



Plataforma en **defensa** de
la libertad de información
...porque sin libertad de información no hay democracia

**CONTRIBUTION SUBMITTED BY
THE FREEDOM OF INFORMATION DEFENSE PLATFORM (PDLI) TO THE LIST OF ISSUES
PRIOR TO REPORTING TO BE ADOPTED ON THE KINGDOM OF SPAIN**

127th session of the of the United Nations Human Rights Committee

Executive overview

1. The **FREEDOM OF INFORMATION DEFENSE PLATFORM** (PDLI, in its Spanish acronym) wishes to express their interest to contribute to the list of issues prior to reporting to be adopted on Spain (127th session of the Human Rights Committee). The PDLI is comprised of a group of organizations and people from the legal field, journalism and social movements, focusing on the threats to the rights to freedom of information and expression in Spain.¹

2. The purpose of this report is to provide information regarding the Spanish authorities' compliance with and effective respect for the international standards applicable to the right of freedom of expression acknowledged in Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights. To this effect, this contribution shall examine the following areas or elements of concern:

- a) Criminalization of expressions upon the basis of protecting third-party rights and other principles and values;
- b) Administrative legislation on the protection of public safety;
- c) Criminal legislation regarding the glorification of terrorism and indoctrination;
- d) Measures for the protection of a safe and pluralistic environment for journalists and the media;
- e) Right of access to information and public transparency.

a) Criminalization of expressions upon the basis of the protection of third-party rights and other principles and values

3. The Spanish Criminal Code (CC)² contains a set of provisions designed to protect rights and interests (which may sometimes be formulated in a vague way), such as the right to reputation (honor), religious sentiments, the integrity of national symbols and the absence of discourse that may be particularly offensive to certain collectives. On several occasions, such precepts (and their application by the Courts) have given rise to disproportionate and unjustified restrictions on freedom of expression, negatively limiting, in particular, the free distribution of political satire and the discourse of minority and even artistic groups.

Slander and defamation

4. Articles 205 to 216 of the CC regulate the **crimes of slander and defamation** ("injuria" and "calumnia" in the Spanish terminology). While it is true that the commission of these crimes does not result in the imposition of prison sentences, the use of criminal law to prevent and offset damage to the reputation of a person caused by a given action or expression was addressed by the United Nations Human Rights Committee

¹ <http://libertadinformacion.cc>

² <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>

(CCPR in the UN nomenclature) in 2011 under General Comment no. 34, which states that “State parties should consider the **decriminalization of defamation** and, in any case, the application of criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”.

Aggravated slander and defamation

5. There are also specific provisions, aggravated with respect to the established penalty, regarding **defamation and slander directed at members of the Royal Family**, either in the exercise of their duties or otherwise, as well as in cases of the use of images of any of them “in a manner that could damage the prestige of the Crown” (articles 492 to 494).

6. Similarly, Article 496 of the CC envisages **serious slander directed at the Parliament (*Cortes Generales*) or the Legislative Assemblies of the Autonomous Communities in session or any of their Committees during the public events at which such are represented**. Article 504 also contains special provisions with regard to cases of slander and defamation (leaving aside the reference to threats) concerning the **National Government, the General Council of the Judiciary, the Constitutional Court, the Supreme Court, the Governing Council or the Higher Court of Justice of an Autonomous Community, the Armed Forces and Security Forces**. Penalties are more serious than those imposed in cases of slander and defamation committed against regular citizens. Article 556 also criminally punishes any lack of respect and consideration due to the authorities in the exercise of their duties.

7. Ruling 79/2018 of the Criminal Chamber of the Supreme Court sentenced rapper Valtonyc to three and a half years in prison for serious slander and defamation of the Head of State for including critical remarks and attacks against the King and his family in his song lyrics.³ Another rapper, Pablo Hasel, was also sentenced by the National High Court (“Audiencia Nacional”) (5/2018) to nine months and one day in prison for his extremely critical messages on social media in relation to State institutions and especially the Crown.⁴

8. With regard to the aforementioned crimes and judicial decisions, the CCPR indicated in the same General Comment that “**simply considering that a declaration insults a public figure is not enough to justify the imposition of penalties**” and that “**all public figures**, including those who hold the most important political positions, such as Heads of State or Government, **may be the legitimate subject of criticism and political opposition**”, as a result of which it “expressed concern regarding laws on matters such as *lèse-majesté*, contempt, lack of respect for authority, lack of respect for flags and symbols, defamation of the Head of State and protection of the honor of public officials”, stating that “**laws should not establish penalties whose severity depends on the criticized person**. States should not prohibit any **criticism of institutions, such as the armed forces or the administration**”.

Offending Spain and its symbols

9. Article 543 of the CC establishes offending Spain and its symbols as a crime. As indicated in the previous paragraph, the CCPR has questioned the criminal prosecution of attacks on flags and other symbols.

10. The comedian Dani Mateo was charged and summoned to testify under Investigating Judge (“Juzgado de Instrucción”) number 47 of Madrid as a result of a gag on a comedy program on October 31, 2018. Although the case was eventually dismissed, the **charge generated a clear feeling of intimidation, particularly in relation to the content of the program in question, which focused on political criticism and debate**. Ruling 37/17 of the Central Criminal Court convicted **an activist who promoted whistling during the national anthem at a soccer match** attended by the Head of State of the **crime of defamation against the King and the crime of offending Spain**. This sentence was subsequently annulled by the Criminal Chamber of the

³<http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=AN&reference=8372290&statsQueryId=121309600&calledf>

⁴ <http://www.poderjudicial.es/search/openDocument/92dfa335f6d5a219>

National High Court.⁵

Offending religious sentiments

11. Articles 524 and 525 of the CC criminalize **the execution of acts or expressions with the purpose of offending religious sentiments**. The CCPR has established that “the prohibition of demonstrations of disrespect for a religion or any other belief system, including the laws on blasphemy, is incompatible with the Covenant”, as a result of which it is not admissible for these prohibitions to give rise to the “prevention or punishment of criticism of religious leaders or remarks on religious doctrine or dogma”. On several occasions, the precepts indicated above have been applied to convict artists, activists and politicians in the exercise of creative, protest and public debate-related activity concerning the role of the Catholic Church in Spanish society.⁶

Hate speech

12. Expressions of “hate speech” are regulated and punishable within the framework of Article 510 of the CC. Organic Law 1/2015⁷ gave it a broader scope, 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 category⁸ 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.

13. Constitutional Court ruling 177/2015⁹ considers the public burning of photographs of the Head of State as hate speech, a contemplation that was dismissed by the European Court of Human Rights,¹⁰ which regarded such as a typical act of political protest in a democratic State. Ultimately, it should also be highlighted that the various protests by separatist groups regarding the presence of members of the State security forces in the region of Catalonia resulted in the submission of at least 150 complaints for the alleged commission of hate crimes.¹¹

14. At a regional level, the Parliament of Andalusia Law 8/2017 of December 28 guaranteeing the rights, equal treatment and non-discrimination of LGBTI people and their families in Andalusia punishes the use of discriminatory language or the transmission of discriminatory and offensive messages and images related to people from the LGBTI collective as a very serious (administrative, non-criminal) offense (Article 62.c)¹².

15. **The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression** (the Rapporteur) has established that hate speech necessarily requires “**the concurrence of a real and imminent danger of violence resulting from the expression, the author’s intention to incite discrimination, hostility or violence and careful examination of the context in which the hate is expressed by the judiciary**”, taking into account that “although some types of expression may generate concern from the point of view of tolerance, civility and respect for others, there are cases in which neither civil nor criminal penalties can be justified”, as well as that “**the right to freedom of expression includes forms**

⁵<http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8372290&statsQueryId=121309600&calledf>

⁶ “The judges thus resolved ten emblematic cases of offending religion”, Público, February 9, 2018:

<https://www.publico.es/sociedad/resolvieron-jueces-10-casos-emblematicos-ofensas-religion.html>

⁷ <https://www.boe.es/buscar/doc.php?id=BOE-A-2015-3439>

⁸ Recently endorsed by Circular 7/2019 of the State Attorney General: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-7771

⁹ <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24578>

¹⁰ Stern Taulats et Roura Capellera c. Espagne [Sec. 3a] no. 51168/15, 51186/15, March 13, 2018

([https://hudoc.echr.coe.int/eng#{"itemid":\["001-181719"\]}](https://hudoc.echr.coe.int/eng#{))

¹¹ <https://www.elmundo.es/espana/2017/10/23/59ecf792ca4741b7118b4570.html>

¹² <https://www.boe.es/buscar/pdf/2018/BOE-A-2018-1549-consolidado.pdf>

of expression that are offensive, disturbing and alarming”, and therefore “not all types of incendiary, hateful and offensive expressions can be regarded as incitement”, hence “the concepts should not be combined”.¹³

b) Administrative legislation on the protection of public safety

16. Organic Law 4/2015 of March 30 on the protection of public safety¹⁴ 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 “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**, according to the information collected by the PDLI.¹⁵

17. The Spanish Ombudsperson has also reported that **the processing of such procedures does not place appropriate value on the potential exercise of fundamental rights such as the right to freedom of expression, that the affected party is not heard or taken into due consideration and that, in most cases, the version provided by the agent of the complaining body is accepted without any kind of verification**.¹⁶

18. Similarly, in relation to public safety, General Comment no. 34 recalls that this principle cannot be used to “suppress information of legitimate public interest that does not harm national security, to prevent the public from accessing this information or to prosecute journalists (...)”.

c) Criminal legislation regarding the glorification of terrorism and indoctrination

19. The evolution of criminal legislation concerning terrorism has **increasingly sought to simplify the concept of apology, ultimately criminalizing the simple glorification or justification of crimes of terrorism in cases of expressions of solidarity and ideological adherence for which neither instigative capacity nor willingness to incite is required**. Article 578 of the CC establishes the public glorification and justification of crimes of terrorism or persons who have taken part in their execution and the realization of acts “involving discrediting, having contempt for or humiliating the victims or their families” as criminal conduct.

20. Between 2011 (the year in which the terrorist group ETA ceased its activities) and 2017, the number of **criminal proceedings based on accusations of the glorification or public justification of terrorism increased five-fold**.¹⁷ Even without there being any proven link with a criminal organization, **several people have been convicted of the above crimes for making favorable or non-condemnatory comments of non-operative terrorist groups on social media (in many cases with an insignificant number of followers)**.¹⁸ Attention is to be drawn to the 2017 sentence of the National High Court convicting 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,¹⁹ the Head of Government during the dictatorship of General Franco, as a result of an action by the terrorist group

¹³ Report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, September 7, 2002, A/67/367, available at: <https://documents-ddsny.un.org/doc/UNDOC/GEN/N12/501/28/PDF/N1250128.pdf?OpenElement>

¹⁴ https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-3442

¹⁵ <http://libertadinformacion.cc/balance-de-la-ley-mordaza-la-pdli-denuncia-la-censura-camuflada-de-laley/>, as well as <http://libertadinformacion.cc/manual-practico-sobre-las-leyesmordaza/>

¹⁶ With reference to the most recent report, released in 2018, pages 165 and following: https://www.defensordelpueblo.es/wp-content/uploads/2019/06/I_Informe_gestion_2018.pdf

¹⁷ <http://libertadinformacion.cc/2017-el-ano-de-los-delitos-de-opinion/>

¹⁸ “Record at the National Court: seven trials for glorification of terrorism on social media in just one week”, Público, February 26, 2017: <https://www.publico.es/politica/record-audiencianacional-siete-juicios.html>

¹⁹ <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/La-Audiencia-Nacionalcondena-a-un-ano-de-prision-a-la-tuitera-que-publico-chistes-sobre-Carrero-Blanco> Cassandra was eventually acquitted by the Supreme Court in its sentence 95/2018: <http://www.poderjudicial.es/search/indexAN.jsp>

ETA, as well as the aforementioned ruling of the National High Court (5/2018) and the ruling of the Supreme Court (79/2018) **convicting rappers for glorifying terrorism upon the basis of the lyrics of their songs containing references to terrorist acts.**

21. Section 2 of Article 575 of the CC equates passive training and indoctrination with common access, for said purpose, to terrorism-related content published online. This facilitates the **criminalization of behavior that is merely consistent with frequent searches for information on terrorism-related issues**, including cases that are merely motivated by ideological affinities without any will to commit a crime, thus contravening the terms under which, as indicated above, General Comment no. 34 establishes that national security cannot be used as a general mechanism to prevent access to published information.

22. The United Nations Special Rapporteur on the promotion and protection of fundamental human rights and freedoms in the fight against terrorism has emphasized the **need to restrict the criminalization of expressions to cases in which there is a “message to the public with the intention of inciting the commission of a terrorist crime**, provided that such conduct, whether it advocates a terrorist crime or otherwise, **leads to a risk of one or more crimes of such a nature being committed”**.²⁰

d) Right of access to information and public transparency

23. The CCPR has established that the Right of Access to Information is fundamental, connected to the right to freedom of expression enshrined in Article 19 of the International Covenant on Civil and Political Rights. The standard established by the CCPR is in keeping with the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights.

24. Spain complies with some key aspects of the right of access to information as defined by the CCPR, including the enactment of a regulation (Law 19/2013 of December 9 regarding Transparency, Access to Public Information and Good Governance) to establish the procedures for requesting information, which entered into force on December 10, 2014. However, even at the time of its approval, the law **gave rise to a considerable amount of criticism, due to its shortcomings from the point of view of the comparable standards and best practices in the area**, from both international organizations²¹ and civil society.²² Amongst other aspects, the criticism focuses on a lack of acknowledgement regarding the right of access being fundamental, the lack of powers of inspection, and penalty by the supervisory authority and the excessive number of requirements for the exercise of the right itself.

25. Spain does not comply with the international standards, as **access to information has not been acknowledged as a fundamental right by the legislators or the courts**, despite the fact that several experts in constitutional law have concluded that it is protected by Article 20.1 of the Constitution.²³

26. **Requests can only be made by people with a national form of identification** (an ID card or residence card). Other potential petitioners, including undocumented persons in Spain and people in other countries, cannot submit such requests. In addition, many regions demand additional requirements, such as having an electronic certificate and/or an official digital signature.

27. A direct consequence of the **difficulty in making applications and the lack of awareness of this right is the obvious gender disparity amongst applicants**. According to official data, the number of requests made (from the law’s entry into force until May 31, 2019) totaled 19,206, of which 13,388 (69.71%) were made by men and only 4,813 (25.06%) came from women. The remainder, about 1,005 requests (equivalent to 5.23%),

²⁰ Report dated December 22, 2010, number A/HRC/16/51: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G11/105/22/PDF/G1110522.pdf?OpenElement>

²¹ See the critical report drawn up by the Representative in matters of media freedom of the Organization for Security and Cooperation in Europe: <https://www.osce.org/fom/104897>

²² See the joint position of different organizations, including Access Info Europe, at the time of the approval of the law: <https://www.access-info.org/es/sin-categorizar/13900>

²³ <https://www.access-info.org/es/frontpage-es/27052>

were submitted by legal entities.

28. Although the law on access guarantees the **right to appeal against rejections**, including the option of going to court, there are numerous **practical obstacles in terms of access to justice**. Firstly, given the complexity of the legal framework, the appeal procedures vary across regional and national levels. It is extremely difficult for a requester to know who to address in order to enforce their right and what to do in the event of a denial. Secondly, the different Transparency Councils that have been established at regional and national levels are relatively weak, in the sense that they cannot issue binding rulings nor punish violations of the law. Although Spain theoretically appears to be complying with the requirements of the CCPR, which states that “it is necessary to establish mechanisms for appeals against denials of access to information and for requests that have been left unanswered”, in practice there is inefficient access to justice.

29. The CCPR has established that **it should be possible to exercise the right of access to information before “all powers of the State** (executive, legislative and judicial) and other public and governmental authorities, whatever their level (national, regional or local), giving rise to the responsibility of the State party. The definition of such organizations may include other entities that exercise public functions”. This is not yet the case in Spain, due to the fact that it excludes the judicial and legislative branch from the scope of the Transparency Law.

30. The CCPR has established that **the right of access to information must be applied to “the registries available to the public body, regardless of the way in which the information is stored, its source and the date of production”**. However, there are several limitations in Spain, including the exclusion of information regarded as “auxiliary” or “internal” from the scope of the law (Article 18), whilst it also allows other laws to prevail, thus restricting access to the information.

31. The CCPR requires that **“the procedures should permit requests for information to be processed in a timely manner”**. The Spanish Transparency Law states that requests must be answered within a period of one month. The Spanish government does not publish the data corresponding to the average period for replying to requests, thus it is impossible to know which organizations are meeting the established deadlines.

32. The CCPR requires that **“State parties should actively proceed with the incorporation of governmental information of public interest into the public domain”**. The Spanish law on access contains a chapter indicating the information that should be published, including a great deal of organizational and financial information. However, there is a lot of data of public interest that has not yet been published, such as the commercial register and cadaster, both necessary in the fight against corruption.

33. The CCPR clarifies that **“the adoption of decisions in a State party that may substantially influence the way of life and culture of a minority group should be framed within a process of information exchange and consultation with the affected communities”**. In Spain, there is a clear failure to comply with this requirement and to ensure the public domain of information on minority groups. This can be observed with regards to the Sustainable Development Goals and, for example, the lack of publication of information on the number of women who have been victims of genital mutilation.

e) Measures for the protection of a safe and pluralistic environment for journalists and the media

35. **Spain does not have a general legal framework that establishes protection and guarantees for all who conduct journalistic activities, either as a paid professional activity or in any other way.** The Rapporteur has recently established that **“the national legal frameworks should protect the confidentiality of the sources of journalists and others involved in the dissemination of information of public interest”**.²⁴

36. Article 20 of the Constitution requires the legislator to draft the regulation on professional secrecy which,

²⁴ Report dated September 8, 2015, number A/70/361:

https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361&Lang=S

in particular, includes the fundamental guarantee of the right to the protection of sources. **This law has been pending approval** since the passing of the Constitution in 1978. **There is also no regulation designed to protect whistleblowers.**

37. Spain must improve in important areas with regard to the guarantee of a pluralistic and open communication system. The existence of non-profit community media, together with public service and commercial media, is a requirement resulting from international standards. **The Joint Declaration of Rapporteurs on freedom of expression of the various international organizations of May 2, 2018,²⁵ includes a call on States to “ensure that community media have a space to operate on all the distribution platforms and have adequate resources”.**

38. Article 32 of General Law 7/2010 dated March 31 on Audiovisual Communication in Spain²⁶ obliges the competent authorities to “guarantee, in any event, the availability of the public radioelectric domain required for the provision of these services” and to adopt the regulatory measures necessary to facilitate the effective presence and carrying out of activities by said means, within a period of one year following the approval of the law (in other words, 2012). To date, **no action has been taken in this regard and thus, there is no legal or administrative framework allowing the effective existence of community media in the Spanish system.**

NOTE: This contribution is based on the submission by the Freedom of Information Defense Platform (PDLI), Access Info Europe, the Federation of Journalist Trade Unions (FeSP), the Criminal Policy Studies Group (GEPC) and the “Legal Regulation and Digital Citizen Participation” Research Group (Complutense University of Madrid) regarding the 3rd Cycle of the Universal Periodic Review (upr) of the Kingdom of Spain, for consideration at the 35th session of the Working Group of the United Nations Human Rights Council, available here: <http://libertadinformacion.cc/wp-content/uploads/2019/07/EPU-España-2019-nforme-CSO-Final.pdf>

²⁵ https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_SP.pdf

²⁶ <https://www.boe.es/buscar/act.php?id=BOE-A-2010-5292>