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Press
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Report on the June 2015 High-Level
International Press Freedom Mission to Spain

Spain: Press Freedom in a Time of Change





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Scott Griffen, IPI Director of Press Freedom Programmes

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Cover photo: Demonstrators against the Law on Public Security gather near a replica of the statue of a lion that stands in front of the Congress of Deputies, lower house of the Spanish Parliament, on June 30, 2015. **EPA/Alberto Martín**



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Background to this Report

This report presents the findings and conclusions from a June 2015 high-level international mission to Spain led by the International Press Institute (IPI). The mission sought to bring concerns related to press freedom and freedom of expression directly to Spanish government officials and representatives of Spanish political parties.

The international participants in the mission were:

- **Paco Audije**, European Federation of Journalists (EFJ) Steering Committee
- **Scott Griffen**, IPI Director of Press Freedom Programmes
- **Katrin Nyman Metcalf**, Chair of Law and Technology, Tallinn Law School/Tallinn University of Technology
- **Ahmed Rashid**, Committee to Protect Journalists (CPJ) Board of Directors
- **Martha Steffens**, IPI Executive Board
- **Stephen Whittle**, former BBC Controller of Editorial Policy

The international delegates were joined by representatives of the Madrid-based **Platform in Defence of Freedom of Expression (PDLI)**, a broad-based coalition of lawyers, journalists, media outlets, consumer groups and academics.

The high-level mission was the culmination of nearly a year's worth of work by an IPI-led international coalition to raise awareness about threats to freedom of expression in Spain.

In September 2014, nine international civil-society groups wrote to the U.N. Human Rights Committee, urging it to highlight these threats in its periodic review of Spain's compliance with the International Covenant on Civil and Political Rights (ICCPR). This was followed in December 2014 by an international fact-finding mission to Spain, during which delegates held over 35 meetings with media, civil society and government actors in both Madrid and Barcelona. In March 2015, IPI and five other groups published an extensive report on the situation of press freedom in Spain,

based in part on the fact-finding mission. The conclusions from that report served as the basis for the June 2015 mission.

The June 2015 high-level mission fell directly in the middle of an extraordinarily crowded and unpredictable election year in Spain. Amid a devastating financial crisis that may now be ebbing, Spain in recent years has witnessed the sudden rise of new political parties and social movements. Many of these are a reaction not only to harsh austerity policies, but also to a wave of corruption scandals engulfing traditional political actors. Moreover, these new parties and movements have joined more established forces in battling to control the country's overall narrative and political future.

The election season kicked off in March with regional elections in Andalusia, Spain's most populous autonomous community. Regional and local elections in most other autonomous communities followed in May. On September 27, Catalonia elected a new parliament in what was described as a plebiscite on independence from Spain. Finally, national parliamentary elections are scheduled to take place on December 20.

Part I of this report contains an overall summary of the issues broached by the delegation and the responses of Spanish officials. In **Part II**, two independent experts who joined the mission reflect critically on recent legal reforms and the situation of broadcast media, respectively.

It should be noted that this report is not primarily an analysis of the various press freedom issues – which was accomplished by the March 2015 report – but rather a summary of government responses to those issues.

Nearly all of Spain's major political parties, including the ruling Popular Party (PP), made prominent representatives available to meet with the delegation, and were generous with their time in debating the issues in question. Unfortunately, the same cannot be said of the Spanish government itself. Despite numerous requests made by IPI and its partners, the Ministries of Justice, Interior

and Industry, as well as the office of the Deputy Prime Minister and the Secretary of State for Communication, did not make any official available or, in some cases, even respond at all.

Introduction

International Press Institute (IPI)

"We have not adopted any restrictive measures with regard to freedom of expression."

That was the leading message that Rafael Hernando Fraile, parliamentary spokesperson for Spain's governing Popular Party, delivered to the IPI-led delegation in June.

"In Spain, there are no problems with freedom of expression," insisted another Popular Party MP, Miguel Sánchez de Alcázar Ocaña, during the delegation's hearing with the Joint Parliamentary Commission that oversees Spain's public broadcaster. "We have an exemplary state of freedom of speech and information, as enshrined in Article 20 of the Constitution. We have no problems either in public media or private media."

Such robust assertions, however, clash loudly with the warnings issued by media, human rights and political observers both within Spain and abroad.

Consider, for example, Spain's controversial new Law on the Protection of Public Security – derided by its opponents as the "gag law" (ley mordaza) – which took effect on July 1, 2015. Among other things, the law punishes the unauthorised use of images of police officers, as well as the failure to show due respect toward the police, with hefty fines. The measure had become a lightning rod from the moment it was first announced, as it was put forward in the midst of an unprecedented wave of public protests in Spain, many of which were a response to the current government's austerity programme, and which have involved clashes between police and demonstrators as well as, in some cases, instances of alleged police aggression against journalists. While the Popular Party has characterised the law as necessary to

protect public order and prevent violence, it is waging a lonely battle in the court of national and international public opinion.

Not a single MP from any of Spain's opposition parties backed the measure when it was passed in a final reading by the Spanish Parliament in March 2015. In May 2015, five opposition parties, including the Socialist Party, filed an appeal against the law with the country's Constitutional Court. Moreover, a June 2015 poll conducted by the Spanish firm Metroscopia found that 75 percent of all those surveyed opposed the law, including 44 percent of Popular Party voters.¹

The law has been fiercely criticised not only by PDLI, which was founded expressly to combat it and similar norms, but also by all of Spain's major press associations, including the Federation of Press Associations of Spain (FAPE), the Madrid Press Association (APM), the National Association of Press and Television Photographers (ANIGP-TV) and the Federation of Journalist Unions (FeSP). "With the entry into force of this law, the exercise of journalism in our country is less free than before," APM concluded.²

In a statement released on June 30, 2015, the Madrid Bar Association³ (a founding member of PDLI) asserted that the Public Security Law, together with two reforms to Spain's penal code, constituted "a curtailment of citizens' fundamental rights and liberties". According to the Bar Association, the law restricted the rights to freedom of expression and information "in an arbitrary and unjustified way, using vague juridical concepts that leave space for impunity in the use of excessive and illegitimate force on the part of the police". The criticism was

¹ Anabel Díez, "44% of PP voters reject the 'gag law'", El País, 6 July 2015 [Spanish], http://politica.elpais.com/politica/2015/07/05/actualidad/1436119482_433885.html.

² "With the entry into force of the 'gag law', the exercise of journalism in our country is less free", APM, 30 June 2015 [Spanish], <http://fape.es/con-la-entrada-en-vigor-de-la-ley-mordaza-el-ejercicio-del-periodismo-en-nuestro-pais-es-menos-libre/>.

³ "Institutional statement on the new Public Security Law, the gag law", Madrid Bar Association, 30 June 2015 [Spanish], http://web.icam.es/actualidad/noticia/2011/Comunicado_institucional_sobre_la_nueva_Ley_de_Seguridad_Ciudadana_la_ley_mordaza.

echoed by the president of General Council of the Spanish Bars.⁴

The U.N. Human Rights Committee, in its most recent evaluation of Spain's compliance with the International Covenant on Civil and Political Rights, published in July 2015, expressed concern over the "chilling effect" that the Public Security Law could have on freedom of expression and assembly and urged Spain to revise the law "in consultation with all actors involved".⁵ The Committee's comments came after five U.N. human rights rapporteurs warned in February 2015 that the law fell short of international standards. "[The Public Security Law] unnecessarily and disproportionately restricts basic freedom such as the collective exercise of the right to freedom of opinion and expression in Spain", U.N. Special Rapporteur on the Right to Freedom of Expression David Kaye said in the statement, which was signed by the special rapporteurs on freedom of assembly; on the promotion of human rights while countering terrorism; on the human rights of migrants; and on the situation of human rights defenders.⁶

The international media, too, have taken notice. In a scathing editorial published in April 2015, The New York Times characterised the Public Security Law as an attempt by the Popular Party to "maintain its hold on power" by discouraging protests and said the measure "disturbingly harkens back to the dark days of the Franco regime".

These harsh reviews hardly paint the picture of an exemplary freedom of expression situation.

Yet for all of the attention showered on it, the Public Security Law represents but one of the challenges to the free flow of information in Spain.

A **March 2015 report**⁷ published by **IPI, Access Info Europe, the Committee to Protect Journalists (CPJ), the European Federation of Journalists (EFJ), and Reporters Without Borders Spain** identified seven such challenges:

- Restrictive new legal norms, including the Public Security Law
- Threats to the independence of Spain's public broadcaster (RTVE)
- The lack of an independent, sector-specific broadcast regulator at the national level
- Inadequate transparency in the allocation of government advertising
- Newly passed transparency legislation that fell short of international standards
- A reported trend among leading public officials of holding "question-less" press conferences
- The continued existence of criminal defamation laws

That same month, the newly formed **Platform in Defence of Freedom of Expression (PDLI)**, a broad-based coalition of journalists, media outlets, activists, lawyers, academics and consumer-rights advocates, published its own report⁸ warning of growing threats to free expression in Spain, with special attention paid to digital rights and freedoms.

The international coalition's March 2015 report stressed that its conclusions should be taken into context: Spain's challenges should be seen in relative terms compared to its European neighbours. Nevertheless, it is jarring to hear officials from Spain's governing party categorically deny the existence of any problems with freedom of expression in Spain. On this claim, the Popular

⁴ "The General Council, against the regression and curtailment of rights posed by the Penal Code and the 'Gag Law'", 1 July 2015 [Spanish], <http://www.abogacia.es/2015/07/01/la-abogacia-contra-la-regresion-y-el-recorte-de-derechos-que-suponen-el-cp-y-la-ley-mordaza/>.

⁵ "Final observations on the sixth periodic review of Spain", 20 July 2015 [Spanish], 114th session, available for download at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fESP%2fCO%2f6&Lang=en.

⁶ "Two legal reform projects undermine the rights of assembly and expression in Spain" - UN experts", Office of the High Commissioner for Human Rights, 23 February 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597#sthash.DbGwxw5l.dpuf>.

⁷ "The State of Press Freedom in Spain: 2015", http://www.freemedia.at/fileadmin/resources/application/SpainReport_ENG.pdf.

⁸ "Limits and threats to the exercise of freedom of expression and information in Spain", PDLI, March 2015 [Spanish], <http://libertadinformacion.cc/informe-pdli-amenazas-a-la-libertad-de-informacion-en-espana/>.

Party is clearly isolated, not only from the political opposition, as this report shows, but also from a wide range of observers among the media, civil society, the academic and legal professions, and international human rights bodies.

What is further conspicuous about the Popular Party's position is that many of the problems that have been diagnosed by national and international actors are not systemic issues but are rather **the direct result of policy decisions taken by the current Spanish government**, led by Prime Minister Mariano Rajoy.

Spain's challenges should be seen in relative terms compared to its European neighbours. Nevertheless, it is jarring to hear officials from Spain's governing party categorically deny the existence of any problems with freedom of expression in Spain. On this claim, the Popular Party is clearly isolated, not only from the political opposition, as this report shows, but also from a wide range of observers among the media, civil society, the academic and legal professions, and international human rights bodies.

For example:

- In April 2012, just five months after taking power, the current government issued an executive decree scrapping the requirement for a two-thirds parliamentary majority when appointing members of the Spanish public broadcaster's executive board. The new procedure allowing for appointment by absolute majority allows the governing party undue influence over the board's composition and, by extension, key editorial positions. Since the change, RTVE has been besieged with accusations of bias and manipulation of news coverage, leading to a complaint before the European Parliament in April 2015.
- In 2013, the Popular Party-controlled Parliament passed a law throwing out a key achievement of Spain's 2010 General Broadcasting Act: the creation of an independent, sector-specific broadcast regulator, something Spain had previously lacked. The 2013 law rolled the broadcast regulator's functions into a "superregulator" – with additional competencies over airports, railroads, the postal service and the energy market – whose 10 members are directly appointed by the government without consultation from Parliament.
- A set of legal reforms driven and/or supported by the current government – the Law



Greenpeace activists protest at the Congress of Deputies, lower house of the Spanish Parliament, in Madrid, Spain, March 26, 2015, against the new Public Security Law. EPA/Sergio Barrenechea

on Public Security, Penal Code reforms related to terrorism and cybercrime, and reforms to the Law on Criminal Procedure – have been widely criticised for disproportionate and vague provisions that could lead to a chilling effect on the media and other speakers.

During the June 2015 international mission, **Spanish opposition parties pledged to reverse many of these moves**, which have been strongly criticised by national and international press freedom advocates. **Governing party representatives, by contrast, defended these policies, and consistently offered what the representatives contended were reasonable justifications for them**, despite the evident dangers the policies harbour for the free flow of information in the public interest.

The widespread criticism of these policies and the government's robust defence of them raises an important question: How is it possible to explain the **yawning gap between the current Spanish government's understanding of these issues – and everyone else's?**

A charitable explanation is that it may be a question of oversight. The government may (still) not have taken sufficiently into account the unintended consequences of its policies on freedom of expression, particularly the chilling effect that can emerge based on a certain public perception. If the Public Security Law is not a threat to freedom of expression, then the government clearly has not done a good enough job of explaining why. Likewise, whatever the financial merits of fusing regulatory authorities together may be, the government may not have properly considered that these savings do not outweigh the costs of subjecting the practice of a fundamental human right to the control of a non-independent body.

A less charitable explanation is that these changes are reactions to types of expression and the media reporting that the current Spanish government does not like. Indeed, the Special Rapporteurs expressed concern that the Public Security Law and other legal reforms "could be a response by the Government and the legislature to numerous demonstrations that have been carried out

in Spain in recent years". Hernando Fraile himself told the delegation that the change to the RTVE appointment procedure was necessary because RTVE reporting had been "anti-government". And a proposal that may have led to a ban on photographing persons being arrested by the police was widely viewed as a response to media coverage of corruption scandals that have implicated Popular Party supporters.

Either way, **the categorical statements by governing party officials made during the high-level mission are troubling and are not reflective of reality**. Above all, they suggest a clear need for civil society to continue rigorous monitoring of press freedom violations in Spain and to continue informing Spanish citizens on the extent of their right to freedom of expression so that citizens can hold their government accountable.

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Mission Summary

International Press Institute (IPI)

Public Security Law and Legal Reforms

The June 2015 delegation expressed particular concern over four pieces of new Spanish legislation that have attracted concern from numerous other national and international observers:

1. Law on the Protection of Public Security
2. Penal Code Reform of March 30, 2015
3. Penal Code Reform on Matters Related to Terrorism
4. Reform to the Law on Criminal Procedure

The first three reforms entered into force on July 1, 2015. The fourth received final parliamentary approval in October 2015 and will take effect two months after its publication in the official government journal.

Background material is available in the form of a detailed analysis performed by PDLI of these provisions and their consequences for freedom of expression and the press.⁹ Furthermore, this present report includes commentary on the legal reforms by Professor Katrin Nyman Metcalf, an independent member of the high-level mission who frequently serves as a legal expert for the Organization for Security and Co-operation in Europe (OSCE).

This section will highlight answers that the mission received in response to their concerns about the effects of these reforms on freedom of expression and the press.

Public Security Law

As noted in the introduction, the Public Security Law¹⁰ has been the target of significant national and international criticism. The bill went through numerous revisions and in some cases adjustments were made in response to this criticism,

including the lowering of fines and the elimination of provisions punishing the act of offending or insulting Spain. However, as Reporters Without Borders Spain noted in the March 2015 report, later drafts of the bill “preserved the essence of the first draft’s censorial spirit”.

The final version of the law includes two articles of particular concern for freedom of expression and the press. First, the “unauthorised use of images or personal data ... that could endanger the personal or family safety of [public security officers] or that put at risk the success of an operation” is considered a “serious offence” and therefore punishable by a fine of between €601 and €30,000. Second, displaying a “lack of due respect toward members of security forces in the line of duty” is considered a “slight offence” punishable by a fine of between €100 and €600. More information about the law can be found in the March 2015 report.

During the high-level mission, the opposition parties consulted by the delegation **unanimously expressed an intent to repeal the law.**

Cayo Lara, parliamentary spokesperson for the United Left, called the measure “the citizen insecurity law”. “How did the government react to the protests? By turning to repressive methods,” he suggested to the delegation.

The Socialist Party’s spokesperson, Antonio Hernandez Vera, accused the government of “proactively trying to ensure that journalists and others fear doing their jobs”. He commented: “Our objective is to repeal [the law].” He emphasised that the Socialist Party was one of five parties to file a constitutional appeal against the law, though he noted that such appeals can take between three and 10 years to be resolved.

⁹ “Report on new legal initiatives related to freedom of information and expression in Spain”, June 2015. http://www.freemedia.at/fileadmin/user_upload/PDLI_Briefing_ENG.pdf.

¹⁰ Organic Law 4/2015 of March 30, on the Protection of Public Security [Spanish], http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-3442.



Spanish police officers face a group of demonstrators during the rally "Surround the Congress", organised by the platform 25S, near the Congress of Deputies, the lower house of the Spanish Parliament, October 4, 2014. EPA/Luca Piergiovanni

Joan Baldoví Roda, MP for the Mixed Parliamentary Group, indicated that Spain had "witnessed a turning back in the progress of a free press", of which the Public Security Law was an indication.

While not currently represented in Spain's national Parliament, the Podemos party has also rejected the Public Security Law. Miguel Alvarez-Peralta, a member of the party's executive council in Madrid and a professor of journalism at the University of Castilla-La Mancha, said the party was "absolutely critical of the gag law and would repeal it". He said that the legal reforms highlighted by the mission would "bring Spain back to the pre-dictatorship era".

IPI believes that vague and disproportionate provisions in the Public Security Law risk chilling the news media and harming the Spanish public's right to information on matters of public interest. It therefore welcomes the commitment of Spain's opposition political parties to repeal the law.

At the same time, IPI emphasises the danger of relying on or waiting for a decision of the Constitutional Court, which could take years. If opposition parties are serious about repealing the law, they must make it an immediate priority should

they assume power following national elections later this year.

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For its part, the Popular Party did not engage IPI in a debate as to the subject matter of the law. However, Rafael Hernando Fraile, the Party's parliamentary spokesperson, defended the Public Security Law in part by highlighting the fact that many of its sanctions are of administrative, rather than criminal, nature. Hernando Fraile stated that "it did not make sense to include these offences in the Penal Code" and presented this change as evidence of the law's lack of restrictiveness.

As Katrin Nyman Metcalf, professor of law and technology at Tallinn Law School/Tallinn University of Technology and an independent member of

the mission, points out in an article accompanying this report, administrative sanctions are indeed often preferable to criminal sanctions. “[P]eople should not risk getting a criminal record for smaller infringements of the law if there are other effective measures that can be taken,” she notes.

Yet, as Nyman Metcalf goes on to explain, the application of administrative sanctions also reduces judicial oversight, which is one of the key criticisms of the law from national and international legal experts. It is also a reason why the phrase “without prejudice to the right to freedom of information”, tagged onto the paragraph on using images or personal data of police officers, is of little comfort.

In its 2015 review of Spain, the U.N. Human Rights Committee criticised the “excessive use of administrative sanctions contained in the [Public Security Law], which exclude the application of certain judicial guarantees”. The Madrid Bar Association said the law “entailed a serious reduction in judicial oversight, in light of the administrative procedures that now punish certain conduct with fines of disproportionate financial amounts”.

The Popular Party’s argument related to administrative sanctions reflected a larger theme visible during the mission: Although the government’s argument may have merit in theory, the law’s intent may, inadvertently or not, appear different when subjected to further scrutiny.

IPI and its partners also raised concerns about the Public Security Law with Soledad Becerril, Spain’s national human rights ombudsman, and encouraged her office to take proactive steps to ensure that the application of the law did not violate freedom of expression, including by issuing recommendations for the police. The Ombudsman’s office did not commit to any action and, in fact, Becerril largely rejected the delegation’s suggestion that freedom of expression and the press were under threat in her country.

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Penal Code Reform: The “Anti-Jihadist Pact”

The so-called “Anti-Jihadist Pact”¹¹ (*pacto antiyihadista*) modified articles of the Spanish Criminal Code that relate to terrorism. The bill was passed in February 2015 with the sole support of Spain’s two largest parties, the Popular Party and the opposition Socialist Party, in addition to three minor opposition groups. All of the other largest parties either abstained or voted against the bill.¹²

In a meeting with the high-level IPI delegation, José Miguel Castillo Calvin, the Popular Party’s parliamentary spokesperson for justice affairs, described the penal code reforms as necessary to deal with “new criminal phenomena”. He said that the anti-jihadist pact had been “inspired by laws in other countries”.

PDLI and other freedom of expression advocates in Spain have opposed the changes under the Pact for a number of reasons, including:

- The conflation of certain cybercrimes with terrorism, which could cast a chilling effect on investigative journalism.
- The inclusion of vague provisions, such as the punishing of “regularly accessing” webpages with “terrorist content”, which could chill the work of both journalists and academics.

¹¹ Organic Law 2/2015 of March 30 modifying Organic Law 10/1995 of November 23 on the Penal Code, relating to crimes of terrorism [Spanish], https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-3440.

¹² “Congress of Deputies gives the green light to the PP-PSOE anti-jihadist pact without gaining further support”, Europa Press, 19 February 2015 [Spanish], <http://www.elmundo.es/espana/2015/02/19/54e5c6d6ca4741110f8b4578.html>.

- The increase in the government's powers to conduct surveillance of journalists and mass surveillance in general.¹³

Writing collectively about the Public Security Law, the Anti-Jihadist Pact and the Penal Code Reform of March 30, 2015 PDLI noted¹⁴: "It is striking that a good part of these new laws aims to sanction or penalise new forms of dissemination [of information] and organisation of protests, such as the Internet and social networks. Another common element is the ambiguous and vague wording of many of the articles, leaving a dangerous margin such that almost anyone can be accused."¹⁵

According to PDLI's analysis, however, "the reforms related to terrorism are the most serious, due to the importance of the penalties and the suspension of fundamental rights (such as solitary detention and the violation of the secrecy of communications) for those accused." It further warned that investigative journalism that relied on leaked information – such as the "Falciani list" (a list of tax evaders released by former HSBC employee Hervé Falciani), the "correos de Blesa" (e-mails of the former president of the bank Caja Madrid, Miguel Blesa de la Parra) or the Snowden affair – could "fall within the sphere of what would now be considered terrorism".

U.N. human rights officials have also criticised the Anti-Jihadist Pact. David Kaye, the U.N. special rapporteur on the right to freedom of expression said in February 2015: "As drafted, the anti-terror law could criminalise behaviours that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise

of freedom of expression, amongst other limitations." He further warned that "[t]he project of law could also allow for misuse in the oversight and removal of information available online."¹⁶ Kaye's statement was endorsed by Ben Emmerson, U.N. special rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism.

Both the Popular Party and the Socialist Party denied that vague language contained in the Pact represented a threat to freedom of expression. In response to the mission's concerns about the clause on "regularly acceding to websites with terrorist content", the Popular Party's parliamentary spokesman on justice affairs reassured delegates that "there has to be a subjective element", explaining: "It is not enough just to visit the website. Unless there is proof of intention [to commit an act of terrorism], there will be no prosecution."

Antonio Hernando Vera, parliamentary spokesperson for the Socialist Party, defended his party's support of the reform due to "the importance of having both of the largest parties in Spain that could govern be in agreement about terrorism". He added: "One of the reasons we negotiated with the government [on the Pact] was to make sure we could put in more guarantees for liberties."

He added: "We feel that there are enough safeguards for freedom."

¹³ For detailed analysis, see PDLI's "Report on new legal initiatives related to freedom of information and expression in Spain", June 2015. http://www.freemedia.at/fileadmin/user_upload/PDLI_Briefing_ENG.pdf. PDLI has published various documents that enumerate the concrete threats for freedom of expression and information, for journalists, activists and social movements, contained in these laws. Further material includes "10 Threats to Freedom of Expression and Information in the New Penal Code", 18 February 2015 [Spanish], <http://libertadinformacion.cc/las-10-amenazas-a-las-libertades-de-expresion-e-informacion-del-nuevo-codigo-penal/>; and "Black March: 10 Questions about the Gag Laws and How They Affect You", 11 March 2015 [Spanish], <http://libertadinformacion.cc/marzo-negro-10-preguntas-sobre-las-leyes-mordaza-y-como-te-afectan/>.

¹⁴ *Ibid.*

¹⁵ PDLI's analysis highlightx in particular Art. 559 of the Penal Code, included in the March 30 reform, which punishes the "public distribution or dissemination, through any medium, or messages of instructions that incite the committing of a crime against the public order [among them "altering social peace"] or that serve to reinforce the decision to carry out such crime" with a fine or with imprisonment between three months and one year.

¹⁶ *Supra* 6.

Both the Popular Party and the Socialist Party denied that vague language contained in the Pact represented a threat to freedom of expression. In response to the mission's concerns about the clause on "regularly acceding to websites with terrorist content", Castillo Calvín reassured delegates that "there has to be a subjective element", explaining: "It is not enough just to visit the website. Unless there is proof of intention [to commit an act of terrorism], there will be no prosecution."

José de Francisco, a legal advisor to the Socialist Party, argued: "You may feel that the language is ambiguous, but the language is what has been in the code for years. We trust the law because of the experience we have had over the last 20 years. There is a lot of case law and we know how the courts interpret the concept of 'public order'."

While IPI welcomed the assurances offered by both parties, it notes that the existence of a chilling effect depends not on the interpretation of courts and constitutional law experts, but rather on that drawn by journalists or other speakers themselves. As Professor Katrin Nyman Metcalf, an independent member of the mission, summarises in her article accompanying this report:

"The potential chilling effect of security related provisions if they are vague and admit the possibility of diverse interpretation must be kept in mind. [...] Members of the international mission had the impression during our meetings that not much attention has been given to perceptions, to the chilling effect or to how the laws are interpreted by the public generally. Rather, the discussion has centred only on assurances that the laws will be well applied – something those opposing them do not believe."

Reform to the Law on Criminal Procedure

The reforms to the Law on Criminal Procedure (*Ley de Enjuiciamiento Criminal*), which has been denounced by some of its critics as the "Torquemada Law" after an infamous leader of the Spanish Inquisition, has generated significant concern among civil liberties activists for, among other things, the expansion of police surveillance activity. PDLI slammed the draft version of the law in June 2015 as completing "the cricle of criminalisation of the Internet".¹⁷



With regard specifically to freedom of the press, the reform has also attracted controversy for a provision that required the adoption of "necessary measures to ensure the respect for the constitutional rights of honor, primacy and image" of suspects being detained by the police. The Spanish media interpreted the provision as an attempt to quell instances of "punishment by media circus"¹⁸ that have accompanied the arrests of prominent figures on corruption-related charges, including many linked to the Popular Party.¹⁹ Media outlets feared that the amendment would result in an effective ban on photographing suspects.

In its meetings with Spanish political parties in June 2015, IPI and its partners strongly voiced

¹⁷ PDLI said of the draft version of the law in June 2015: "For PDLI, with the new Law on Criminal Procedure, the circle of criminalisation of the Internet is closed. The reforms open the door for exceptional measures that can be applied against anyone who expresses an opinion on the Internet, leaks documents, shares P2P files or carries out protest actions online - that is, all of the new crimes introduced by the Penal Code [...]." See "Report on new legal initiatives related to freedom of information and expression in Spain", June 2015. http://www.freemedia.at/fileadmin/user_upload/PDLI_Briefing_ENG.pdf. A summary of key changes introduced by the reforms can be found, among other places, here [Spanish]: <http://www.20minutos.es/noticia/2569200/0/novedades/lec/congreso/>.

¹⁸ Spanish: *Penas de telediarario*.

¹⁹ Fernando Garea, "PP changes the law to avoid images such as the arrest of Rato", *El País*, 2 June 2015 [Spanish], http://politica.elpais.com/politica/2015/06/02/actualidad/1433257856_462858.html.

opposition to the amendment, which IPI characterised as a serious infringement on the public's right to information about the activities of public figures and government officials.

Later that month, a coalition including the Association of Daily Newspaper Publishers (AEDE), the Federation of Press Associations of Spain (FAPE) and the Federation of Journalist Unions (FeSP, a member of PDLI) denounced the provision as an "attack on the work of journalists and media outlets" and suggested that the law would be found unconstitutional. The group noted that Spain's Constitutional Court had frequently ruled that "in matters of public interest and with true information, the collective right to information must prevail of the right to individual honour, privacy and self-image".²⁰

In what would appear to be a **clear victory for press freedom advocacy**, Spanish Justice Minister Rafael Catalá announced in July, in response to the criticism, that the bill would be modified to protect the media's right to photograph police detainees.²¹ The final version of the bill, adopted in September 2015, states that measures are to be adopted to protect the constitutional rights of honour, privacy and image of detainees "with respect to the fundamental right of freedom of expression".

Public Broadcasting

In April 2015, the Council of Journalists (Consejo de Informativos), an internal RTVE advisory body, presented a complaint to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs. The complaint²² alleged that RTVE's

own ethical and professional guidelines were being "systematically breached in relation to impartiality, plurality, accuracy and objectivity, becoming instead a propaganda tool in the service of Government".

Among other things, the document presented specific instances of what it deemed the "manipulation of information" related to the coverage of matters of public interest, particularly in relation to financial and other scandals that implicated members of the Popular Party. It also highlighted a "purge" of TVE personnel with "recognized standing and professional experience" who were replaced at their posts with "people who have not been trained in the spirit of public service media and who come from media marked by a certain ideological bias, clearly aligned with the stubborn defense of governmental thesis".

The list of allegations against RTVE is, in fact, long. IPI's March 2015 report noted many of them, which will not be recapitulated here for reasons of space. Suffice to say, too, that the broadcaster's troubles have caught the attention of the international media, including the Financial Times,²³ as well as other European public broadcasters.²⁴

IPI and its partners shared their concerns related to the independence of RTVE with members of the Joint Parliamentary Committee that oversees RTVE in a hearing held during the June 2015 mission. In contrast to a previous visit to Spain in December 2014 when RTVE representatives declined to answer questions related to press freedom, MPs at the hearing responded candidly

²⁰ Publishers and journalists oppose the Criminal Procedure Law", El País, 23 June 2015 [Spanish], http://politica.elpais.com/politica/2015/06/23/actualidad/1435079810_778230.html.

²¹ "Agreement between Justice Ministry and journalist to photograph detainees", Europa Press, 23 July 2015 [Spanish], http://www.telecinco.es/telemania/tribunales/Justicia-no-prohibira-grabacion-difusion-imagenes-arrestados-pena-telediar-io_0_2023875235.html.

²² PDF of complaint [Spanish] available at http://cdn27.hiberus.com/uploads/documentos/2015/04/14/documentos_informekonsejodeinformativosdetve_b96136da.pdf, via Jaime Olmo, "TVE journalists allege manipulation and "parallel newsroom" before the European Parliament", InfoLibre, 14 April 2015 [Spanish], http://www.infolibre.es/noticias/medios/2015/04/10/los_periodistas_tve_llevan_manipulacion_redaccion_paralela_ante_parlamento_europeo_31167_1027.html. English version provided to the International Press Institute.

²³ See, for example, Tobias Buck, "Spanish state broadcaster TVE accused of political bias," Financial Times, May 2015, <http://www.ft.com/intl/cms/s/0/4625b188-e818-11e4-9960-00144feab7de.html#axzz3dmFu3oCx>.

²⁴ For example, on April 16, 2015, the Austrian public broadcaster ORF reported aired a segment entitled "Spanish media in uproar", which scrutinised the Spanish government's policy toward RTVE and the consequences for the station's independence.

and specifically to the conclusions presented in the March 2015 report.

The parties of both the left (the Socialist Party and the Plural Left, plus the Mixed Parliamentary Group) and the right (the Popular Party) that participated in the meeting agreed that RTVE was in a crisis, but fundamentally disagreed as to what constituted the crisis and how it had come about.

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"The problem in public media is a financial crisis," Popular Party MP Miguel Sánchez de Alcázar Ocaña insisted with relation to RTVE, whose market share has plunged to around 10 percent. The previous Socialist government's decision to ban advertising in RTVE, he argued, had led directly to a drop in revenue, which was compounded by Spain's overall economic troubles. "Since the ad ban, there has not been an equal playing field between public and private broadcasters," he said.²⁵

Another Popular Party MP, Julia de Micheo Carillo-Albornoz, first vice-president of the Joint Committee, also interpreted the concerns about RTVE as largely being related to its competitiveness and financial health. She, too, criticised the decision to ban advertising in RTVE, suggesting that it was "only logical" that the situation had suffered as a result. She added: "You can't measure audience share now as before, as there are so many more channels." Both MPs, however, noted that despite

the financial situation, the government had not cut any members of RTVE's staff, whom the MPs praised for their professionalism.

Germán Rodríguez Sánchez, the Socialist Party's spokesperson on the Joint Committee, rejected the characterisation offered by the PP representatives, who he suggested were using financial issues as a smokescreen. Financial problems "are not the issue," he said. "The loss of impartiality and credibility is the problem."

Rodríguez Sánchez, like the Consejo de Informativos in its submission to the European Parliament, suggested that the PP government's executive decree altering the appointment process for members of RTVE's administrative board²⁶ lay at the root of the crisis. He described a public broadcasting law²⁷ passed by the previous Socialist government in 2006 – which enacted the requirement for a two-thirds majority and established the Council of Journalists as an internal monitoring body – as a "watershed, actually eliminating state control over positions in the public broadcaster". The 2012 executive decree, he indicated, had rolled back that progress.

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MPs from the Plural Left and the Mixed Parliamentary Group agreed with that position. "We want the [2012 decree] to be amended to offer protec-

²⁵ Advertising existed as a partial source of RTVE's funding until 2006. The Public Broadcasting Funding Act of 2009 requires private senders to make an annual contribution to RTVE's budget as a consequence of private senders' increased revenue from the advertising pie via RTVE's withdrawal.

²⁶ Royal Decree-Law 15/2012 of April 20, on the Modification of the Administrative Regime of the RTVE Corporation, as foreseen in Law 17/2006 of June 5 [Spanish], <http://www.boe.es/boe/dias/2012/04/21/pdfs/BOE-A-2012-5338.pdf>.

²⁷ Law 17/2006 of June 5, on State-Owned Radio and Television [Spanish], <http://www.boe.es/buscar/act.php?id=BOE-A-2006-9958>.



Spanish Prime Minister and Popular Party leader Mariano Rajoy addresses the media following Spanish local and regional elections at Popular Party headquarters in Madrid, May 25, 2015. **EPA/J.J. Guillén**

tion for the public broadcaster, not just for the institution, but also for the journalists who work there, to protect from intimidation and harassment," Ricardo Sixta Iglesias, the Plural Left's spokesperson on the Joint Committee, said.

The Podemos party, which is not currently represented in Parliament, told the IPI-led delegation that it supported bringing Spain's public broadcasting system up to European standards. Miguel Álvarez-Peralta, a member of the party's executive council in Madrid, proposed, among other things, installing ombudsmen or public editors in all public television stations.

In its March 2015 report, IPI and its partners expressly recommended restoring the requirement for a two-thirds majority. **While all opposition parties at the hearing endorsed such a move, the Popular Party did not, instead defending the change on various grounds.**

Sánchez de Alcázar told the IPI-led delegation that the decree had been passed in order to solve a blockage in the appointment process. "We couldn't get a consensus," he said. The headnotes to the decree argue the same, stating: "[T]he appointing of the members of the Administrative Council

and the President thereof, based on a system of qualified majority in the legislature, has proven to be inefficient as it does not allow the Council to be filled with the agility necessary to avoid paralysis in the functioning of the RTVE Corporation."

That such a political blockage might exist is not hard to imagine, even if one concludes, as IPI does, that solving it by throwing out an important tool to guarantee RTVE's independence is unwise. In any case, Rafael Hernando Fraile, the Popular Party's parliamentary spokesperson, offered a different justification for the legislative change. Previously, he said, "RTVE was not independent, but anti-government". He continued: "RTVE was decidedly pro-Socialist, that's why we changed the appointment procedure."

IPI views such comments with great concern, as they suggest that the public broadcaster is viewed as a political tool in Spain – in service of the government instead of the public – rather than as a vessel for impartial news and information.

Shortly before the international delegation's visit, RTVE board president José Antonio Sánchez Domínguez had stirred controversy by declaring to the Joint Committee that he "votes for

the PP and will continue to do so". Opposition party members of the Joint Committee strongly denounced his comments, highlighting them as further evidence of RTVE's lack of independence.

Hernando Fraile defended Sánchez Domínguez, telling the delegation: "In a democracy you can vote for whom you want. One shouldn't question the work of a public servant because of the party that he votes for, and it doesn't mean that others have to vote for the PP".

That is, of course, true in theory. But, as Stephen Whittle notes in his chapter on broadcasting, "public service broadcasting requires trust". And trust is exactly what RTVE appears to lack. Even if Sánchez Domínguez's political affiliation had no impact in practice on RTVE's reporting, no one would believe it: The perception that RTVE's programming is ideologically manipulated is too ingrained. Unfortunately, far from dispelling that perception, the policies of the current government have only served to increase it.

Broadcast regulation

In 2010, the Socialist-led Spanish government passed a General Broadcasting Act²⁸, a key component of which was the National Broadcasting Council (CEMA, *Consejo estatal de medios audiovisuales*), an independent sector-specific regulator. CEMA, whose stated aims included guaranteeing "transparency and pluralism in the broadcasting sector" and "independence and impartiality in public radio [and] television", was to consist of an executive council and a consultative council. Members of the executive council, including its president, would have been appointed by the Congress of Deputies via a three-fifths majority. The consultative council would have included representatives of broadcasters, advertisers, unions and consumer organisations, among others.

Despite its model structure, CEMA was never allowed to begin its work. In 2013, the Popular Party government repealed the legislation on CEMA and created the National Commission on Markets and Competition (CNMC)²⁹. Citing an "environment of austerity" and a "clear tendency ... toward a uni-sectorial model of convergence", the government decided to house regulatory competencies for energy, telecommunications, market competition, railways, the postal service, airports and audiovisual media all under one roof.

In 2012, Deputy Prime Minister Soraya Sáenz de Santamaría said of CEMA: "If we don't create it, we will directly be saving €7 million and, probably, another regulator body can carry out the same work, with the same efficiency, without incurring a cost increase."³⁰

Whatever the merits of fusing regulatory functions, the fact is that CNMC is not simply "another regulatory body": It is composed in a radically different manner than CEMA and lacks any guarantee of independence. CNMC is governed by a 10-member executive board whose members are named directly by the government. Parliament has the power to veto an appointee, but only via an absolute majority, for which MPs from the governing party are required – hardly a check on the executive branch. The arrangement was strongly opposed by most opposition parties (and in autumn 2013, the Popular Party quashed an attempt by a smaller party, Union, Progress and Democracy, UPyD, to veto three board candidates who had been directly appointed from the responsible government ministry.³¹

Notably, while CEMA would have held licensing authority, CNMC does not. Given CNMC's manifest lack of independence, this might be seen as a positive if the licenses were not instead awarded directly by Spain's Ministry of Industry, Energy and Tourism.

²⁸ Law 7/2010 of March 31 on Audiovisual Communication [Spanish], <http://www.boe.es/buscar/act.php?id=BOE-A-2010-5292&b=59&tn=1&p=20100401#tv>. (See under Part V, Arts. 44-54, for provisions on CEMA.)

²⁹ Law 3/2013 of June 4, on the Creation of the National Commission on Markets and Competition [Spanish], http://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-5940.

³⁰ "Not creating CEMA means a savings of seven million euros", Europa Press, 20 January 2012 [Spanish], <http://www.elmundo.es/elmundo/2012/01/20/comunicacion/1327073838.html>

³¹ "Congress of Deputies supports the appointment of the ten CNMC board members", *Energíadiario.com*, 5 September 2013 [Spanish], <http://www.energiadiario.com/publicacion/el-congreso-apoya-el-nombramiento-de-los-diez-consejeros-de-la-cnmc/>.

Podemos co-founder and secretary-general Pablo Iglesias speaks during the 'Other State of Nation Debate' held at the Fine Arts Circle in Madrid, February 25, 2015. **EPA/Ballesteros**



Opposition political parties strongly criticised the failure to implement CEMA during meetings with the high-level international mission in June 2015.

Antonio Hernando Vera, parliamentary spokesperson for the Socialist party, called the decision and the government's justification for it "the perfect example of using the [financial] crisis as a pretext", adding: "It costs much more for the country not to have independent information."

"Neither democracy nor democratic controls are cheap. You have to spend money to get those." – MP Ricardo Sixto Iglesias, Plural Left

Ricardo Sixto Iglesias, of the Plural Left, sounded a similar note.

"Neither democracy nor democratic controls are cheap," he said. "You have to spend money to get those."

Hernando Vera also outlined a proposal for an independent selection process, which would also apply to membership on RTVE's board. "What we suggest is for all public bodies to have a panel of independent experts and consultants to approve and evaluate candidates before they go

to Parliament. Individuals could apply for a post rather than being named to it by the government, because the post would be publicly announced."

Álvarez-Peralta, of Podemos, agreed that CNMC "is not independent". He emphasised that the broadcast sector should be supervised by audio-visual experts, journalists, and representatives of civil society – part of an effort, he said, to "degovernmentalise" state institutions such as CNMC or RTVE.

In line with the trend previously noted in this report, while the Popular Party's justifications for discarding CEMA – austerity and efficiency – may sound reasonable on their face, recent events offer a reminder of the deeper layers and consequences that such decisions may involve. During the high-level mission, opposition parties unanimously pointed to the government's announcement in April 2015 of a tender for six new private broadcasting licenses to be awarded just before national elections in late autumn. The timing, they claimed, was evidence of a hidden agenda.

As Stephen Whittle, former BBC Controller of Editorial Policy and an independent member of the high-level mission puts it elsewhere in this report: "It is even more troubling when the awarding of licenses is so obviously tied to the electoral

calendar and leaves the Government open to the charge of seeking to reward political service by media owners.”

Community media

In some cases, as with CEMA, the current Spanish government repealed provisions contained in the 2010 Broadcasting Act; in other cases, it has simply ignored them.

Such is the situation with respect to community media. The 2010 Broadcasting Act sought, for the first time, to provide a legal framework for community media in Spain, which it described as playing an important role in meeting “the specific cultural, social and communication needs of communities and social groups as well as in supporting citizen participation and building the social fabric”.

The law explicitly recognised a right to pluralism in broadcast media, and specifically a right to the existence of community media. It directed the government to develop a framework for licensing community media within 12 months.

Over five years have now passed since the 2010 Broadcasting Act took effect on May 1, 2010. No such framework has been developed (neither by the Socialist government, which held power until December 2011, nor by the Popular Party government, which took power that same month).

According to Spain’s Network of Community Media (ReMC), as of August 2015, “no broadcaster has been able to obtain a license nor does there exist a process to acquire one. This situation impedes the creation of this type of broadcaster and [moreover] those that are already in existence cannot have their situation regularised, despite what it is foreseen by the General Broadcasting Act, meaning that they are subject to sanctions and fines”.

In a briefing provided to IPI, ReMC highlighted several examples of such fines, including a €500,000 penalty levied against the Catalan community broadcaster La Tele and a €100,000 penalty against the Canary Islands community radio station San Borondón. In both cases, regulators ruled that the broadcasters had been operating without a license and ordered them closed.



Members of an international press freedom delegation to Spain led by the International Press Institute (left-hand side) meet with representatives of Spain’s Socialist Party, including parliamentary speaker Antonio Hernando Vera (third from right), on June 18, 2015. **Photo: Courtesy Spanish Socialist Workers’ Party (PSOE).**

During the high-level mission, only Podemos took an unprompted position with respect to the situation of community media. Miguel Álvarez-Peralta, a member of the party's executive circle in Madrid, stated that strengthening community broadcasters as part of a "plural, dynamic third media sector" was a cornerstone of the party's media policy. "Community media play a special role that public and private media cannot," he said. "They expand the debate and turn audiences into active members of that debate."

These efforts have at times taken a draconian turn. In one case, which was brought to the delegation's attention by Podemos, the local telecommunications authority in Asturias (part of the national Ministry for Industry, Energy and Tourism), threatened the owner of a building in Oviedo with a €500,000 fine if he did not identify within 10 days the owner of an unlicensed community broadcaster that the authorities suspected was operating inside the building.

Both the Council of State and Spain's human rights ombudsman have criticised the Spanish government's failure to comply with the terms of the 2010 Broadcasting Act with respect to com-

munity media. ReMC itself is challenging the government's lack of compliance in a case currently pending before Spain's Supreme Court. A decision is expected in 2016.

IPI is troubled by the Spanish government's refusal to comply with the requirement to develop a regulatory framework for community media. This inaction manifestly violates the right of community media to operate as a part of a pluralistic media environment, as clearly established by the 2010 Broadcasting Act.

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Other issues: Access to information and institutional advertising

The legal reforms and issues related to broadcasting freedoms emerged as the decisive topics in the high-level delegation's meeting with Spanish political parties.

Spanish Deputy Prime Minister Soraya Sáenz de Santamaría during a press conference held after a cabinet meeting at La Moncloa Palace in Madrid, Spain, May 29, 2015. EPA/Ángel Díaz



However, in its introductory remarks, IPI representatives also named transparency and access to information as issues of concern, citing in particular the lack of sufficient data on institutional advertising in media outlets and the passage of right-to-information legislation that does not meet international standards. It is therefore worth briefly summarising the responses given by some political parties on these issues.

With regard to institutional advertising, the international coalition's March 2015 report explained in detail how a lack of information on the criteria used by public bodies to award advertising to media houses made it difficult to make determinations about the possible existence of "soft censorship" in Spain. Some civil society organisations considered that the government's decision in 2014 to centralise the allocation of institutional advertising through a pool of private advertising agencies worsened the situation, as key information such as the identity of media outlets that receive public advertising and details on the objective, overall costs, preferred media, etc. would only need to be published "when deemed appropriate".³² Moreover, as the March 2015 report noted, citing an expert on institutional advertising at the University of Sevilla,³³ "Spain's new law on transparency and access to information obligate public institutions to disclose all advertising contracts, whatever their size. However, when the contracts are arranged through central advertising agencies, information regarding how these agencies allocate the spending does not fall under the new law."

Officials generally did not respond to the delegation's concerns about institutional advertising, although this was at least partly due to time constraints. Nevertheless, given the problems identified in the March 2015 report, IPI urges that further monitoring work be done on this critical issue and that civil society assist in identifying the steps that must be taken to improve the current situation.

With regard to the second issue, the March 2015 report also included an extensive chapter written by Access Info Europe on the inadequacies of Spain's 2013 Law on Transparency, Access to Information and Good Government, which has taken effect in stages over the past two years.

The Socialist Party expressed regret that it was unable to support the bill when it came to a vote in parliament, which it characterised as a "difficult" decision given that the measure was the first of its kind in Spain. Jose de Francisco, legal advisor to the Socialist Party, explained that the previous Socialist government had begun drafting an access to information law that he said was based on a Council of Europe model but that the Popular Party's version "had added in more cases in which the right to information can be denied and had reduced the independence of the oversight body", which the Socialist Party could not support.

Álvarez-Peralta, of Podemos, pointed to the lack of a "culture of transparency" in Spain and said the party would seek to bring the country's access to information law up to European standards. He described the current law as a "shadow" of what it should be.

During the December 2014 mission, Carmen Martínez Castro, Spain's Secretary of State for Communication, had strongly defended the law. "We have the will to see that [this law] works, to put it in practice and see what we need to improve" she said. "This law will change the culture of the government and of [Spanish] society."

But on this issue, too, the Popular Party appears to be isolated – and not only from its political opposition. As the March 2015 report made clear, the consensus on Spain's access to information law among media outlets, academics, and civil society observers is clear: a missed opportunity that fails to respect European and international standards on transparency.

³² Eva Belmonte, "Government centralises the purchasing of advertisement in the media and limits such purchasing to a maximum of five companies", 8 May 2014 [Spanish], [http:// elboenuestrodecadadia.com/2014/05/08/el-gobierno-centraliza-la-compra-de-anuncios-en-medios-y-la-limita-a-un-maximo-de-cinco-empresas/](http://elboenuestrodecadadia.com/2014/05/08/el-gobierno-centraliza-la-compra-de-anuncios-en-medios-y-la-limita-a-un-maximo-de-cinco-empresas/).

³³ Fernando Vicente, "With institutional advertising the heart of democracy is in play", Eldiario.es, 23 May 2013 [Spanish], [http:// www.eldiario.es/andalucia/reparto-publicidad-institucional-jugamos-democracia_0_135437303.html](http://www.eldiario.es/andalucia/reparto-publicidad-institucional-jugamos-democracia_0_135437303.html).

Recommendations

With an eye toward Spanish national elections scheduled to be held in late 2015, IPI, the Committee to Protect Journalists, the European Federation of Journalists and the Platform in Defence of Freedom of Expression urge the next Spanish government to take the following specific policy steps:

- Repeal the Public Security Law.
- Restore the process for appointing members of RTVE's executive board foreseen under the 2006 Law on Public Broadcasting, which required a two-thirds majority in Parliament for such appointments.
- Implement an independent, sector-specific broadcast regulator, such as the one originally foreseen under the 2010 Broadcasting Act.
- Implement a regulatory and licensing framework for community media, as required by the 2010 Broadcasting Act.
- Take necessary steps to ensure that the allocation of official advertising in media outlets is undertaken in a transparent manner and according to objective criteria.

In general, the Spanish government should ensure that any legal reforms:

- are undertaken with due regard to public perception and the danger of a chilling effect on freedom of expression and the press
- are drafted as precisely as possible
- take into account the concerns of national and international civil society as well as those of international human-rights bodies and representatives
- reflect international standards on freedom of expression as well as emerging best practices

Reforms that have already been passed but do not meet these standards should be revised.



Annex

List of Political Parties in Spain and their Representation in the Congress of Deputies (350 seats total; count includes one independent member not shown below)

PARTIES	SEATS
Popular Party	185
Spanish Socialist Workers' Party	109
Catalan Convergence and Unity Party	16
The Plural Left Group	11
United Left	
Initiative for Catalonia Greens	
Aragonese Union	
Union, Progress and Democracy	5
Basque Nationalist Party	5
Mixed Parliamentary Group	19
Amaiur	
Republican Left of Catalonia	
Galician Nationalist Bloc	
Canarian Coalition	
Coalició Compromís	
Asturias Forum	
Geroa Bai	
Navarrese People's Union	

Source: Website of the Congress of Deputies.

Requests for meetings were sent to all parliamentary groups, in addition to the as yet non-represented parties Podemos and Ciudadanos. The high-level mission to Spain met with representatives of the Popular Party, the Socialist Party, the Plural Left, and the Mixed Parliamentary Group. The Catalan Convergence and Unity Party and the Basque Nationalist Party also agreed to meet the mission delegation, but later cancelled (in the case of the Convergence and Unity Party, due to a meeting in Barcelona that resulted in the dissolution of the party on June 17, 2015; in the case of the Basque Nationalist Party, due to an urgent legislative vote). The delegation also met with representatives of the Podemos party.

Expert Commentary:

“The Public Security Law and Other Legal Reforms”³⁴

Professor Katrin Nyman Metcalf

*Chair of Law and Technology, Tallinn Law School/Tallinn University of Technology*³⁵

Executive summary

- *Vaguely worded provisions in the Public Security Law as well as Penal Code reforms related to terrorism have the potential to lead to self-censorship on the part of journalists and others.*
- *While the Spanish government has offered assurances that the legal changes will be narrowly applied, it must also address the critical issue of how these changes are perceived and understood by the public.*
- *Restrictive measures related in particular to terrorism, where there are few established international standards, must take into the account principles of necessity and proportionality.*
- *The introduction of administrative sanctions in place of criminal ones, as foreseen in the Law on Public Security, must not erode the principles of transparency or independent judicial review.*

Introduction

Among the issues that concern freedom of expression activists in Spain are several changes to legislation, most specifically a new Public Security Law (Ley Orgánica de Protección de la Seguridad Ciudadana) (nicknamed “the gag law” – ley mordaza – by its critics) and changes to the Penal Code, both of which entered into force on July 1, 2015. Furthermore, reforms to the Criminal Procedure Code are currently being considered by the legislature.³⁶

This report does not contain a detailed analysis of the legal changes (as this was not part of the mis-

sion), but points out the concerns raised and the comments given on this by different interlocutors during the international expert mission.

Legal changes

The Public Security Law, among other things, makes the unauthorised use of images or personal data of public security officers punishable. This is very likely to have a limiting effect on media and restrict the important watch-dog role of a free media. The law also requires persons to show due respect to members of the security forces in the line of duty. This formulation is vague and open to different interpretations.

A number of amendments to the Penal Code have been carried out. The Code is old and in many cases the amendments are updates to modernise the code. Certain amendments, however, give cause for concern, as they could have a chilling effect on freedom of expression due to unclear formulations. One example is the prohibition of regularly visiting websites with terrorist content. It is not clear what would amount to “regularly visiting” and the meaning of “terrorist content” is also not clear. We were ensured by the defenders of the amendments (the Popular Party as well as to some extent the Socialist Party, who both are signatories to an anti-jihadist pact, which is a background to the legal amendments) that there is a need for a subjective as well as objective element for any activity to fall under the provisions, i.e. one must intend to commit acts of terrorism in order to be found guilty.. Provided this is properly applied by an independent judiciary, the

³⁴ This article was originally published on www.freemedia.at on July 7, 2015.

³⁵ This article reflects the views of the author as an independent member of the international mission.

³⁶ Ed. Note: The reforms to the Criminal Procedure Code were passed in October 2015.

application of the provisions may well be acceptable, but the vagueness can nevertheless have a chilling effect.

The amendments to the Criminal Procedure Code would, among other things, allow for the possibility to install so-called spyware and other means of electronic surveillance. The draft amendments to the Code have been changed during the drafting and legislative process. The possibility for surveillance without judicial approval, as initially proposed, has been reduced. The working group under the High Judicial Council that examines draft legislation (see below) suggested changing this and their suggestion was accepted. The amendments are still under consideration by the legislature. It is very important to avoid the temptation, which unfortunately is common in many countries, that, because it is so easy to use modern technologies for mass surveillance, such surveillance is undertaken without due regard for proportionality and necessity.

International standards

The potential chilling effect of security related provisions if they are vague and admit the possibility of diverse interpretation must be kept in mind. It will take a while before jurisprudence develops and during this period, journalists, researchers and others who, for legitimate reasons, access websites must not feel afraid that such activity can be construed as an offence. Members of the international mission had the impression during our meetings that not much attention has been given to perceptions, to the chilling effect or to how the laws are interpreted by the public generally.

As concerns legal measures related in different ways to security concerns and the fight against terrorism, the situation for international experts is somewhat different than the situation related to advice related to e.g. public service broadcasting, broadcast regulation or access to informa-

tion legislation. In those cases there exist best international practices as well as different well-established national systems that may be used as models. For various reasons there are fewer good models to use for security-related matters. There is no internationally binding or universally accepted definition of terrorism in international law. Most countries in the world struggle with the limits between acceptable and legitimate infringement of rights in order to ensure security. There are thus in this matter no ready-made international solutions to suggest. This does not mean that there are no best practices to point to. What is very important is that the requirements of necessity and proportionality of any restrictive measures be duly and transparently taken into consideration. Such requirements include that any measures that restrict rights and freedoms have a chance of being successful in combating the matters they are aimed at. The restrictions and their motivation should be as clear as possible.

The potential chilling effect of security related provisions if they are vague and admit the possibility of diverse interpretation must be kept in mind. It will take a while before jurisprudence develops and during this period, journalists, researchers and others who, for legitimate reasons, access websites must not feel afraid that such activity can be construed as an offence. Members of the international mission had the impression during our meetings that not much attention has been given to perceptions, to the chilling effect or to how the laws are interpreted by the public generally. Rather, the discussion has centred only on assurances that the laws will be well applied – something those opposing them do not believe.

All countries that respect human rights and individual freedoms grapple with problems of conflicting interests in certain situations. This is recognised in human rights instruments that indicate that freedoms and rights are not absolute. Article 10 of the European Convention on Human Rights as well as Article 19 of the Covenant of Civil and Political Rights both contain explicit limitations of the right to freedom of expression. Many of our interlocutors brought up this possible conflict and stressed that there is no lack of understanding of the possible limitations of rights that new laws or

legal amendments may bring. We were ensured that the exercise of balancing rights will be properly undertaken in practice. In most cases this can neither be verified nor contradicted until there is case law on specific provisions. It must, however, be recognised that laws that may limit freedom of expression can have a disproportionate restrictive effect on expression and free media, which is a problem even if such effect may be based on partially exaggerated fears.

Procedural issues

As mentioned, during the meetings with interlocutors it was pointed out that these provisions carry no risk as the interpretation will be made by judges who have experience in making such interpretations. For example, it was suggested that the concept of terrorism was not well defined in existing legislation either, but this has been sensibly applied for years already. It was stressed that there is a need for the subjective as well as the objective element for an activity to be punishable, i.e., an intent to commit terrorist acts. As with any laws, the criteria will be determined through application. There is no need to question the fact that there is an independent judiciary in Spain, with professional judges. However, when new laws are introduced that may have an effect of limiting freedom of expression, it is important to also keep in mind perceptions and understandings – not just definite negative effects in practice.

One change that was mentioned in different contexts (and that will only be commented upon in general terms here) is that some issues will become administrative offences instead of criminal ones. This is often a positive change as issues should only be criminal offences if the type and seriousness of the issue merit this. People should not risk getting a criminal record for smaller infringements of the law if there are other effective measures that can be taken. At the same time, under the rule of law there are established rules and procedures for the application of criminal sanctions, including possibilities for appeal. Sanctions are normally applied by independent judicial officials in an open process. In the case of administrative sanctions, the method as well as the body applying the sanctions may vary. With-

out commenting in detail on any of the specific proposed changes, one can generally note that it is very important that the change to administrative offences not lead to abolishing independent judicial review of the sanctions or cause the procedure of application to become less transparent.

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The legislative process

It was evident that there is a climate of polarisation in Spain among different political parties, with the governing (and dominant) Popular Party often being isolated against the others, but also with traditional parties, like the Popular Party and the Socialists (and to some extent also the United Left) being in contradiction with the new parties (Podemos, Ciudadanos) and civil society activists. Although it may be the case that such a climate can lead to exaggerated fears about legal reforms, it does not change the fact that it is the role of the government to mitigate such fears and counteract any chilling effect that new or amended laws may have on freedom of expression.

Opposition parties stated that they would abolish new legislation such as the Public Security Law and in some cases some or all of the mentioned changes to the Penal Code and Criminal Procedure Code, if elected. As far as the Public Security Law is concerned we were told that all opposition parties are united in their opposition while for other laws the picture is somewhat more mixed. The Socialist Party supported by four other parties has made an appeal to the Constitutional Court regarding the Public Security Law. They have also used this possibility regarding other laws. The existence of an independent Constitutional Court is a very important guarantee of the rule of law.

The process in that Court is, however, slow and decisions can take several years.

The international mission also noted positively that the High Judicial Council has a working group of high-level judges, lawyers and academics that makes reports on new legislation during the drafting stage. This process ensures that the group's opinion is taken into account, even when such opinion is critical. The government is obliged to ask for the group's opinion, although the High Judicial Council's report is not binding on the government. However, in most cases, its suggestions are followed. The group has recently been critical of some proposed legislation due, among other things, to its possible negative influence on freedom of expression and the government has altered some proposals accordingly. Most notably, the provision on extended surveillance without court order was taken out of the draft reform of the Criminal Procedure Code after a negative assessment by the group.

Recommendations

There should be more clarity in the language of the law and/or other means to ensure that people are not afraid of any negative consequences, such as explanatory notes or clear statements of the intent of the legislation. Such clarity can serve to mitigate the possible negative effects.

For any restrictive law, there is a need to consider proportionality. The more restrictive a measure, the more essential it is that the measure be the only effective way to counteract the serious risk in question. Thus, it is important to first assess the risk and then see what measures can be taken against it, selecting those measures that provide the greatest possible security at the least possible cost to rights and freedoms.

Expert Commentary:

“Public Broadcasting and Broadcast Regulation”³⁷

Stephen Whittle

*Former Controller of Editorial Policy, BBC*³⁸

Executive summary

- *Concerns about the politicisation of RTVE, the Spanish public broadcaster, have increased as Spain enters a critical election year, with votes at the national, regional and local levels.*
- *The decision by the current Spanish government to alter the appointment process for members of RTVE’s executive board sets a dangerous precedent that should be reversed.*
- *The international mission’s visit exposed clear political fault lines, with the ruling Popular Party justifying the procedural change as necessary given the public broadcaster’s “anti-government reporting”.*
- *The government should implement an independent, sector-specific broadcast regulator in accordance with the original aim of the 2010 broadcast law.*
- *The direct granting of broadcast licenses by the government is unusual and its recent decision to award licenses so close to scheduled national elections is troubling.*

Introduction

In April 2015, the Madrid correspondent of the Financial Times reported on the current situation facing the Spanish public broadcaster, RTVE. His report echoed concerns raised the previous month by IPI.

“For more than 50 years millions of Spaniards have sat down each night to watch the *Tel-ediario*, the flagship news programme of state broadcaster TVE. In recent months, however, the

channel has not just been reporting the news – but making it as well.

TVE and its news programmes stand accused of blatantly favouring the government of Mariano Rajoy and his ruling Popular Party, while sidelining opposition voices.

The channel’s own journalists have grown so concerned about political interference that they sent a delegation to Brussels this month to make a formal complaint to the European parliament. In a seven-page document, they describe TVE as a “propaganda instrument in the service of the government” – and chronicle a series of alleged journalistic lapses and manipulations.”

His report went on to point to the particular danger the alleged interferences represented given this year of elections in Spain at the local, regional and national level. And he cited the president of RTVE’s News Council, the internal ethical watchdog: “I have been with the channel for 30 years, and I have to say that it has never been this bad,” says Alejandro Caballero. What we want is a channel that is in the service of the public. What we have is a channel that is an instrument of the government, and that is being put to use by the government.”

Report on the mission

As the summer heat hits Madrid, the political temperature is also rising. The ruling conservative party, the Popular Party (PP), has re-launched itself after its losses in the recent local and regional elections, putting forward newer, fresher faces.

³⁷ This article was originally published on www.freemedia.at on July 29, 2015.

³⁸ This article reflects the views of the author as an independent member of the international mission.

The classic struggle for power in Spain in which two parties, the PP and the Socialist Workers' Party (PSOE), slug it out has become a four-horse race in which each of the contenders has been attracting around 20 percent support in the polls. As in most wars, the first casualty is truth not least because it is traditional in Spain for the winner to take all the spoils, especially when it comes to public and other significant appointments.

Journalists from across the political spectrum fear that the freedom of expression that Spain has enjoyed since it was enshrined in the Constitution after the end of the dictatorship is under threat both openly and behind the scenes.

Last December the International Press Institute (IPI) sent a fact finding delegation to Spain. The mission report, underlines concerns about independence and impartiality at the RTVE as well as the lack of a sector specific and independent broadcasting regulator.

RTVE

When it comes to the protection of the impartiality of public service broadcasters and the role of broadcast regulation, there are European standards – from both the Council of Europe and the EU – which apply.

The most recent IPI mission sought to persuade Spain's political parties that it was in all their interests, as well as in the interest of the media and public, to ensure that coverage of the elections by the public broadcaster was accurate and impartial and included all the voices in the campaign.

Recently, the newly appointed chairman of RTVE has boasted of his political affiliation to the PP and overseen a process of putting known government supporters into the newsroom and in key reporting posts.

His own appointment was made thanks to an executive decree that changed the law governing RTVE to allow a simple parliamentary majority rather than a qualified one when appointing the membership of RTVE's board. This is a dangerous precedent. Decrees which override existing laws

should only be used for emergencies – not to upset a fundamental principle of good governance in relation to the public broadcaster.

When the mission met with the joint parliamentary committee that oversees the public broadcaster, the political fault lines were only too clear. The Right denies that there is a problem or that freedom of expression is under threat; the Left looks at the same facts and draws the opposite conclusion.

As a Council of Europe Committee of Ministers Declaration on Public Service Media Governance (February 2012) puts it:

12. A properly functioning governance system depends on a number of conditions. These include the processes through which the support of the key stakeholders – including the State – is secured, the existence of an appropriate level of independence from government or other public and private interests, and the procedural guarantees ensuring that the decisions of public service media are consistent with their remit, are properly taken and fully implemented[emphasis added].

The more obvious party-political approach behind the change was clear. Indeed, Rafael Hernando Fraile, parliamentary spokesman for the PP in Parliament, told the IPI mission that it had to be done as "RTVE reporting had been anti-government".

When the mission met with the joint parliamentary committee that oversees the public broadcaster, the political fault lines were only too clear. The Right denies that there is a problem or that freedom of expression is under threat; the Left looks at the same facts and draws the opposite conclusion. In subsequent meetings with the parties, the PSOE said that if elected they would restore the previous law as related to the appointment procedure and would recommend appointments using a system of public advertisement with a selection made by an independent panel before being submitted to Parliament.

No such commitment was forthcoming from the PP though they did agree that an exchange visit between the RTVE and the BBC might be beneficial in the run up to the elections to share experience covering hotly contested campaigns and ensuring impartiality.

Again, the Council of Europe declaration points to a key principle:

47. Public service media organisations occupy a uniquely privileged place in public debate and democratic processes. Their independence is prized precisely because of the expectation that public service media organisations will reflect and promote open and public debate, to underpin wider democratic goals. Public service media organisations need to be confident that they can hold power to account on behalf of the public whose interests they serve without political interference.

Recommendations

Public Service Broadcasting requires trust. Part of that trust comes from being able to rely on the public service broadcaster to provide as impartial and accurate a picture of the world as possible. In news and current affairs coverage, public service broadcasters should set the highest standards of independence and impartiality. News has to be truthful, even when inconvenient; it must be informed, reliable, and never distorted to the point where people are led to false conclusions. A PSB should give people the requisite context and background so that they grasp the significance of what they are being told. It should deal fairly with all political parties and ensure that their policies are reported and challenged appropriately.

Last, but by no means least, a PSB should be truly accountable for what is done and how. A PSB should aim to set the standard in terms of what is reported, how it is reported and why. A PSB should also be prepared to explain and, where necessary, defend the decisions it takes. It should also have the courage and the grace to admit mistakes when they are made. For example, its

editorial guidelines should be available to all, as well as its promises of performance.

Again, as the Council of Europe Declaration puts it:

3. The primary mission of public service media is to support general interest objectives such as social progress, public awareness of democratic processes.... As an important public source of unbiased information and diverse political opinions, public service media must remain independent from political or economic interference and achieve high editorial standards of impartiality, objectivity and fairness.

We continue to suggest that:

- the appointments process for the Chairman and board of RTVE revert to the system originally foreseen by the 2006 Law on Public Radio and Television and be supported by an independent advertising and selection process;
- there be a legislative duty on RTVE to provide impartial news and election coverage;
- RTVE coverage be given to all the significant parties contesting the election and that such coverage be both balanced and fair; and
- RTVE take part in exchanges with other PSBs in Europe.³⁹

News has to be truthful, even when inconvenient; it must be informed, reliable, and never distorted to the point where people are led to false conclusions. A PSB should give people the requisite context and background so that they grasp the significance of what they are being told. It should deal fairly with all political parties and ensure that their policies are reported and challenged appropriately.

³⁹ Ed. Note: These recommendations have been modified from those originally published on July 29, 2015 on www.freemedia.at.

Independent regulation

Other European countries see the value in having an independent, standalone body in this crucial field of freedom of expression and content that has the necessary sectoral expertise and is able to balance freedom of expression and economic and plurality issues.³⁷ Such bodies can work with flexibility and speed; provide credibility and stability as they are insulated from day-to-day political influence; are efficient and effective; provide for public participation and transparency; and reduce both political uncertainty and interference.

We were disturbed to learn in Madrid that six new digital TV licences are to be awarded in November just before national elections are expected to take place. It is unusual for such licenses to be granted directly by the Government, as they are in Spain, rather than by an independent sector specific regulator. It is even more troubling when the awarding of licenses is so obviously tied to the electoral calendar and leaves the Government open to the charge of seeking to reward political service by media owners.

We again raised the issue of restoring the section of the 2010 General Broadcasting Act which foresaw the creation of an independent regulator, the National Broadcasting Council, which would guarantee:

- a. The free exercise of broadcast communication in the areas of radio, television and connective and interactive service foreseen in the present law.
- b. The full implementation of the rights and obligations established in the this law, especially as relates to minors

- c. Transparency and pluralism in the broadcasting sector
- d. Independence and impartiality in public radio, television and connective and interactive series and the fulfilment of the public service mission that they embody.

Unfortunately, the parties of the left and the right are also split on this issue.

Other European countries see the value in having an independent, standalone body in this crucial field of freedom of expression and content that has the necessary sectoral expertise and is able to balance freedom of expression and economic and plurality issues.⁴⁰ Such bodies can work with flexibility and speed; provide credibility and stability as they are insulated from day-to-day political influence; are efficient and effective; provide for public participation and transparency; and reduce both political uncertainty and interference.

European standards

The European Union's directives take legal precedence in all 28 member states. They require member states to achieve a particular result without dictating the means of achieving that result. In the field of broadcasting, the 2010 Audiovisual Media Services Directive ("AVMSD") is the pre-emptive legal authority.

The AVMSD suggests, but does not direct, member states to have independent regulators for broadcasting. Reference is made in Article 30 as follows:

"Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive... through their competent independent regulatory bodies."

In March 2013, the Commission consulted on whether there should be greater legal clarity at EU level on the function, organisation, status,

⁴⁰ Currently, content regulation is performed by the National Commission on Markets and Competition, the so-called "superregulator", which is also responsible for regulating the energy, telecommunications, railway, postal and airport industries. The Commission was created by Law 3/2013 of June 4, on the Creation of the National Commission on Markets and Competition, which also officially repealed the sections of the 2010 General Broadcasting Act related to the National Broadcasting Council.

competences and resources of independent regulatory bodies within the context of the AVMSD. This followed on from two significant reports conducted for the Commission.

The High Level Group on Freedom and Media Pluralism recommended that: *"A network of national audio-visual regulatory authorities should be created, on the model of the one created by the electronic communications framework. It would help in sharing common good practices and set quality standards. All regulators should be independent, with appointments being made in a transparent manner, with all appropriate checks and balances."*

The Committee on Civil Liberties, Justice and Home Affairs also issued a report which called, "on the National Regulatory Authorities to cooperate and coordinate at EU level on media matters, for instance by establishing a European Regulators' Association for audiovisual media services, to harmonise the status of the National Regulatory Authorities foreseen by Articles 29 and 30 AVMSD by ensuring they are independent, impartial and transparent, both in their decision-making processes and in the exercise of their powers, as well as in the monitoring process, and to provide them with appropriate sanctioning powers to ensure that their decisions are implemented."

Then Commission Vice-President Neelie Kroes also underlined the importance of having independent regulators and stressed the latter's contribution in shaping the regulatory framework.

Recommendation

We continue to suggest that Spain implement the intention of the original 2010 General Broadcasting Act and create an independent audio-visual regulator.



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