



Report

New legal initiatives related to freedom of information and expression in Spain: The “Gag” Laws

Platform for the Defence of Free Expression

1. NEW LAWS IN SPAIN THAT THREATEN THE FREEDOMS OF EXPRESSION AND INFORMATION

On March 26, 2015, Spain approved three new, wide-ranging laws that seriously impact the rights and freedoms of its citizens, in particular freedoms of expression and information, as PDLI has reported.

Indicative of the unprecedented step backward that these measures encompass is the attention paid by the international press, such as the *Guardian* or the *The New York Times*, the latter having referred to one of the measures as an “ominous law”. One can also point to the unanimous social consternation (from organisations of judges, academics and various civil society groups united under the platform No Somos Delito [“We are not a crime”], in which PDLI also participates). The [human rights] rapporteurs of the United Nations also released a highly critical statement opposing the approval of the measures.

These law will take effect on July 1, 2015. For this reason, we believe they should be a central topic in the meetings that will take place as part of the International Mission.

What are the “leyes mordaza” (“gag laws”)?

The term “ley mordaza” (“gag law”) was first used to describe the draft Law on Public Security (Ley Orgánica de Protección de la Seguridad Ciudadana) due to its impact on freedom of expression and the right to protest.

However, the Law on Public Security is not the only law that curtails these rights. Two reforms of the Penal Code also do so. One of these reforms is that which has been euphemistically called the “anti-terrorist or anti-jihadist agreement” and the other is the reform initiated by former minister of Justice Gallardón.

Furthermore, there are two bills under consideration in Parliament that also impact freedoms of expression and information: the proposed Law on Criminal Procedure and the proposed Law on the Reform of the Judiciary.



When were they approved and when will they take effect?

The Law on Public Security and the two Penal Code reforms were definitively approved by the legislature in March 2015. According to an amendment introduced in the Senate, all three measures will take effect on July 1, 2015. The exception to this is a single provision in the Law on Public Security related to Ceuta and Melilla, which took effect the day after the law's publication in the Official Journal of the State.

The bills to reform the Law on Criminal Procedure were recently approved by the government and are currently under consideration in Parliament.

Are these laws necessary in Spain?

Statistics show that there is no increase in crime that justifies these reforms. On the contrary, the number of crimes committed has decreased. Furthermore, Spain enjoys one of the lowest crime rates in the European Union, much less than countries such as Sweden, the U.K., Germany, the Netherlands or France.

As far as terrorism is concerned, this issue seems to be used as an excuse to cut into freedoms, as PDLI has already suggested in relation to the Charlie Hebdo case.

Furthermore, associations of lawyers and magistrates have stated that these laws "will not lead to greater security".

On the other hand, surveys show that security is not among the leading priorities for the Spanish public, in comparison to other questions, such as corruption, which is insufficiently dealt with by these new laws.

Whom do they affect?

Everyone, because they constitute an unprecedented curtailment and change in our system of fundamental rights and liberties.

Although they appear to be measures that only affect activists or journalists, anyone who expresses an opinion (whether in the street or on the Internet), who participates in a protest or who looks for certain information can be considered as a criminal.

By extension, all the rights that depend upon the existence of an active, informed society will also be affected.

How do these laws curtail or harm fundamental rights?

These measures threaten or criminalise the rights to produce and receive information, the right to freedom of expression and the right to protest. They also criminalise the poor and immigrants. NGOs and civil society groups of all types (such as Caritas, Greenpeace, Amnesty International, PAH, SOS Racism and PDLI) have argued such in this video, which is a response



to televised comments by the Ministry of the Interior in which he stated that these measures would not harm rights.

What has the UN said about these laws?

On Feb 23, 2015, the UN published comments from various special rapporteurs of the Human Rights Council regarding Spain. The rapporteurs expressed their full rejection of the Law on Public Security and the reforms of the Penal Code, citing limitations of freedom of expression and assembly, as well as [expressing concern over] the subject of anti-terror offences.

Agreeing with what PDLI had been arguing, the rapporteurs warned, among other things, that “[a]s 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. They added: “The project of law could also allow for misuse in the oversight and removal of information available online.”

How do these laws affect freedom of expression and what are their consequences for journalism?

In recent months, 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. 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.

These are some of the main questions:

The Law on Public Security hones in on what has been the usual dynamic of dissemination for the new protests: viral processes using social networks.

Article 30.3 considers as organiser or promoter of an activity [a person who] “even not having endorsed or proposed a communication [...] by means of publications or declarations, can be determined as being behind [an activity] through the oral or written manifestations disseminated [during the activity]”.

The **Penal Code** heads in the same direction when it says: “The public distribution or dissemination, through any medium, of messages or 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, shall be punished with a fine of three to 12 months or with imprisonment between three months and one year” (Art. 559). Furthermore, web links can be accused of a crime against intellectual property (Arts. 270 and 271). On the other hand, the fight against pedophilia is moved to the penalisation of the mere access of juvenile pornography, even if such is simulated through animated drawings.



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 also affects **investigative data journalism or leaking** by considering certain cybercrimes as terrorism, including "accessing data contained in a system" (Art. 573); reporting on protest activities (Art. 579); "**regularly visiting**" **websites with terrorist content** (Art. 575); or regularly engaging in forms of "cyberprotest" such as the dissemination of calls to action or the alteration of an aspect of a website (Arts. 578 and 579).

Investigative data journalism/leaking. Investigations such as the "Falciani list" (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 would fall within the sphere of what would now be considered terrorism. Art. 373 of the new Criminal Code, despite the amendments that have been presented, continues to consider cybercrime as terrorism. These cybercrimes, through a modification introduced several weeks ago and that is now under consideration in the Senate, include the offence of "unauthorised access, through whatever means or procedure and violating security measures implemented to prevent such access, to data of cyberprogrammes contained in a computer system" (Art. 197 bis).

Reports and information on cyber security. The new definition of terrorism as also encompassing cybercrimes can also affect those who investigate and write on this topic. In fact, this has already occurred in the United States with journalists who cover Anonymous, such as Barret Brown (convicted) or Quinn Norton.

Visiting web sites. Art. 575 states that whoever "regularly accesses" web pages with terrorist content may commit a terrorist offence. The definition of this offence is so imprecise (the "purpose" must be to "seriously destabilise the functioning of political institutions or of economic or social structures of the state, force public powers to carry out an act or abstain from carrying it out, or seriously disturb public peace" that nothing prevents anyone from reading such content, for example, those with an information or journalistic aim, from being accused.

Furthermore, the fact that what is being penalised is the visiting of sites, and not dissemination, is made clear when the law states: "The acts will be understood as committed in Spain when the contents are accessed from Spanish territory."

Reporting on protest actions. Article 579 also states that whoever "publicly disseminates messages (...) that (...) by virtue of their content, are prone to incite others to commit one of the crimes under this chapter" may also be accused of terrorism.

Keeping in mind that acts of resistance such as the paralysing of an eviction or the occupation of a bank can be considered, under this reform, as terrorism, whoever covers these acts and/or disseminates information about them, can also find themselves accused. With the aggravating



factor that if, as has been the case, such coverage is carried out through social networks of the Internet, the punishment will be harsher.

Surveillance of journalists and mass surveillance. The fact that journalists, or any other person carrying out journalistic work, can be considered terrorists, even if they do not end up being convicted, is very serious: The mere possibility of being accused brings with the suspension of democratic guarantees, such as unauthorised wire tapping and solitary preventative detention for five days.

Furthermore, several of the new offences, such as visiting websites with terrorist content, open the door to justifying preventative surveillance practices in search of specific search/navigation profiles, something completely perverse, in the view of PDLI.

Cyberprotests. It is not only freedom of information, but also freedom of expression and the right to protest that are threatened under the supposedly "anti-terrorist agreement". Arts. 578 and 579 punish with the type of punishments used for terrorism offences the dissemination of messages through the Internet that can be considered to be "praising or publicly justifying" the committing of any of the new offences or the "dissemination of calls to action" that may incite others to commit such offences. Included among the cybercrimes now treated as terrorism offences is the alteration of websites as a form of protest. This includes crimes "against the crown", which could include caricatures or satirical content.

Provision of technological services. Art. 577 introduces among the forms of collaboration with a terrorist organisation the provision of technological services, which includes a large and imprecise range of activities.

In terms of the **recording of police officers**, the Public Security Law considers as a serious infraction "the unauthorised use of images and personal or professional data of authorities and members of [public security forces] that could endanger the personal or family safety of the agents". The fines may be up to €30.000. Although the article in question (Art. 36.26) includes the disclaimer "with respect to the fundamental right to information", PDLI fears that this is a merely rhetorical addition: no judge will weigh these rights unless the affected person files legal proceedings against the sanction imposed against him.

Who supports and who is opposed to these laws?

Dozens of associations, NGOs and social movements, such as Caritas, Amnesty International, Greenpeace, PAH or the assemblies of 15M, united under the platform "No Somos Delito" ("We are not a Crime"), have protested against these laws. Members of the legal community, such as the association "Judges for Democracy" or academic chairs in penal law from 35 Spanish public universities have also stated their opposition.

The majority of opposition parliamentary groups have declared their opposition to these laws and have presented veto proposals.

Why are these measures being proposed now?



“To make everything in the Internet illegal and prohibit any outbreak of 15M. Which they really fear. And above all in advance of the general elections.” These are, according to Carlos Sánchez Almeida, legal director of PDLI, the true reasons for these laws.

The UN rapporteurs level a similar line of criticism when they state:

“We are concerned that the reform proposals could be a response by the Government and the legislature to numerous demonstrations that have been carried out in Spain in recent years.”

Is there a possibility of turning things around?

These laws have all been officially published and will take effect shortly. The treatment of some of these provisions through the use of urgent procedural mechanism has been criticised by PDLI for being irregular, anomalous and contrary to the Rules of the Legislature. Nearly all opposition parliamentary groups (except the Socialist Party in the case of the penal code reforms related to terrorism) have committed to repeal these laws if they achieve a sufficient parliamentary majority. On the other hand, a constitutional challenge has been lodged against the Public Security Law.

Definitive texts of the new laws

The Official Journal of the State (BOE) published, in the edition dated March 31, 2015, the measures known as the “gag laws”. The majority of the legislation will take effect, as has already been stated, on July 1.

1. Law on the Protection of Public Security (Ley de protección de la seguridad ciudadana)
<http://boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3442.pdf>
2. Penal Code Reform (Reforma del código penal)
<http://boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3439.pdf>
3. Penal Code Reform of Terrorism Legislation (Reforma del código penal en materia de terrorismo)
<http://boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3440.pdf>

2. REFORM OF THE LAW ON CRIMINAL PROCEDURE

For over a month, a reform of the Law on Criminal Procedure (Ley de Enjuiciamiento Criminal) has been under consideration in the Congress of Deputies, by means of two separate initiatives: the bill “On the Modification of the Law on Criminal Procedure to Strengthen Procedural Guarantees and the Regulation of Measures for Technologic Investigation” and the bill “On the Modification of the Law on Criminal Procedure for the Acceleration of Penal Justice and the Strengthening of Procedural Guarantees”.

Currently following a period of amendments in the Justice Commission, these bills are pending a vote in the full Congress (expected on Thursday, June 11).



PDLI has been warning against these reforms for months. Some of the most criticised aspects, such as an increase in grounds for allowing wiretapping without judicial authorisation, were removed from the text in the initial drafting stage (before being introduced in the Congress of Deputies). But other, equally dangerous aspects for liberty have persisted.

Moreover, during the amendment stage, additional restrictions were introduced, such as the prohibition on recording or photographing detained persons.

According to the legal director of PDLI, Carlos Sánchez Almeida, the following are the principal threats contained in the new law:

The installation of trojans:

Judges can order the installation of spyware to investigate any crime on the Internet.

Article 588 septies a. legalises the installation on the part of the police of spyware "that permits, in telematic and remote form, the examination at a distance and without knowledge of the bearer or user of the content of a computer, electronic device, cyber system, instrument of mass data storage or database.

On what grounds can a judge be asked to authorise the use of this software without the knowledge of the user? That is the big problem. PDLI considers the current wording of this provision to be excessively generic given that it legitimises such an exceptional measure.

For one thing, this measure will be able to be invoked in the case of any crime committed "through computer instruments or through any other form of information technology or telecommunication or communication service". This includes, for example, publishing on the Internet content that can be considered as insult or slander, or sharing files via P2P network.

"Terrorism offences", the definition of which has expanded and become blurred under the new penal code, may now include [everything] from the leaking of information to the dissemination of calls to action on the Internet. "Crimes against the Constitution, of treason, and relative to national defence" are other circumstances under which the installation of spyware can be requested.

Undercover agents

The reform creates the role of "undercover cyberagents" who can exchange illicit files. At issue are two additions to the current Article 282 that allow police agents, with judicial authorisation, to "act under assumed identity".

Furthermore, it will be possible to obtain images and record conversations "in planned encounters between the agent and the person under investigation, even when these encounters are carried out inside a home.



The additional provisions add: "The undercover cyberagent will be able to exchange or send files containing illicit content and analyse the algorithms associated with such files."

Secret installation of tracking devices

The reforms would allow for the possibility of installing "devices or technical mechanism for following and tracking", which can be done without judicial authorisation for a maximum of 24 hours, according to the new article 588 quinquies b. The police are already using such mechanisms, as could be gathered from the case in which an activist found a GPS tracking device attached to his car upon arriving at the Circumvention Tech Festival, a gathering on surveillance and privacy, in which PDLI also participated.

Secret legal proceedings

The right to legal defence is seriously threatened through several changes introduced in the bill, such as the possibility of denying or detaining the accused "access to legal proceedings" (Art. 527) - something that, for Sánchez Almeida, "returns to the secret trials of the Inquisition".

Criminalisation of the Internet

For PDLI, with the new Law on Civil 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, as rejected even by the United Nations.

3. OTHER LEGISLATIVE AND PARLIAMENTARY INITIATIVES

Additionally, PDLI also views with concern the possible negative impact on freedom of expression and information from other types of initiatives under consideration, such as the bill on national security, or already approved, such as the Report of the Subcommittee of the Interior on Social Networks. Also of concern are announcements of possible future initiatives, such as that indicated by the Minister of Justice related to the publication of materials related to judicial investigations.



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