



Analysis

Spain: Will the new 'progressive' government uphold freedom of expression?

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Following a general election in November 2019 – the third in just 18 months – Spain now has a coalition government formed by the Spanish Socialist Worker's Party (*Partido Socialista Obrero Español*, PSOE) and a group of left parties under the umbrella of *Unidas Podemos*. This follows a situation in which the country was ruled by a PSOE caretaker government for a year-and-a-half, following a vote of no confidence in the former president Mariano Rajoy (of the conservative *Partido Popular*, PP). The PP was in power for seven years and in 2015 passed the controversial Law on Citizens' Security or *Ley Mordaza* ('Gag Law'), a measure that has been harshly criticised for its attempts to curtail freedom of expression, among other civil liberties.

A number of proposed reforms to this law and other measures that restrict basic liberties were contained in the coalition agreement reached between the PSOE and *Unidas Podemos*. It outlines an intention to reform the Gag Law in order to prioritise citizens' rights and emphasises, in particular, the rights to assembly, improved identification of police officers and derogation of article 315.3 of the Penal Code, which has been used to impose penalties for coercion during strikes. However, experts have highlighted that there is much more that could be done by the government.

Following the announcement of the coalition government in January, the *Plataforma en Defensa de la Libertad de Información* (Platform in Defence of Freedom of Information, PDLI) published the ten top priorities the new administration should deal with to ensure respect of the right to freedom of expression. The organisation has called on the government to align domestic law with its human rights obligations, including a revision of the Criminal Code, the Gag Law and the Royal Decree Law 14/2019, which allows internet shutdowns. Many of these

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concerns were recently echoed at the UN Human Rights Council, where Spain is currently undergoing its third universal periodic review.¹

The following text is a translation of an article published by the PDLI in the wake of the formation of Spain's new coalition government. Whether the government will keep its own promises – and whether it will become any more ambitious in promoting and upholding civil liberties – remains to be seen.

The 10 challenges for the new Spanish government regarding freedom of expression²

The *Platform for the Defence of Freedom of Information (Plataforma en Defensa de la Libertad de Información, PDLI)* has stressed today [8 January 2020], coinciding with the appointment of Pedro Sanchez as prime minister, the main challenges the new cabinet will have to face regarding freedom of expression and mass media policy.

These pending tasks are included in the annual report issued by the Platform each year, in which it analyses the situation of this fundamental right in Spain.

In order to amend the unprecedented reverse that freedom of expression has suffered in democracy in recent years, the PDLI proposed 10 urgent measures to align Spanish regulations to the international standards with which it has pledged to comply.

Some of these measures are already included in the agreement that enables the coalition government between the Spanish Socialist Worker's Party (*Partido Socialista Obrero Español, PSOE*) and *Unidas Podemos*, leading to the appointment of Pedro Sanchez.

Among other measures, the PDLI underlines the necessity of abolishing the so-called *Ley Mordaza* modifying the Penal Code, improving the Transparency Law, protecting whistle-blowers and putting an end to the interim legal basis of RTVE (the Spanish public broadcaster).

1. Abolish the Organic Law on Citizenship Security, known as 'Ley Mordaza'

The PDLI has repeatedly denounced that the '*Ley Mordaza*' is unnecessary to protect citizens' security and yet useful for repressing rights and liberties. This is also implied in the information released by the interior ministry, because it shows a penalty regime in which the most ill-defined articles are the most-used.

The sanctions imposed for alleged infringement of article 37.4 related to "disrespect and offense" (*faltas de respeto y consideración*) towards members of the security forces

¹ 'Universal Periodic Review – Spain', UN Human Rights Council, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/ESindex.aspx>. See also: 'Spain: Statement on the Universal Periodic Review', *PEN International*, 30 January 2020, <https://pen-international.org/news/spain-statement-on-the-upr>

² 'Los 10 retos del nuevo gobierno sobre libertad de expresión', PDLI, 8 January 2020, <http://libertadinformacion.cc/los-10-retos-del-nuevo-gobierno-sobre-libertad-de-expresion/>

outnumbered all others, in a steady progression that has tripled in number between 2016 and 2017. 65,007 fines claiming infringement of this article, amounting to €9,730,644, have been imposed since the law came into force.

Furthermore, penalties related to ‘disobedience or resistance to authority’ (article 36.6) reach the sum of 42,850. The revenue from infringement of this article was higher, reaching €26,282,353. The article referring to inappropriate photographs of police officers (36.23) has justified 125 fines since the entry in force of the law, amounting to €7,786,300 in revenue.

2. Reform the Penal Code, derogating articles such as offense to the religious affiliations, insults against the crown, libel and slander; and modification of others referring to hate speech or terrorism

For the PDLI, the Penal Code is the principal cause of the most serious attacks against freedom of expression. The Platform’s annual report highlights more than ten articles of the law that fail to comply with UN standards: 205 to 216 concerning libel and slander; 492 to 494 about concerning offence to the honour of the Crown; 496 on offence to the Congress or regional parliaments; 504 on libel and slander against the government and other institutions; 556 on disrespect to authority; 543 on affronts to the honour of Spain and its symbols; 524 and 525 regarding offence against religious sentiments; and article 510 on hate speech.

Along with these, articles modified by the ‘anti-jihadist pact’³ should be added to the list, for instance the exaltation of terrorism (article 578) and indoctrination (article 575), that can be used to penalise individuals for merely for browsing web pages.

Cases such as the vegan group accused of terrorism;⁴ the tweets of Cesar Strawberry or Cassandra, that took them to the Spanish high court (*Audiencia Nacional*); or the procession of “the insubordinate vagina”⁵, the consequence of which was a penal procedure lasting two years for offending religious sentiments, constitute evidence of the urgency with which the reform is needed.

Journalists and media outlets have also been affected by the application of these articles that have proved to be damaging for freedom of expression – for instance *El Jueves* (a satirical magazine) or Dani Mateo, the humourist at *El Intermedio*.

³ An agreement reached by the main political parties in Spain in 2015 aimed at fighting extremist ideas online, which included some restriction on freedom of expression and liberties.

⁴ Cesar Strawberry is a Spanish artist and rapper of the band Def Con Dos, who was condemned to one year’s imprisonment (later suspended) after publishing a series of tweets that were claimed to glorify terrorism. Casandra was charged in 2016 with injury to victims of terrorism after she posted a series of tweets about the assassination of Luis Carrero Blanco, a Spanish prime minister who was assassinated by the Basque terrorist group ETA on 20 December 1973.

⁵ On 1 May 2014 an oversized model vagina was carried through the streets of Seville as part of a feminist protest. A number of participants were subsequently arrested and charged with offending religious sentiments. In January 2016, the case was dropped. More information is available (in Spanish) at: ‘Apoyo al Coño Insumiso de Sevilla’, <https://apoyoconoinsumiso.wordpress.com>

3. Conclude the reform of RTVE and concede frequencies to community media outlets, which are essential for plural information and the right to information

When the previous legislature ended on March 2019, the Congress approved the inclusion of the result of the public tender aimed at the selection of the Administrative Council and the president of RTVE in the “list of initiatives to be transferred to the chamber to be constituted in the 13th legislature”. In other words, it dismissed the possibility that after the elections the public tender concerning RTVE would be repeated.

Despite this, no progress has been made during these months and RTVE continues with a temporary character.

Regarding community media outlets, the PDLI, along with the group that gathers these media (ReMC) and the Federation of Journalists' Union (*Federación de Sindicatos de Periodistas*), considers that the community media outlets have to be granted juridical security for carrying out their work – for example, through licenses or analogous instruments, protection in case of interference from pirate radio stations and access to promotional activities proposed by the public administration.

4. Transparency: legal protection for whistle-blowers and for platforms, media and journalists publishing information of public interest

It is essential to grant immunity to those bringing to light corruption in private and public organisations with the purpose of improving transparency and press freedom. Immunity should cover whistle-blowers' actions but should also be extended to the platforms, journalists and media organisation publishing leaks.

On the one hand, the PDLI proposes a more precise regulation of the whistle-blower function, following a proper transposition of the Directive recently approved by the Council of the EU⁶ and, on the other hand, it proposes the reform of article 197 of the Penal Code related to the disclosure of secrets, “a sword of Damocles for investigative journalism”.

5. Balanced distribution of institutional promotion and announcements

The lack of transparency and fairness in the distribution of advertising contracts amongst different media outlets promotes disloyal competition, and it hampers freedom of information, according to the PDLI.

Although national regulation on the matter exists (law 29/2005), this has not prevented public institutions and bodies, whose total cost to the state budget is above €60 million, being used as a carrot or a stick, depending on the editorial line of the media.

⁶ The Spanish public broadcaster has had a provisional Administrative Council appointed by decree in 2018 because of the blockade by the PP to passing the law establishing that the administrative council had to be elected following a public tender and approved by the Congress.

In order to resolve these situations, the *PDLI* proposes stricter legal requirements and increased transparency of the information about the placement of adverts by public institutions.

6. Enhance the Transparency Law

From this standpoint, amongst the priority reforms, it is imperative to improve the Transparency Law, bringing it in accordance to the highest international standards regarding this type of norm.

First, as the *PDLI* has proposed, it is necessary to recognise the right to access information as a fundamental right, following what has already been established by international case law.

Besides that, it is necessary to eliminate the obstacles that currently exist for exercising that right, improving the procedure for access to make it easier and more efficient and to reduce the reasons available for denying access to public information.

7. Protect journalists from violence

Despite living in a democratic state, in recent years journalists have not always seen their safety protected.

As a means to avoid these situations, the *PDLI* seeks the development by Spain of the principles contained in the International Declaration on the protection of journalists⁷ and the extension of these measures to any provider of information, in particular those who do not enjoy support from media companies.

Furthermore, the *PDLI* demands that the size and type of the lettering used on police uniforms to identify agents (in particular, agents in the Police Intervention Units⁸) must be specified. This goes beyond journalists' safety to cover that of any person who exercises their right to demonstration and protest, because it will ease possible claims brought against disproportionate use of force or powers of sanction.

On the other hand, an increasing problem that authorities need to tackle urgently is the online harassment to female journalists. Whereas its solution is not purely legislative, it does require the commitment of all the public authorities.

8. Reform the Law on Criminal Prosecution, banning pre-emptive espionage

Along with the Law on Citizens' Security and the double reform of the Penal Code, the Law on Criminal Prosecution is considered the third '*Ley Mordaza*' by the *PDLI*. Some of the main threats coming from the new law are the possibility of ordering the installation of surveillance

⁷ 'International Declaration on the Protection of Journalists', *International Press Institute*, 11 May 2016, <http://www.freemedia.at/international-declaration-on-the-protection-of-journalists/>

⁸ In essence, the riot squad – these units are deployed at demonstrations, riots, or events with large crowds that it is deemed may become violent, etc.

software (trojans) to investigate any criminal activity online; the “undercover informatics agents”, who will be able to exchange illegal files; or the secret installation of tracking devices.

9. Protect freedom of expression and information online

Starting with the Intellectual Property Law (*Ley de Propiedad Intelectual*) added to the Penal Code or the already-cited Law on Criminal Prosecution, the Spanish legal order contains provisions that allow a disproportionate interference in internet freedoms. The most recent has been the so-called ‘Digital Decree’.

To these must be added immediate legislative risks such as those deriving from the transposition of EU laws that have already been approved (for example, the Copyright Directive⁹ or the Audiovisual Media Service Directive¹⁰) or those currently under discussion (such as the Terrorist Content Regulation,¹¹ which will have direct legal effect, or the so-called Digital Services Act).

Concerns arise about attempts to label as “hate speech” actions that do not qualify as such, becoming a widely used justification to limit online freedoms with the alleged purpose of defending national security or fighting against fake news and misinformation. Last year, the *PDLI* informed the Congress about this issue and it was included in the conclusions of the report resulting from the presentation aimed at studying different questions related to cybersecurity in Spain.

10. Improve access to justice

Providing the justice system with the necessary means and supporting duty lawyers is imperative, since it guarantees the effective exercise of our rights and liberties, amongst them, the freedom of expression and information.

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⁹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593>

¹⁰ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013>

¹¹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventing the dissemination of terrorist content online, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52018PC0640>

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