, because it belongs to the innermost recesses of the human soul, cannot be perceived by the senses, it can never be the object of direct proof, and therefore, necessarily, it must be the object of indirect or circumstantial evidence, and the animus must be deduced or inferred from all the objective factual circumstances that, seriously, could have been fully accredited.

Therefore, it is not enough to offend the religious feelings of other people, which in this case occurs unequivocally, but the conduct is required to mock the dogmas, beliefs, rites or ceremonies of a religious confession and, in addition, is carried out with the express and unequivocal intention of offending the religious feelings, an extreme that must be assessed using the aforementioned factual circumstances to assess whether this tendency element is accredited or if, on the contrary, it is not verified and therefore comes from the agreed file.

The allegation consisting of the need to examine the preparation of the performance, the exposition and the subsequent reaction that it produced is admitted; however, the practice of interested proof after the statement of the defendant tending to the accreditation of the knowledge of the same about the dogmas and beliefs of the Catholic religion is not necessary, since from his statement as well as from his messages and communications in the social networks it can be inferred that he possesses sufficient training and knowledge to understand the effect that the use of forms that are said to be consecrated in a performance can produce in believers.

The performance or artistic action is defined as a scenic show in which provocation or astonishment plays a major role, as well as aesthetic sense. In the performance titled "Amen" that the defendant made, according to the literal tenor (PAEDOPHILIA) that can be read in the photographs and that is already recorded in the first statements he makes about the work, it is intended to draw attention to cases of paedophilia within the Catholic Church, trying to achieve this goal through an intense provocation and used forms for it, that according to the author of the work were consecrated, that disappeared from the exhibition when the persecuted reaction took place and the scandal was unleashed, the publicity and the attention of the mass media around the work, purpose that the

same pursued to obtain the denunciation and reflection around the mentioned cases of paedophilia; without this implying, nor can it be deduced from the work, that the Catholic Church as an institution or group of believers as a whole is the author of the aforementioned offence, being publicly known as it is referred to in one of the appeals, which is a religious confession that explicitly rejects its conduct. Contrary to what is stated in the appeals, it has not been proved that the defendant claimed simply to encourage public attendance at the exhibition and/or increase the value of the same, statement lacking any kind of probative value.”

71. The assessment carried out by the domestic judges reveals that **they made an appropriate and balanced evaluation of the rights in question, focusing on whether or not the elements of the criminal type were present (principle of criminal legality, enshrined in Article 7 of the Convention: no punishment without law).**
72. The fundamental question for the domestic authorities (criminal judges) was whether the artistic activity constituted an offence against religious feelings, or whether it was part of the legitimated right to social and institutional criticism, especially since it was carried out as part of an artistic activity.
73. Neither the investigative court nor the Provincial Court of Navarra ever denied the offences against religious feelings. However, in order for all the elements of the type provided for in Article 525 of the Criminal Code to be present, it is not enough for religious feelings to be offended; the conduct must also make a mockery of the dogmas, beliefs, rites or ceremonies of the religious confession and, moreover, is carried out with the express and unequivocal intention of offending religious beliefs, which must be weighed by referring to the aforementioned factual circumstances in order to assess whether such a trend element is accredited, which is not the case, and therefore the closure agreed upon by the investigative court was appropriate, as set out below:

*“(…)In the performance entitled AMÉN made by the defendant, according to the literal tenor (paedophilia) that can be read in the photographs and that already records the first statements he makes about the work, **he intends to draw attention to cases of paedophilia within the Catholic Church, trying to achieve this goal by means of intense provocation** and for this purpose he used forms, which according to the author of the work were consecrated, that disappeared during the exhibition with the reaction pursued, unleashing the scandal, the publicity and the mass media attention around the work. The purpose was to achieve the rebuke and reflection on the aforementioned cases of paedophilia, not implying or inferring from the work that the Catholic Church as a whole is the author of the aforementioned offence, being publicly known as it is referred to in one of the appeals, that it is a religious confession that explicitly rejects it. Against what is stated in the appeals, it has not been proven that the defendant merely sought to encourage public attendance at the exhibition or to increase the value of the exhibition, an assertion lacking evidential support.”*

74. In his public statements, the artist declared that at no time did he intend to offend the Catholic believers. Thus, on leaving the court of Pamplona on 25 February 2016, after declaring that he was under investigation before the Navarra investigative court no. 2 for the performance, he stated that “at no time“ has there been “a free and direct search for offence“ in the performance in which he exhibited 242 consecrated forms making up the word “paedophilia“ and he stressed that his work “always has a critical and subversive content“. The artist pointed out that from the beginning he had already stated that his work was “critical “and that his creations “always have a critical and subversive content“. He told journalists that what he wanted to do ”at all times“ was ”a criticism of the scourge of paedophilia“ and that he did it ”in this way because he felt there would be a reaction. That was part of the performative and artistic process” said Mr. Azcona, adding that” at no time has there been a search for free and direct offence” and that ”there enters the subjectivity of each person in the ability to be offended or not.”(see ANNEX 1)⁵.

III

3. *Cette même circonstance emporte-t-elle violation du droit de la requérante au respect de ses convictions religieuses tel qu’il se trouve garanti par l’article 9 de la Convention (voir E.S. c. Autriche, no 38450/12, § 44, 25 octobre 2018) ?*

1.- European Convention on Human Rights

“Article 9 Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 Freedom of expression

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not

⁵ See Annex I. Statements made by the artist Mr. Abel Azcona

prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

2. United Nations

(a) International Covenant on Civil and Political Rights

“104. The relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) of 1996 provide that:

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.”

3.- Joint declaration on defamation of religions and anti-terrorism and anti-extremism legislation.

On 9 December 2008, the OSCE Representative on Freedom of the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression, and ACHPR Special Rapporteur on Freedom of Expression

and Access to Information, adopted a joint declaration which, insofar as it is relevant, noted the following:

“Defamation of Religions

- *The concept of ‘defamation of religions’ does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.*
- **Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.**
- *Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.*
- *International organisations, including the United Nations General Assembly and Human Rights Council, should desist from the further adoption of statements supporting the idea of ‘defamation of religions’.*”

4.- Freedom of expression in the framework of artistic creation

75. Freedom of expression refers not only to information or ideas that are favourably received or considered to be harmless or indifferent, but also to information or ideas that hard, annoy or distort the State or some people. These are requirements of pluralism, tolerance and a spirit of openness without which a democratic society cannot be built.
76. Artistic freedom is of exceptional objective importance within the Constitutional State, inasmuch as it constitutes a visible expression of certain social pathologies that will often manifest themselves in the specific space for reflection on art in the community itself. For this reason, just as a Constitutional State cannot exist without free media, neither is it conceivable without free artists.
77. A preliminary study of the issue was carried out in the well-known judgment *Joseph Burstyn, Inc. v. Wilson*, which sought to assess the adequacy to the First Amendment of the prohibition that the State of New York had decreed against the exhibition and distribution of the film *The Miracle*, directed by the Italian filmmaker Roberto Rossellini. In the said judgment, Judge Frankfurter concluded that if we accept that morality and religion are issues that in a pluralistic Constitutional State have to be brought back to the private sphere, *concepts such as obscenity or sacrilege can only be weakly understood when imposed on a right such as artistic freedom.*

78. The right to artistic freedom necessarily encompasses what Nobel Prize in Literature Mr. Mario Vargas Llosa has described as the *right to irreverence*⁶. Without this possibility of attacking morality, artistic freedom not only ceases to be recognisable as such, but to a large extent loses that forward-looking and emancipatory capacity that is inherent to it within a society, and that justifies legal protection comparable to that of freedom of expression and information.

5.- The Court's case-law

79. The Court has drawn a line of argument that protects the right to freedom of expression through artistic creation, without ignoring the fact that it must have limits.

80. In the judgment delivered in *Otto Preminger v. Austria* (no. 13470/87, § 47) , the Court stated as follows:

" Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith ".

In that old judgement, the Court recognised that just as it is not possible to set up a concept of religion that is valid for the whole of Europe, it is also not possible to determine definitely when respect for religious feelings constitutes a legal limit on freedom of expression.

81. In *Müller and others v. Switzerland* (no. 10737/84), the majority of the Court held that the conviction for obscenity imposed on an artist who had exhibited a work loaded with lust at an exhibition of contemporary art did not breach Article 10 of the Convention, since the Member States enjoy a wide margin of appreciation at domestic level as to what the protection of public morals should be in a given society.

82. In the judgments delivered in *Hadyside v. United Kingdom* (no. 5493/72) and *Kokkinakis v. Greece* (no. 14307/88), the Court found that both public morality and the States' own relations with religion are matters where Member States enjoy a wide margin of appreciation in establishing the regulatory framework.

83. In the judgment *Giniewski v. France* (no. 64016/00) the Court held that the civil penalty imposed on a journalist who, in a newspaper article had linked the doctrine of the Catholic Church to anti-Semitism and the genocide of the Jewish people, constituted a breach of Article 10 of the Convention. And also, in *Aydin Tatlav v. Turkey* (no. 50692/99 [27]), the majority of judges concluded that Turkey had violated the

⁶ VARGAS LLOSA, M., «The Right to Irreverence», *El País*, 22 February 2006.

Convention by criminally condemning the author of a book that severally criticised the Islamic religion [28]. In both cases, and contrary to *Otto Preminger v. Austria* (cited above), the specific contribution of freedom of expression to the formation of public opinion within a democratic society leads the Court to assert the preferential position of this freedom against attempts to exclude from public debate certain opinions that may be considered offensive to certain religious groups.

84. There are many cases in which the States have been condemned by the Court for restrictions on artistic freedom. In one such case, *Vereinigung Bildender Künstler v. Austria* (no. 68354/01), the artistic material which had been banned from exhibition by the Austrian authorities because of its obscene nature was a satirical painting depicting in a clearly sexual manner several leaders of the Austrian Freedom Party (FPÖ), including its then President M. Haider, together with the nun Theresa of Calcutta. The majority of the Court took into account the characteristics of the satirical artistic tradition and also the very public dimension of the politicians who had been satirised. Two circumstances which, together with the fact that the ban issued by the Austrian courts was not limited in time and place, led the majority of the Court to declare that there had been a breach of Article 10 of the Convention.
85. In *Karatas v. Turkey* (no. 23168/94), the work that had given rise to the dispute was a collection of poems, *The song of a Rebellion*, a composition with a strong epic tone in which the author glorified the Kurdish resistance against the Turkish government, inviting the Turkish people to resistance and fight. The Turkish authorities convicted the author of the offence of disseminating separatist propaganda, a conviction which was found by the majority of the Court to be contrary to Article 10 of the Convention. In its judgment, the Court took into account the reduced impact that the work in question could have on society, since it was a poetic composition intended for an initially minority audience, but also the very political dimension of the work, and in this respect it valued the specific contribution that this work, or this type of work, could make to a democratic society. In short, in *Karata* and in *Bildender Künstler*, it is the explicit political dimension of the discourse, but not the artistic support of the expression, which seems to determine the added value of artistic freedom in the weighting carried out by the Court. In our view the explicit political message dignifies for the Court the work of art, at least for the purpose of equating its legal treatment with that of other forms of freedom of expression, traditionally subject to specific protection.

6.- Application to the present case

The domestic authorities' assessment

86. The fact that the performance could be offensive to the religious feelings of Catholic believers -whose cases of paedophilia by the church hierarchy were criticised in the artwork - **was never denied by the domestic authorities**. However, the task of the

criminal judges is to determine whether the typical elements of the offences under investigation were present or not.

87. The existence of an offence against religious feelings (which is a subjective perception) cannot be misconceived with the necessary concurrence of the elements required in the domestic legal system to consider the commission of an offence.

88. The power to determine the existence of the typical elements of the offence lies with the domestic authorities and, in particular, with bodies with competence in such criminal matters. It is therefore up to them to establish, within their margin of appreciation, whether beyond the existence of an offence against religious feelings, the requirements laid down in the Spanish Criminal Code for considering actions to constitute an offence have been met.

89. Obviously, when it comes to the protection of a certain right covered by the Convention, it is necessary to consider whether another right could be breached under its protection. It is in such cases of possible conflict between rights that the proportionate weighting to be given by the domestic authorities (administrative and judicial) is most important.

In the present case there is a conflict between two rights protected by the Convention, namely the right to the protection of religious feelings and the right to freedom of expression through a work of art.

90. As discussed above, the domestic authorities gave strict consideration to the artistic activity carried out and decided that it could not be included among the types of criminal offences that punish hate crimes or crimes against religious feelings in Spain. This was because **it had not been established that the alleged conduct made a mockery of the beliefs, rites or ceremonies of the religious confession or was carried out with the express and unequivocal intention of offending religious beliefs.** To this end, they examined in detail what the reported artistic activity consisted of: the use of forms to convey the word “paedophilia”.

91. It is worth recalling what the Provincial Court of Navarra said when it confirmed the filling of the complaint agreed by the investigative court:

“Therefore, it is not enough to offend the religious feelings of other people, which in this case definitely occurs, but conduct requires making a mockery of the dogmas, beliefs, rites or ceremonies of a religious community and, moreover, is carried out with the express and unequivocal intention of offending religious beliefs, which must be assessed on the basis of the factual circumstances cited above, in order to evaluate whether this trend element is accredited or whether, on the contrary, it is not verified and therefore comes from the agreed file”.

While the activity being investigated did not amount to a crime, even though it might offend religious feelings, it was not criminal, as it contained a criticism of a scourge detected within the Catholic Church and publicly denounced by its highest authority.

92. In the instant case, beyond the artistic support of the work which allows it to be placed within the context of a work of art, it is not possible to ignore its political burden of social criticism of a social scourge such as paedophilia within the Catholic church, of such magnitude that the Catholic church itself, as it is public and notorious, has had to deal with it by calling a Vatican summit on sexual abuse in February 2019⁷, in which its highest representative, Pope Francis, made several public statements condemning this phenomenon. Thus, he stated that “no abuse should ever be covered up or underestimated”⁸; or “paedophilia is a plague for which the Church is wounded”⁹.
93. The work of art was the object of the complaint before the domestic courts head and obviously critical purples with the referred reprehensible phenomenon of paedophilia within the ecclesiastical hierarchy.
94. To find in such work of art a criticism of the Catholic believers or the Catholic faith itself means to distort its nature, since it is obvious -as was made clear by the relevant judges- that the criticism was aimed exclusively at condemning an offence reported by the Catholic Church itself on various occasions within its sphere of activity.
95. The use by the artist of hosts or forms used by the Catholic Church for the communion deserves special mention. It is clear from a reading of the judicial decisions handed down in the instant case that the domestic judges did not agree with the artist’s use of those forms, even though their judicial function was not to agree or disagree with a moral reproach, but to establish whether the activity under investigation was liable to criminal prosecution. It is important to differentiate between these two aspects, since otherwise it would imply appealing to a non-existent right for judges to consider any artistic activity as criminal simply because it is considered as such by the complainant.
96. As stated in the joint declaration adopted on 9 December 2008 by the OSCE Representative on Freedom of the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression, and ACHPR Special Rapporteur on Freedom of Expression and Access to Information:

“The concept of ‘defamation of religions’ does not accord with international standards regarding defamation, which refer to the protection of reputation of

⁷ <http://www.rtve.es/noticias/20190224/papa-francisco-promete-iglesia-llevara-ante-justicia-cualquiera-cometa-abusos-nunca-intentara-encubrirlos/1889481.shtml>

⁸ <https://www.lavanguardia.com/internacional/20190224/46656821373/papa-francisco-abuso-encubierto-infravalorado-cumbre-vaticano.html>

⁹ https://www.lasexta.com/noticias/internacional/el-papa-francisco_201901275c4dbfa40cf2aed38714f895.html

individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.

Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.”

Availability of other remedies for the applicants to protect the right to honour or religious feelings. Failure to exhaust available remedies.

97. As seen above, the applicants did not resort to the administrative or judicial remedies available to them in order to repair the potential damage caused by the work of art that was the subject of the complaint. In fact, they limited themselves to resorting to the criminal procedure together with civil actions, thus choosing the way reserved for the most legally reproachable conducts.
98. Nevertheless, they did not file a claim for protection of the right to honour. Honour, privacy and self-image stand as autonomous limits to freedom of expression whose function is to protect human dignity in its “static aspect”. This limits on freedom of expression are embodied in various criminal law offences (insults, slander, offences against privacy) but also in the “unlawful interference” referred to in civil law (Act no. 1/82, on the Protection of the Right to Honour, Personal and Family Privacy and Self-image). Limits whose ultimate function is to protect the so-called “static aspect of dignity”: that part of dignity which is due to the individual for the mere fact of being a person.
99. Article 1(2) of the above-mentioned Act no. 1/82 establishes the compatibility of the judicial protection granted by the criminal jurisdiction with that contained in this rule in the civil jurisdiction. An application for damages in civil proceedings would make it possible to obtain a cessation of the activity complained of and even compensation for damages.
100. Article 9 of said Act sets out the legal remedies available to defence against unlawful interferences, and the claims that the injured party may make. With regard to compensation for damages, it is presumed that such damages exist in all cases of proven interference, and include not only pecuniary damages but also non-pecuniary damages, which are particularly relevant in this type of illegal act.
101. There are countless **examples of the right to honour in the Spanish legal system being satisfied in the civil sphere**, including an explanation of why it should not be subject to criminal prosecution but should be subject to civil proceedings. See, for example, the fresh Supreme Court decision no. 973/2019, which concludes as follows:

“8.- In the present case, it is a matter of upholding a civil claim with much less severe consequences than a criminal conviction (which was the case in that Court’s judgment), and which is essentially aimed at repairing the honour of the offended party (in this case, his memory) and alleviating the pain of his relatives by repairing the reputation of the deceased, thus respecting the requirement of proportionality in restricting freedom of expression.”¹⁰

IV

4. *La requérante est-elle fondée à soutenir qu’elle est victime d’une discrimination, contraire à l’article 14 de la Convention combiné avec l’article 9 de la Convention et/ou l’article 8 de la Convention (voir, mutatis mutandis, D.H. et autres c. République tchèque [GC], no 57325/00, CEDH 2007-IV) ?*

European Convention on Human Rights

Article 14

“Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Domestic law

Spanish Constitution

Article 14

“Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”

¹⁰

<http://www.poderjudicial.es/search/openCDocument/759571a449b069c26d6a89c0f14fb3b891529eae56216599>

Prior consideration of the question posed

The question raised by the Court on this particular point is rather surprising.

102. The violation of the right to equality involves providing a benchmark for the person(s) against whom such discriminatory treatment is potentially advocated. In the present case, the question has been confined to copying the narrow allegation made by the applicants, even with reference to the same judgment invoked in their application.
103. We shall now examine that judgement and whether or not it applies to the present case, from which the complaint originated.

The Court's case-law

104. The well-established case-law of the Court has settled that discrimination means treating people in similar situations differently without an objective or reasonable justification (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV, and *Okpysz v. Germany*, no. 59140/00, § 33, 25 October 2005).

105. The judgment in *Gaygusuz v. Austria* (no. 17371/90) states the following:

*“36. According to the Court's established case-law, Article 14 of the Convention (art. 14) complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. **Although the application of Article 14 (art. 14) does not presuppose a breach of those provisions - and to this extent it is autonomous - there can be no room for its application unless the facts at issue fall within the ambit of one or more of them** (see, among other authorities, the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, p. 32, para. 22).”*

106. In the case referred to by the Court in the question posed (*D.H. v. Czech Republic*, no 57325/00), the claim on discrimination by a group -the Roma- whose children were sent to special education schools was examined; in the present case, however, one group has not been discriminated against as opposed to another group (the Catholic believers in relation to others), since other groups or different cases have not been the subject of criminal proceedings either.

Application to the present case

107. The differences between the case decided by the Grand Chamber in *D.H. v. Czech Republic* and the present case are overwhelming:

1.- In that case, the Court examined racial discrimination against an ethnic group on account of their inclusion in a special education schools. In the present case, the domestic authorities merely considered that the performance by an individual artist was not worthy of criminal prosecution, as it did not fall within any of the offences under the Spanish Criminal Code.

2.- In the case examined by the Grand Chamber, the existence of discriminatory treatment in relation to another ethnic group was fully proven.:

“183. The applicants’ allegation in the present case is not that they were in a different situation from non-Roma children that called for different treatment or that the respondent State had failed to take affirmative action to correct factual inequalities or differences between them (see Thlimmenos, cited above, § 44, and Stec and Others, cited above, § 51). In their submission, all that has to be established is that, without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.”

And it concludes as follows:

“208. In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. In that connection, it notes with interest that the new legislation has abolished special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools.”

Unlike the above case, the present application does not provide a single piece of information or evidence of discriminatory treatment of the applicants or even of Catholic believers in relation to other religious groups. Consequently, it is difficult to claim a violation of the right to equality when there is no other group, person or group of persons in respect of whom such discrimination can be alleged for comparative purposes.

3.- The judgment itself states that:

206. Nevertheless, whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation (see Buckley v. the United Kingdom, 25 September 1996, § 76, Reports 1996-IV, and Connors, cited above, § 83).

- 108.** In the instant case, the applicants had all the procedural remedies available to them: bringing the complaint, resorting to the higher court -the right of appeal- first, and then resorting to the Constitutional Court.
- 109.** The criminal protection of the allegedly violated right was however, limited to a criminal sphere. There is no evidence that the applicants used any means to protect the rights other than the most punitive formula, such as criminal proceedings.
- 110.** A violation of the right to equality could be invoked provided that, in similar cases, an artist had been convicted by the Spanish authorities of an action similar to that in the present application, for having violated freedom of religion. However, **no single similar case is offered for comparison.**
- 111.** The applicants, the Christian Lawyers Association, once filed a complaint¹¹ against the director of the *Reina Sofía* National Museum and Art Centre, which contained the work so called *Cajita de fósforos* [Small Box of Matches] by the Argentinian group *Mujeres Públicas* [Public Women], in which the message "*The only Church that illuminates is the one that burns. Contribute*" can be read. In that same complaint, four other works were also reported: *If the Pope were a woman, abortion would be a law*; a photo in which the Virgin Mary and other saints appear next to the word "*Idiot*"; *The Pope is from Argentine and abortion is clandestine*; and *Estampitas* [little cards bearing images of saints], which in the opinion of the applicants "distorts" the Lord's prayer with pro-abortion messages.

¹¹ https://www.granadahoy.com/ocio/Abogados-cristianos-Museo-Reina-Sofia_0_859414548.html

The aforementioned complaint was dismissed by the relevant court (see Annex 2)¹², and upheld by the Provincial Court of Madrid, without this party being aware that the now applicants filed a complaint with the Court as a result of:

1. The Museum being allowed to include the above-mentioned works in the exhibition, and
2. The complaint against the Director of the Museum that allowed their exhibition being dismissed.

The case presents many similarities with the one examined here, with the only difference that the complaint in that case was against the Director of a Museum and, in the present case, against the artist who is the author of the work concerned.

In the Provincial Court's decision no. 73/2013, deciding the appeal and upholding the dismissal of the complaint, the following was stated (see Annex 3)¹³:

“There is no crime of provocation against Catholics.

The provocation referred to in Article 510.1 of the CC is not a verbal or written assault or aggression, nor even hatred of Catholicism itself, but an invitation to discriminate, hate or use violence against groups, associations, and more than against groups or associations, against the people who make them up.

Nor can it be said that offenses against the Catholic religion are comparable to information that is injurious to the Catholic Church because of the religion it expounds; and censorship of the Catholic Church, however bitter and inconsiderate it may be, or however much it distorts the facts or assesses them in an openly unjust manner, is protected by freedom of expression, especially when it was carried out on the occasion of the World Youth Days and when the collective protagonism corresponded to these young people, Catholics mostly, and to the Pope, who is the individual to whom the highest dignity within the Catholic Church belongs, and in whom criticism of the celebration of those days, of the Pope's visit, and of the possible expense that this might entail, is within the right of criticism, even unjust, biased or sectarian, common to all democratic systems.

¹² See Annex 2. Decision no. 4564/2014 of the Madrid Investigative Court no. 13 de Madrid dated 27/3/2015

With respect to the offence referred to in Article 525.1, offenses against religious beliefs, the answer must be that to describe the Catholic Church as a religious organization "whose history is full of crimes and which is the enemy of social justice and human progress" can be considered a lack of respect for historical truth, or an accentuation of the most reprehensible moments or actions from the current viewpoint of some members or Church leaders, deliberately forgetting everything positive, but this is a very common and widespread view based on Marxist thought or even on critical thought of the work of colonization, of the defense of the faith by the Inquisition, of the crusades, etc., but which cannot be criminalized. On the other hand, certain images that are offensive to the bishops in general and not specific to anyone, or that oppose reason and faith, reserving intelligence only to the former, do not represent a mockery of dogma, belief or rite. Just as the reprehensible expressions about churches that burn, the divine omnipresence that their presence under a defecation supposes or the label of great inquisitor to the Pope, are not a mockery of beliefs, rites or dogmas, but rather a disqualification of them, where what is intended is to label the temples as useless, or supposedly ingenious reductions to the absurd or inadequate reminder of the present Pope's career as Cardinal Prefect of the Congregation of the Doctrine of the Faith, more or less mixed up with his obligatory adolescent contribution as a soldier to the National Socialist Germany.

The call to create cartoons or messages "for the mockery of religious institutions and God" (clause 4 of the CNT call, page 58) must be interpreted in the light of clause 2, which introduces a festive and humorous tone in it and establishes that the works will be valued "for their ingenuity and critical and sympathetic message" and in any case the references to religious institutions do not refer to any particular one, but to all of them, whether they relate to the Catholic religion or to other monotheistic confessions, Christian or non-Christian, or to polytheistic religions, and this is not the object of protection of the aforementioned Article 525.1 of the Criminal Code. Nor can God be the object of protection under the Criminal Code, which refers to the religious beliefs of human beings.

¹³ See Annex 3. Decision no. 73/2013 of the Provincial Court of Madrid of 24/1/2013

The same can be said of the image of Jesus Christ as a suicide bomber, inasmuch as Christ is God for Christianity and is not subject to the protection of the criminal law. To claim that this unfortunate image is an apology for terrorism is absurd. At most, it would be an accusation of terrorism against Jesus Christ, without meaning or measure, but not a form of provocation or invitation to terrorism, as required by Article 18.1 of the CC. It is unthinkable that such an image would be a source of inspiration for a Christian to place bombs.

Therefore, there is no apology of terrorism of Articles 571 et seq. and 18 of the CC. Similarly, it is an open exaggeration to claim that the image of a hanged bishop, the reference to the church burning or the phrase "totus muertos"[totus dead] constitutes a crime of genocide. These expressions do not deny, nor do they have the potential to claim the rehabilitation of any particular regime that protects a genocidal persecution for religious reasons; therefore, the elements of Article 607.2 of the Criminal Code are not fulfilled”.

- 112.** In view of the foregoing, and contrary to the applicants’ statement, it would be discriminatory if the present case would have been treated differently from previous cases by Spanish courts.

FINDINGS

1.- The domestic authorities acted at all times in a respectful manner for all the rights under the Convention, weighing up the conflicting rights in a reasoned and proportionate manner, assessing the requirements of the domestic legal system for the imposition of penalties as a result of the commission of criminal acts, and concluding that the conduct complained of could not be subjected to criminal prosecution because the elements required by domestic criminal law were not present..

2.- The action taken by the domestic authorities was entirely consistent with the most recent case-law of the Court itself, as set out above (see *Mariya Alekhina c. Russia*, no. 38004/12)

3.- The applicants only resorted to the criminal jurisdiction, whereas they could have resorted to the protection of the civil jurisdiction by filing a complaint against the right to

honour under the law. Instead, they pursued the most punitive means of reproach of any legal system, reserved for the most socially reprehensible conduct.

4.- As indicated above, it would be very difficult to understand why the domestic authorities should be blamed for having followed the European Court's own advice (see the judgment in *Mariya Alekhina and others v. Russia*), whereas the Spanish State has been condemned by this Court precisely for doing just the opposite, when an act of social criticism in a public place, such as burning the portraits of the king of Spain, was criminally sanctioned (see *Stern Taulats v. Spain*).

It could not be understood that, when performing an artistic activity with a high degree of social criticism of the reprehensible conduct of certain members of the hierarchy of the Catholic Church, the Court would reproach the domestic courts which, after having examined all the relevant evidence, did not consider that there was a hate crime, nor that the elements of the criminal type provided for in the Spanish Criminal Code were present. If they had acted otherwise, not only could they have been accused of breaching the principle of legality in criminal law -there is no crime without law- but also of failing to protect the right to freedom of artistic expression within a community.

5.- Furthermore, it would be difficult to understand a possible conviction in a case such as the present one, in which the domestic authorities have only been able to review and decide whether the activity reported was worthy of criminal reproach or not, whereas in other cases Spain has been precisely condemned for having imposed a penalty on an activity which, according to the Court, should have been protected by the right to freedom of expression..

6.- Accordingly, having chosen the criminal course of action to protect its rights, the applicants chose the most punitive means in the domestic legal system, thereby renouncing the use of other less punitive means available to them within the Spanish legal system, and thus preventing the domestic authorities from fulfilling, where appropriate, the positive obligations to protect the rights under the Convention.

For all the above reasons, we hereby

PLEAD TO THE COURT

1º.- To deem first observations submitted in due time.

2º.- To admit as evidence the electronic documents linked in the footnotes of the present observations as well as the Annexes listed at the end of this written pleadings.

3º.- To dismiss the application on the grounds stated, finding that there has been no breach of the Convention by the Kingdom of Spain, in particular of Articles 6.1, 8, 9 and 14 of the European Convention on Human Rights.

In Madrid for Strasbourg, 16 January 2020

THE AGENT OF THE KINGDOM OF SPAIN

Alfonso Brezmes Martínez de Villarreal

ANNEXES

ANNEX 1- STATEMENTS MADE BY THE ARTIST MR.ABEL AZCONA

ANNEX 2- DECISION OF THE MADRID INVESTIGATIVE COURT.

ANNEX 3- DECISION OF THE PROVINCIAL COURT OF MADRID



MINISTERIO
DE JUSTICIA

ABOGACÍA GENERAL DEL ESTADO
DIRECCIÓN DEL SERVICIO JURÍDICO DEL ESTADO

S.G. DE CONSTITUCIONAL Y DERECHOS HUMANOS

Área de Derechos Humanos

TO THE EUROPEAN COURT OF HUMAN RIGHTS

ADDITIONAL OBSERVATIONS

APPLICATION No. 22604/18

ASOCIACIÓN ABOGADOS CRISTIANOS

v.

SPAIN

CORREO ELECTRÓNICO:
aedhumanos@mjusticia.es

C/ SAN BERNARDO, 45
28015 MADRID
TEL.: 91 390.4515/2358

TO THE EUROPEAN COURT OF HUMAN RIGHTS

The Court has communicated to the Spanish Government the applicant's observations as regards the present claim together with their claim for just satisfaction, inviting us to submit our written observations in respect thereof.

Within the time limit set for this purpose, and on behalf of the respondent State, I hereby submit the following observations:

On the merits

I

Procedural deviation from the subject matter of the applicant's claim

1. The applicant Association in the present case has misunderstood the nature of the protection system of the European Convention on Human Rights for potential victims.

The applicants exhausted all domestic remedies as regards domestic courts from the time the complaint lodged against the author of the work of art by the Association, namely the current applicant, was filed.

A mere reading of the application to the Court is enough to show the procedural deviation of the applicants: the application concerns a complaint against a specific action taken by the Spanish authorities, namely the judges for criminal matters who did not find sufficient evidence in the facts reported to consider, in accordance with the Spanish Criminal Code, that the artist who is the author of the work in question could be convicted as having committed any of the offences listed in that Code.

However, **the decision to authorize the exhibition by the Pamplona City Council was not challenged by the applicants, nor did they exhausted domestic proceedings against such decision.** Therefore, they can hardly now claim to reverse their application in order to have the Kingdom of Spain condemned for the actions taken by the said City Council in authorizing the exhibition.

2. From the outset, both at the time of exhausting domestic remedies and upon the application lodged with the Court, the legal debate before the Court has **exclusively focused on the actions of the national judges in closing the complaint filed** and on the inadmissibility of the appeals, including the *amparo* appeal, filed against the closure of such complaint.

Therefore, it cannot be accepted at the present stage of establishing just satisfaction that the procedural object of the application is altered.

II

On the controversial artwork and the offense to religious feelings

3. The applicants seek to convince the Court that this respondent party participates in and supports the artwork subject of the application. Thus, they pretend that the Kingdom of Spain and its Agent before the Court disregard the legitimate protection of the religious feelings of any community. Nothing could be further from the truth, which can be confirmed by the Court itself by simply reading our first observations.
4. At no stage does the written observations submitted by Spain contain a statement in support of the content of the artwork concerned, but merely provides a legal basis for the reasoning behind the action taken by domestic authorities in closing the complaint lodged by the applicants, which was in full compliance with the Convention.
5. On the other hand, the applicants note that the purpose of the artwork was to ascribe to Jesus Christ cases of paedophilia within the Catholic Church, by the

mere fact that the artist used religious forms, consecrated or not. Such statement has no support whatsoever, since it does not arise either from the artistic intervention itself or from the videos recorded by the artist to explain his work.

However, what is clear from the interpretative elements at our disposal –the evidence and the author’s own artistic interpretation of the artwork- is that **the aim of such artwork was to denounce, in the most striking possible way and within the much more flexible parameters assigned to an artwork, the persistent and public cases of paedophilia within the Catholic Church.**

6. **The fact that using the forms adopted by the Catholic Church to give communion to its worshippers could be considered offensive for religious feelings does not necessarily imply the criminal nature of the activity at issue, and that the applicants have the right to have the artist sentenced to a term of imprisonment** for the production and exhibition of his work.
7. Nevertheless, this and nothing else is what Spain has maintained from the outset in order to substantiate the reasons why the present application should be rejected or, as the case may be, dismissed.
8. On the other hand, when affirming that the fact of being consecrated forms or not was not judicially proven, we refer to the transcription of the decision issued by the Court of Pamplona in which such assertion is contained, even though there are some videos in which the artist recorded himself taking these forms in Catholic churches.

In other words, we are simply taking up an undisputed fact: that it has not been proven in court, even if the applicants wish to make it seem otherwise, although that fact, in any case, was not relevant to the decision of domestic judges to consider that neither the subjective nor the objective elements of the types of crime set out in the Spanish Criminal Code were present.

III

Assessment of the fresh observations submitted as regards Convention rights

We now turn to the new arguments made by the applicants in respect of the observations made by Spain in relation to each of the provisions of the Convention allegedly breached:

Article 6.1

9. In that regard, the following was stated by the applicants: *“When this party filed the complaint, both criminal and civil actions were exercised simultaneously. The Applicant, by opportunity criteria, chose to pursue the civil action together with the criminal action by initiating a criminal proceeding. In any case, the chosen option by this party is totally legitimate and nothing was judged on the civil action requested by this party. The Court only requires a reasonable choice and one that allows satisfaction.”*
10. However, contrary to the allegations submitted at this stage by the applicants, the Judge in the Criminal Court of Pamplona expressly ruled on the civil action brought by the applicant since, in dismissing the complaint that also joined civil action by choice of the applicant, the civil action was also dismissed.
11. Thus, even though the applicant’s decision was legitimate – criminal and civil actions accumulated versus the criminal action alone, with the exercise of civil actions preserved - they must abide by the consequences of that decision.

The applicants could have exercised the criminal action with express reservation of civil actions, as granted by the Spanish Criminal Procedure Act¹, which they failed to do. Had they acted in that way, the filing of the complaint would not have impaired the subsequent exercise of civil actions.

¹ “Article 100

All offences and misdemeanours give rise to criminal proceedings to punish the guilty party and may also give rise to civil action for the return of things, repair of damages and compensation for damages caused by the punishable act.”

12. Accordingly, it was the applicants' own conduct that resulted in the procedural damage they claim to have suffered.

Article 8

13. According to the applicant's new written submission: *"The intrusion into the private life of Catholics is evident. The "author", AC, gets into the house of Catholics (the Catholic Church), during 242 Masses, steals in an inappropriate way the most sacred thing for Catholics, Consecrated Hosts, and with these Consecrated Hosts creates an exhibition that links the Sacred Hosts and with it Christ himself with paedophilia, all of which is also financed and promoted by the City Council of Pamplona. All this could have been done with non-consecrated hosts, but if the author sought precisely these Consecrated Host, it was to directly attack the most sacred of Catholics, Jesus Christ himself. The author, with his exhibition, directly links the Consecrated Hosts, and with it Jesus Christ Himself, who is God for Catholics, with paedophilia."*

14. The allegations submitted by the applicant are misleading, since the subject matter of the application with the Court is solely the closure of criminal actions against the artist; that is, the accuracy or inaccuracy of actions taken by domestic judges in assessing the absence of an offence.

15. This is so because domestic remedies were exhausted by the applicant solely with regard to criminal actions, not to administrative ones. The subsequent appeals were brought against the filing of the complaint and not, as explained above, against the action taken by the City Council of Pamplona in authorizing the exhibition.

16. For present purposes, we can only refer to our already extensive first observations, which justified the legal correctness of the filing of the criminal complaint and the reasons for the inadmissibility of the application with the Court, in the absence of the right to criminal conviction of a third party, although there are less harmful domestic mechanisms -civil action on the right to honour

and privacy- to eventually compensate the applicant Association and its members.

Article 9

17. As regards this provision, the applicants maintain that: *“For this reason, the Kingdom of Spain has breached its duty to guarantee the public manifestation of religious convictions, by the Pamplona City Council organizing an exhibition where the author profaned and stole 242 Consecrated Hosts of Catholic Masses, protected by Article religion for a totally vexatious, humiliating and hurtful use for Catholics.”*

18. Thus, the paragraph transcribed from the judgment of the Court mentioned by the applicants (*Pichon and Sajous v. France*, no. 49853/99) does in no way support the application. Such paragraph refers to general aspects related to the right protected by Article 9 of the Convention, but is in no way comparable to the case in question, in which claims are made for the filing of a criminal complaint against the author of the artwork concerned.

19. On the other hand, the applicants once again insist on the action taken by the City Council of Pamplona: *"It is also a malicious violation of the spirit of tolerance that should characterize a democratic society, also allowing the Pamplona City Council to continue the exhibition despite the great social upheaval of all Spain, the offensive content of the exhibition, thereby altering the religious life of believers."*

Article 14

20. None of the allegations now provided by the applicants enables a difference of treatment of said Association or its members in relation to third parties. Article 14 of the Convention requires the existence of a comparative term from which damage may be inferred, and discrimination cannot be invoked in a generic way as a potential injury.

21. Over and above, in our written observations Spain has provided comparative terms from similar cases in which similar treatment was given to the applicant Association. That is, the common practice is somewhat similar to the one reported: the filing of complaints for carrying out artistic activities or their authorisation as they are protected by another of the rights of the Convention, namely freedom of expression.

IV

Partial and extemporaneous expert evidence

22. In paragraph 26 of their observations, the applicants note the following:
“Moreover, this part commissioned an expert examination of an art expert (senior technician of the Navarra Museum and General Director of Culture), totally independent who concluded about the author, A.C. and the exhibition: “the avidity of the artist to obtain benefits, the desire for prominence and under the pretext of free artistic expression to seek notoriety by resorting to the offense.”
23. Neither is this expert evidence relevant, since it does not add anything to sustain the just satisfaction requested, nor can it in any way be considered "absolutely independent", both because it was commissioned by the party invoking it, not by the judge, and because of the very content of the expert report, the wording of which clearly shows the sympathy of the alleged expert with the religious conviction that is the object of the artistic activity concerned.

On the just satisfaction claimed

24. Finally, concerning the just satisfaction claimed by the applicant Association, since Spain holds that the application has to be entirely dismissed, the just satisfaction claimed should be also dismissed.
25. However, *ad cautelam*, in the event the Court were to uphold such claim in whole or in part, it is appropriate to consider the allegations put forward by the applicants to show that they made a gross mistake in the calculation of the just satisfaction claimed; it should be noted that **the calculation made by the applicants is based on a rather surprising aspect: the alleged economic benefits obtained by the artist in performing his artwork**
26. Thus, the applicants quantify their claim for just satisfaction not on the alleged damages incurred by the applicant Association or its members, but on the alleged benefits obtained by the artist in performing his artwork.
27. **The applicants do not allege that domestic authorities acted in such a way as to file the complaint, which is the purpose of the application, nor do they allege any moral damage suffered by the members of said Association, which is intended to defend the Catholic Church, but that the artist benefited from the performance of the artwork which, according to the applicants, should never have been authorised.**
28. It seems more like an individual civil claim against the artist to obtain reimbursement of the fees received for the artwork than a claim before the Court against Spain.
29. Last but not least, **apart from using an absolutely erroneous concept for the calculation of just satisfaction, the applicants do not provide any evidence of the alleged fees received by the artist,** on which the claim is based. In any

case, this constitutes **a breach of the burden of proof** which requires a principle of proof to be provided by the claimant, namely the applicant.

For all the above reasons, we hereby

PLEAD TO THE COURT

To deem the current written observations and the reply to the applicant's claim for just satisfaction submitted in due time and, by virtue thereof, declare the application inadmissible or, alternatively, dismiss the application on the grounds expressed both in the present observations and in the first observations submitted in due form by Spain.

Madrid, 15 July 2020

THE AGENT OF THE KINGDOM OF SPAIN

Alfonso Brezmes Martínez de Villarreal