



Spain

Author: Joan Barata, Justitia

Joan Barata works on freedom of expression, media regulation, and intermediary liability issues. He is a Senior Fellow at Justitia’s Future Free Speech project. He is also a Fellow of the Program on Platform Regulation at the Stanford Cyber Policy Center. He has published a large number of articles and books on these subjects, both in academic and popular press. His work has taken him to most regions of the world, and he is regularly involved in projects with international organizations such as UNESCO, the Council of Europe, the Organization of American States or the Organization for Security and Cooperation in Europe, where he was the principal advisor to the Representative on Media Freedom. Joan Barata also has experience as a regulator, as he held the position of Secretary General of the Audiovisual Council of Catalonia in Spain and was member of the Permanent Secretariat of the Mediterranean Network of Regulatory Authorities.

Country Summary

Despite its high ranking in freedom of expression indexes, political polarization, reflected in the media, and an increase in Strategic Lawsuit against Public Participation (SLAPPs) against journalists remain issues of concern in the country. Restrictive laws were passed between 2015 and 2021: one which adopted a broad definition of hate speech not requiring a direct and justifiable link with incitement to discrimination, hostility, or violence, inducing a rise in the number of strategic lawsuits against public participation (SLAPPs); one law criminalized the “lack of respect and consideration” for agents of the authority; while criminal sedition provisions included in the Spanish Criminal Code were repealed in 2022 and replaced with an “aggravated public disorder” offense. Three notable non-legislative developments were described: A “Procedure for intervention against Disinformation” adopted by the Department of National Security which raised concerns among media and civil society of being used as a

tool to monitor the Internet on a regular basis. The secessionist process in Catalonia and the Government's policies during the Covid-19 pandemic triggered acts of verbal denigration, attacks against journalists and media actors during coverage of public demonstrations were also reported. Also, journalists and media entities complained about the way online press conferences by Government officials were managed and organized during the Covid-19 pandemic.

Introduction

Since the adoption of the Constitution of 1978, Spain can be considered a Western liberal democracy based on the rule of law and the respect and protection of fundamental rights. Spain has ratified the most relevant international and regional human rights instruments, is a member of the European Union and the Council of Europe and accepts the jurisdiction of the European Court of Human Rights (ECtHR). The Spanish Constitution protects the right to freedom of expression and freedom of information (Article 20). Protection for such rights can be obtained from both ordinary courts and the Constitutional Court, among other possible mechanisms (including the Ombudsperson or *Defensor del Pueblo*).

Spain occupies the position number 32/180 in the Reporters without Borders (RWP) World Press Freedom Index.⁶²⁸ This is the lowest position during the period 2015-2022. Spain obtained the highest ranking during the years 2019-2021, at 29th position. In Article 19's Global Expression Report 2023, Spain is ranked 20/161 with a score of score of 87.⁶²⁹ The most recent report highlights political polarization reflected in the media, and an increase in SLAPPs against the media and journalists as main issues in the country. In Justitia's Free Speech Index, Spain comes 8th out of 33 countries, with a score of 73 – a high approval of free speech.⁶³⁰

In 2020 Spain undertook the third cycle of the United Nations Universal Periodic Review (UPR). However, recommendations accepted by Spain in the previous cycle (2015) were (and still remain) not fully implemented. Areas to be addressed include: (i) decriminalization of defamation and (ii) modification of the Public Safety Law so that freedom of expression and the right to peaceful assembly are not affected, and there is an increase in security forces' awareness of respect for human rights during demonstrations. During the third cycle new recommendations were also accepted in areas such as revising the Criminal Code, to ensure that crimes align with internationally recognized definitions, and a review is conducted of criminal laws concerning lèse-majesté and offending religious feelings. However, Spain did not agree to fully decriminalize defamation and include it in the Civil Code, and in doing so follow standards set by the European Court of Human Rights.

⁶²⁸ <https://rsf.org/en/country/spain>

⁶²⁹ <https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf>

⁶³⁰ <https://futurefreespeech.com/interactive%20map/>

During the mentioned cycle, several civil society organizations submitted reports to the Human Rights Council, raising issues of criminalization of slander and defamation, criminalization of offenses to Spain and its symbols as well as religious sentiments, excessive scope of hate speech restrictions, disproportionate and unjustified legislation on public safety, and broad criminalization of glorification of terrorism and indoctrination. Most of these issues remain unaddressed.

I. Legislation

In 2015 a comprehensive reform of the Criminal Code was adopted. It significantly impacted the regulation of hate speech under Article 510 (Organic Law 1/2015 of 30 March). The explanatory memorandum of the law refers to Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law to justify this reform. However, the reform enshrined a very broad notion of hate speech, which does not necessarily require the concurrence of a direct and justifiable link with incitement to discrimination, hostility or violence. This consideration of hate speech as a broad category has enabled individuals and collectives such as politicians and security forces to criminally prosecute anyone who insults them on social media, thus giving rise to a situation of intimidation of anyone who expresses distasteful or hurtful ideas, especially in political discourse, artistic creation, and parody.

Organic Law 4/2015 of March 30 on the protection of public safety includes, as a serious offense subject to fines of 601 to 30,000 euro, the unauthorized use of images and other data of members of security forces in the event that such endangers principles as broad as “the personal or family safety of the agents, the protected facilities or the success of an operation, with respect to the fundamental right to information” (Article 36 (23)). It also punishes the “lack of respect and consideration” for agents of the authority. These general administrative provisions have proved problematic in relation to the exercise of freedom of information. People conducting activities of a journalistic and informative nature in relation to the mode of action of the security forces and corps have been subject to administrative procedures that have led to economic penalties. In 2020, the Constitutional Court declared that article 36.23 was not aligned with the constitutional protection of the right to freedom of information. However, journalists covering police actions (particularly in the course of public demonstrations) have continued to be punished under the also mentioned more general provisions included in the law on respect and consideration.

Criminal sedition provisions included in the Spanish Criminal Code (articles 544 to 549) were repealed by Organic Law 14/2022 of 22 December and replaced it with an “aggravated public disorder” offense carrying between three – five years’ imprisonment. This reform was triggered by criticism around the Supreme Court decision of 2019 sentencing a series of Catalan politicians and activists to imprisonment terms.

II. Non-legislative developments

A “Procedure for Intervention against Disinformation” adopted by the Department of National Security created some concern among media and civil society since it was seen as a tool to monitor the Internet on a regular basis⁶³¹.

In 2017 a Swedish-Turkish journalist was detained by the police at the El Prat airport in Barcelona, where he was vacationing. Police reported that he was held by police following Interpol order. The next day he was arrested on charges of “insulting the Turkish president” and “terror propaganda.” The National High Court (Audiencia Nacional) decided to release and allow him to return to Sweden a few weeks after the detention⁶³².

Political polarization in Spain around the secessionist process in Catalonia as well as more general political controversies (including the Government’s policies during the COVID-19 pandemic) triggered alleged acts of verbal denigration and attacks against journalists and media actors. Physical attacks and intimidation during coverage of public demonstrations were also reported.⁶³³

During the COVID-19 pandemic journalists and media entities complained about the way online press conferences by Government officials were managed and organized. Journalist had to submit their questions in advance and some access restrictions were also established.⁶³⁴

III. Enforcement

In 2019, a series of Catalan politicians and activists were sentenced to 9-13 years of prison over 2017 independence referendum and its aftermath. Convicted individuals were found guilty of sedition, disobedience, and misuse of public money.⁶³⁵ Decisions were confirmed by the Constitutional Court. Previously, the UN Special Rapporteur on the right to freedom of opinion and expression, David Kaye, urged Spanish authorities to refrain from pursuing the criminal charge of rebellion against political figures and protesters in Catalonia that carries a jail sentence of up to 30 years. The Rapporteur also expressed that charges for acts that do not involve violence or incitement to violence may interfere with rights of public protest and dissent.⁶³⁶ In 2021 the Government issued partial pardons (regarding the sedition conviction) for all defendants thus releasing all from prison. A ban on a return to public office was

⁶³¹ <https://rsf.org/en/government-s-anti-fake-news-policy-potentially-threatens-press-freedom-spain>

⁶³² <https://europeanjournalists.org/blog/2017/09/27/spain-must-release-journalist-hamza-yalcin/>

⁶³³ <https://rsf.org/en/journalists-attacked-during-far-right-protests-spain> , <https://rsf.org/en/catalan-referendum-attacks-journalists-biased-coverage> and <https://rsf.org/en/alarm-about-growing-violence-against-reporters-catalonia>

⁶³⁴ <https://rsf.org/en/coronavirus-spanish-government-yields-pressure-journalists-and-agrees-live-press-conferences>

⁶³⁵ https://internationaltrialwatch.org/wp-content/uploads/2021/03/STCIA_EN.pdf

⁶³⁶ <https://www.ohchr.org/en/press-releases/2018/04/un-expert-urges-spain-not-pursue-criminal-charges-rebellion-against>

maintained as a penalty for other crimes.⁶³⁷ The pardon had been previously recommended by the Parliamentary Assembly of the Council of Europe.⁶³⁸

In *Stern Taulats and Roura Capellera v. Spain* (2018), the ECtHR found that the Spanish courts had violated the freedom of expression of two citizens by imposing criminal sanctions for expressing political disapproval by burning a picture of the Spanish royals during an official visit.⁶³⁹

In 2017, the National High Court convicted writer and activist Cassandra Vera to a year in prison for the publication of a tweet containing a joke about the death of Luis Carrero Blanco, the Head of Government during the dictatorship of General Franco, as a result of an action by the terrorist group ETA. Vera was acquitted by the Supreme Court in 2018.⁶⁴⁰

In 2018, the Supreme Court confirmed the conviction and sentence of a rapper on charges of hate speech and incitement to terrorism. The rapper had made public audio and video archives of his songs which included lyrics valorizing groups regarded as terrorist and calling for violence against politicians and the Spanish royal family. The Court held that the lyrics constituted criminal offenses because they created an atmosphere of fear and anxiety and that it was irrelevant that the rapper did not intend to harm any person. The Court found that imprisonment was a proportionate response and confirmed the lower court's sentence of three and a half years' imprisonment.⁶⁴¹ The Constitutional Court refused to review this case.

In 2020, the Constitutional Court revoked the judgment of the Supreme Court that had sentenced a singer and songwriter to one years' imprisonment after the singer published a series of tweets seeming to support two terrorist groups. The ruling of the Constitutional Court considered that the decision of the Supreme Court did not take into account the preferred position that freedom of expression occupies in any democratic society and the repressive nature of criminal sanctions which should be applied as the last resort of the judiciary.⁶⁴²

In 2022, the Supreme Court confirmed the decision of the Central Election Commission considering reasonable and proportionate Twitter's decision to suspend the account of the political party Vox on grounds of racist comments.⁶⁴³

⁶³⁷ <https://www.theguardian.com/world/2021/jun/22/spanish-government-pardons-nine-jailed-catalan-leaders>

⁶³⁸ <https://assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2021/20210603-ProsecutionPoliticians-EN.pdf>

⁶³⁹ <https://hudoc.echr.coe.int/eng?i=001-181719> and

<https://globalfreedomofexpression.columbia.edu/cases/stern-aulats-rou-ra-capellera-v-spain/>

⁶⁴⁰ https://en.wikipedia.org/wiki/Cassandra_vera

See also: <https://globalfreedomofexpression.columbia.edu/cases/state-v-cassandra-vera/>

⁶⁴¹ <https://globalfreedomofexpression.columbia.edu/cases/case-jose-miguel-arenas-valtonyc/>

⁶⁴² <https://globalfreedomofexpression.columbia.edu/cases/the-case-of-cesar-strawberry/>

⁶⁴³ <https://www.poderjudicial.es/search/TS/openDocument/3a7e96863b8ab6f2/20220314>

Conclusion

The right to freedom of expression and freedom of information is constitutionally and legally protected in Spain. Spanish institutions formally accept the international provisions, interpretation criteria and standards set by existing mechanisms including the European Court of Human Rights. However, there are still areas for improvement regarding the exercise and protection of the mentioned rights in the country. Journalists receive strong attacks from politicians based on ideological interests. Reporting activities may also be the target of threats of physical attacks in certain circumstances, such as when covering big political rallies and police abuses. Administrative legislation on public safety still contains broad provisions that are used to restrict the mentioned reporting activities. Criminal legislation still includes a significant number of provisions that can be used against those expressing shocking and offensive ideas, including artists, performers, and activists. This application of repressive legislation may lead to particularly severe and disproportionate penalties in areas such as hate speech or terrorism. Political figures and particularly the royal family still enjoy a privileged protection against criticism and extreme views on monarchy. Even though the situation in Catalonia – regarding the illegal referendum of 2017 and the so-called independence process – entails several complex legal matters, certain measures and decisions taken by the judiciary against those involved in these events have had a disproportionate and negative effect on the right to freedom of expression. The ruling coalition between the socialist party (PSOE) and a group of left-wing parties (Podemos) has been announcing their willingness to reform existing legislation to better protect freedom of expression. However, changes in this area have not been significant and most important issues remain to be addressed.