

# **LIBERTIES RULE OF LAW REPORT 2022**

**SPAIN**



## **Foreword**

This country report is part of the Liberties Rule of Law Report 2022, which is the third annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties). Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU, and it is built on a network of national civil liberties NGOs from across the EU. Currently, we have member and partner organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

Liberties, together with its members and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it, and to gather public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2022 Report was drafted by Liberties and its member and partner organisations and covers the situation in 2021. It is a ‘shadow report’ to the European Commission’s annual rule of law audit. As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to feed its own rule of law reports and to provide an independent analysis of the state of the rule of law in the EU in its own right.

Liberties’ report represents the most in-depth reporting exercise carried out to date by an NGO network to map developments in a wide range of areas connected to the rule of law in the EU. The 2022 Report includes 17 country reports that follow a common structure mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. Thirty-two member and partner organisations across the EU contributed to the compilation of these country reports.

Building on the country findings, the 2022 Report offers an overview of general trends on the rule of law in the EU and compiles a series of recommendations to national and EU policy makers, which suggest concrete actions the EU institutions and national governments need to take to address identified shortcomings.

**[Download the full Liberties Rule of Law Report 2022 here](#)**

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# Spain

## About the authors

rights  
international  
spain

**Rights International Spain (RIS)** is a Spanish independent, not-for-profit NGO working to hold the Spanish State accountable for its obligation to protect and respect human rights and civil liberties through a more effective use of international law principles and mechanisms. RIS's mission is to strengthen human rights accountability in Spain by monitoring government activity, with a particular focus on rule of law and access to justice, as well as raising civil society's awareness and mobilize support to demand justice. To accomplish its mission, RIS develops timely and rigorous policy and legal analysis, produces other advocacy and communications resources and tools for the general public, and supports strategic litigation initiatives.

## Key concerns

In the area of justice, concerns remain regarding the respect of standards of the independence of the judiciary, particularly due to the persisting failure to renew the General Council of the Judiciary (CGPJ) on hold since

2018, gaps in the applicable legal regime, and the appointment of its spokespersons.

As regards the media environment, the highly polarized political context negatively affects the work of journalists targeted by smears and attacks, particularly by the far right. This has resulted in campaigns of hatred and intimidation towards journalists, especially online.

In addition, journalism professionals reported barriers to carry out their work including sanctions and judicial prosecutions, issued in response to denunciations of harassment and police brutality. They have highlighted an increased level of difficulty covering protests and reporting on migrants' crossings from the borders of Spain with Morocco (Ceuta, Melilla and the Canary Islands) due to repressive provisions of the Law on the Protection of Citizen's security. Many digital media also suffered cyberattacks that affected their work, and politicians have been taking legal action that may qualify as SLAPPs against journalists, putting them under unwanted scrutiny at odds with legal requirements on the protection of journalists' sources. Some governments reportedly used Pegasus, an Israeli spyware, to spy on journalists including within Spain.

Timid reforms initiated by the Law on the Protection of Citizens' Security are insufficient to dispel the serious concerns over the negative impact of such instrument on civic space and on the activities of civil society organisations

in Spain. Restrictions imposed in the context of the COVID-19 pandemic further restrict the exercise of the right to freedom of assembly, with uneven practices by local and regional authorities in their application, thus undermining legal certainty.

Systemic human rights violations and the failure to ensure redress for such violations, as denounced by international and regional human rights monitoring bodies, negatively affect the rule of law framework. These include the lack of exhaustive investigation into police ill-treatment allegations and systematic push-backs of migrants and asylum seekers at external borders, also due to provisions of the so-called Law on the Protection of Citizens' Security which hinders effective monitoring and reporting of violations. Efforts to provide for reparation for human rights violations committed during the Civil War and the dictatorship continue to be considered insufficient.

### State of play

- ⊖ Justice system
- N/A Anti-corruption framework
- ⊖ Media environment and freedom of expression and of information
- N/A Checks and balances
- ⊖ Enabling framework for civil society
- ⊖ Systemic human rights issues

#### Legend (versus last year)

- Regression: ↓
- No progress: ⊖
- Progress: ↑

## Justice system ⊖

### Judicial independence

#### Appointment and selection of judges, prosecutors and court presidents

The renewal of the General Council of the Judiciary (CGPJ) is due to take place every five years (art. 568 Ley Orgánica del Poder Judicial 6/1985, LOPJ). However, the process is still on hold since 2018<sup>1</sup> given the lack of political agreement due to discrepancies around the conditionality of the opposition party that demands the reform of the LOPJ (regulating the constitution, functioning and governing of courts). The disagreements revolve around

1 Out of the six previous renewals, three times it was done belatedly (with delays of eight, four and 22 months).  
Source: <https://www.newtral.es/cgpj-renovacion-en-plazo-anomalia-sin-precedentes/20210721/>

enabling judges to choose 12 out of the 20 representatives in the governing body,<sup>2</sup> instead of the Parliament choosing them.<sup>3</sup>

During its most recent congress the Independent Judicial Forum (*Foro Judicial Independiente*) ratified its position regarding the need to renew the law regulating the judiciary (LOPJ) before renewing the Council.<sup>4</sup> However, the Government and the main opposition party reached an agreement by which the renewal of certain appointments of constitutional organs (Constitutional Court, Court of Auditors, Ombudsman, and the Agency for Data Protection) would precede the changes in the system of election of those nominations. In November, the four candidates to the Constitutional Court presented by the opposition party in agreement with Government were ratified by Congress<sup>5</sup> (its twelve members are appointed for a period of nine years and shall be renewed by thirds every three years).<sup>6</sup> The endorsement of the

suitability of the candidates was highly controversial, especially regarding the impartiality and independence of one of the candidates nominated by the opposition party. Despite this agreement, the negotiation has not led to the reactivation of the discussions for the renewal of the CGPJ.

The progressive association of Judges for Democracy (*Juezas y Jueces para la Democracia*, JJpD) has called for the members of the CGPJ to resign<sup>7</sup> in order to force the renewal of the council. The renewal has also been demanded by the Progressive Association of Prosecutors (*Asociación Progresista de Fiscales*).

### ***Independence and powers of the body tasked with safeguarding the independence of the judiciary***

The Report adopted in June 2021 by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the

2 Art 122.3 Spanish Constitution. Art. 567 LOPJ 6/1985 establishes the election of the 20 members of the CGPJ by the Parliament (10 by each chamber, the Congress and the Senate).

3 According to the Consultative Council of European Judges CCJE Opinion No. 24 (2021) para 29: “The CCJE recommends that Councils for the Judiciary should be composed of a majority of judges elected by their peers.”

4 <https://www.forojudicialindependiente.es/2021/11/08/conclusiones-xvii-congreso-de-fji-2021-jerez/>

5 <https://elpais.com/espana/2021-10-14/el-gobierno-y-el-pp-llegan-a-un-acuerdo-para-renovar-todas-las-altas-instituciones-salvo-el-poder-judicial.html>

6 Spanish Constitution Art. 159.1 establishes that four of its members shall be proposed by Congress and four by the Senate (in both cases with a three-fifths majority), two by Government and another two by the CGPJ (the Council would need to recover its ability to make appointments, currently on hold awaiting for resolution of appeals to the law that prevents this body to nominate members under this interim situation).

7 <http://www.juecesdemocracia.es/2021/12/04/comunicado-ijpd-exigiendo-la-dimision-vocales-del-cgpj-consejo-inmediata-renovacion/>

Council of Europe<sup>8</sup> regarding judicial impartiality states the following in paragraph 91:

“doubts have been raised due to the direct contacts which allegedly took place between the judges of the [Spanish] Constitutional Court and members of the national government. Also, the President of the Constitutional Court publicly stated that the judiciary’s mission was to guarantee the unity of Spain. This has been understood as openly taking a stand against the political positions defended by the indicted Catalan leaders, whose court cases were still pending. Furthermore, as the Supreme Court in its judgment of 14 October 2019 (page 114) admits, an investigating judge involved in the case, Mr Pablo Llarena, had referred in one of his decisions to “the strategy targeting us”, thus admitting that he felt like one of those “targeted” by the strategy used by the accused. The impartiality of the Spanish Supreme Court is finally put into doubt by a message of a senior senator bragging that they could control the Supreme Court and the General Council of the Judiciary “through the back door”.<sup>9</sup>

Despite affirming that the decision on the fairness of the proceedings is the responsibility

of the Constitutional Court and ultimately the European Court of Human Rights, the report mentions several condemnation by human rights organisations and parliamentarians on the issue of the arrest, detention and prosecution of former Catalan government members.

Several organisations of judges signed a communication<sup>10</sup> asking politicians to be cautious and refrain from acts that could undermine the reputation of judicial institutions, as a result of several statements by political representatives questioning judicial resolutions lately.

The Plataforma Cívica por la Independencia Judicial addressed the Petitions Committee of the European Parliament to request the European Commission to investigate the structural legal reforms affecting the judiciary, its independence, and the separation of powers, namely: regarding the applicable legal regime of the CGPJ and concerning the election procedure of its spokespersons. The petition alleged the omission of due process of prior hearing of involved actors, as required by EU legislation. In response, the Petitions Committee decided to examine the submission and request the European Commission to conduct a preliminary investigation and forwarded the petition to the working group on democracy and the rule of law within the Committee on Civil

8 AS/Jur (2021) 07.

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

10 <https://www.forojudicialindependiente.es/2021/11/15/las-asociaciones-judiciales-ante-las-manifestaciones-de-responsables-politicos-sobre-resoluciones-judiciales/>

Liberties, Justice and Home Affairs (LIBE) of the European Parliament.<sup>11</sup>

Several associations of prosecutors (*Asociación de Fiscales and the Asociación Profesional Independiente de Fiscales APIF*) have criticized appointments by the State General Prosecutor due to their alleged ideological nature,<sup>12</sup> having requested her resignation<sup>13</sup> for what they considered to be “erratic and sectarian behaviour and conflict of interests”.

In the “Second Compliance Report of ‘GRECO 4th Round Evaluation Report 2013,’”<sup>14</sup> GRECO notes that its concerns regarding the lack of any new information provided by the Spanish authorities “remain as prevalent, if not more, than before,” regarding the legislative framework governing the General Council of the Judiciary Power (CGPJ) and its effects on its independence to remedy any shortcomings (recommendation V). It underlines that the main aim of the CGPJ of safeguarding the judiciary’s independence is compromised, “as evidenced by the recurrent public disquiet,”<sup>15</sup> and the criticisms on the

perceived politicisation of the CGPJ in citizens’ eyes and within international fora. Thus, regretting the lack of positive developments in that regard leads to the conclusion that the recommendation has not been implemented. This is further underpinned by the standards of the Council of Europe which advises that “judges are elected by their peers” (Opinion No. 10, 2007 of the Consultative Council of European Judges CCJE, paragraph B.c.),<sup>16</sup> and the prime relevance of the composition of the CGPJ.

The Special Rapporteur on the independence of judges and lawyers referred to this warning in his 2021 report, “Impact and challenges of the coronavirus disease (COVID-19) pandemic for independent justice.”<sup>17</sup>

11 <https://plataformaindependenciajudicial.es/2021/07/15/la-plataforma-interviene-en-parlamento-europeo-15-vii-2021/>

12 <https://conflegal.com/20210507-la-apif-afirma-que-los-nombramientos-buscan-controlar-politicamente-el-funcionamiento-del-ministerio-fiscal/>

13 [Conclusions of the XXIII Congress of the Association of Attorneys](#) (November 2021).

14 Adopted by GRECO at its 87th Plenary Meeting (March 2021) <https://rm.coe.int/0900001680a3fd50>

15 Ibid p. 8

16 CCJE Opinion No. 24 (2021): conclusions and recommendations: 10: The members of the Council must be selected in a transparent procedure that supports the independent and effective functioning of the Council and the judiciary, and avoids any perception of political influence, self-interest or cronyism (paras 27, 29, 31, 34).

17 [A/HRC/47/35](#)

## **Media environment and freedom of expression and of information –**

### **Independence and public trust in media**

In its ‘Annual Report on the Journalistic Profession’,<sup>18</sup> the Madrid Press Association highlights among the main problems of journalism in Spain the lack of independence of the media and the precarious employment of the sector.

65% of the journalists surveyed pointed to the lack of press freedom caused by political and economic pressure. If last year the level of media freedom was rated 4.6 (on a scale of 1 to 10), this year the score has dropped one tenth (4.5). In addition, media professionals denounce the high political polarization as a risk for their journalistic work. At the same time, the research indicates a slight increase in confidence in information, going from 5.2 to 5.4.

### **Safety and protection of journalists and other media activists**

#### **Smear campaigns**

The current climate of constant political tension puts journalists in the spotlight. A trend is emerging of attacks against journalists and media moving away from online platforms to other spaces, as Reporters Without Borders reports. Reporters Without Borders has in particular raised concerns over smears and attacks by the far-right political party VOX, which reportedly, “insists on a strategy of stigmatizing journalists by calling them ‘enemies’ and intensifies online harassment and intimidation strategies”.<sup>19</sup> Journalists have become the target of attacks by organized groups on social networks. These groups have the purpose of limiting the voices that cover certain information. These attacks are most offensive when they are directed against women journalists, as in the case of Anna Bosch.<sup>20</sup>

#### **Lawsuits and prosecutions against journalists (including SLAPPs)**

Organic Law 4/2015 of March 30 on the Protection of Citizens’ Security, socially known

18 Madrid Press Association: [2020 Annual Report of the Journalism Profession](#).

19 Reporters Without Borders (RSF) published the new edition of its [World Press Freedom Index 2021](#) (April 21, 2021).

20 Personal account of the journalist Anna Bosch: “I am not the first, before many other #women (sports journalists, actresses, writers ...) have suffered and continue to suffer. But this is the first time that has happened to me: For more than 12 hours I have been suffering a virtual rape in a herd here, on @TwitterEspana”. Seen on Twitter: <https://twitter.com/annabosch/status/1462003100001132548>

as the “Gag Law” (Ley Mordaza, in Spanish), states in its Article 36 that the unauthorized use of images or personal and professional data of police officers that could put the safety of the agent or their family at risk, constitutes a serious offense. The penalties are included in Article 37 and vary from €601 to €30,000.

This law has been highly criticized by press associations and fundamental rights organizations in and outside Spain. These organizations have denounced that this norm impacts journalism and activism through sanctions that limit press freedom. As reported by the Platform for Freedom of Information,<sup>21</sup> since 2015 there have been 98,586 sanctions.

The Ministry of the Interior has recognized that more than 200 people have been denounced since 2015 for disseminating images of police actions. This information,<sup>22</sup> which was given by the Ministry at the request the deputy from the party EH Bildu, Jon Iñarritu, also contains the case of two graphic journalists from the Navarrese media (Ahotsa.Info and Ekinklik) who on April 9 were covering a protest against an urban project. Consequently, the police officers sanctioned them for having published images of the protest in their media outlet. According to the Basque police press release,

the reason was that, “both photojournalists were in a private property against the will of the owner.”

The government of Spain has initiated the revision of the Law on the Protection of Citizens’ Security. However, organizations such as International Amnesty have pointed out that, “the proposal is closer to being a make-up of the current version rather than a modification of articles of concern for freedom of assembly, expression and information.”<sup>23</sup> The organization explains that the norm leaves police intervention uncontrolled, since police agents can continue to limit freedom of expression, information and peaceful protest without justification.

Guillermo Martínez is a journalist who reported<sup>24</sup> having suffered an attack by a policeman who asked him for his press accreditation. However, despite the medical report and videos that confirm his account, a judge believed the agent’s version and asked to open criminal proceedings for the crime of false testimony against Martínez and three other journalists who witnessed the incident.

The trial against the photojournalist Albert García was held in 2021. He was arrested while

21 See for example: [International consensus against the Gag Law](#) (December 15, 2021).

22 See for example: [More than 200 people reported since 2015 for disseminating images of police actions in the heat of the ‘gag law’](#) (December 1, 2021).

23 See for example: [Amnesty International regrets that the proposed reform of the Citizen Security Law continues to constitute a “gag in the face of peaceful protest”](#) (13 December 2021).

24 See for example: [Four journalists, investigated for false testimony after reporting a police attack on one of them](#) (November 23, 2021).

working for the newspaper El País covering the protests against the sentence against the Catalan independence movement on October 18, 2019. The Prosecutor’s Office asked that García be sentenced to 18 months in prison and fined a penalty €480 for allegedly attacking two riot agents of the National Police. García denied the allegations, explaining that photographing “irregular” policing had been the reason for his arrest. During the trial, the Prosecutor changed the charges and withdrew the prison sentence request: initially, García was accused of a crime of attack and minor injuries, but the Prosecutor modify the charges into an offense of disobedience and resistance to authority and requested a fine amounting to €4,800. Finally, the judge acquitted the photojournalist for lack of evidence.<sup>25</sup> Several journalists’ organizations launched a note in which they described this case as, “a trial against the entire profession and an attack on the freedom of the press.”

### ***Confidentiality and protection of journalistic sources***

The deadline to transpose Directive 2019/1937 of the European Parliament and Council,<sup>26</sup> which refers to the protection of persons who report on violations of Union law in the fight

against corruption, expired on December 17 2021 and Spain has not yet taken any implementation measures. The Directive establishes as mandatory the requirement to have internal reporting channels —within the organizations—and external — before independent authorities— in order to be able to formulate alerts about infractions of the law.

At the same time the directive contemplates: public disclosure to the media as a legitimate channel, as long as identity protection is guaranteed; the prohibition of retaliation in the workplace if it is indicated while exercising this civic action, as well as protection and reparation measures for those who bring the matter to public attention. The Platform for the Defence of Freedom of Information (PLI)<sup>27</sup> proposed that the scope of the directive be extended to all citizens and should guarantee anonymity, protecting not only journalists, but also their sources.

In this sense, the judicial proceedings that the digital newspaper eldiario.es<sup>28</sup> has been facing since October 2021 is noteworthy. A judge asked the digital newspaper to identify the sources that allowed them to publish the information about the assets in the Pazo de Meirás, in the middle of a dispute over ownership of

25 See for example: [EL PAÍS photojournalist Albert García acquitted for “lack of evidence”](#) (November 2, 2021).

26 Directive 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report infringements of the right to the Union. Seen in the Official Journal of the European Union: <https://www.boe.es/doue/2019/305/L00017-00056.pdf>

27 See for example: [The PLI regrets the unjustified delay in the transposition of the whistleblower protection directive](#) (December 17, 2021).

28 See for example: [Protecting our sources is a constitutional right](#) (October 14, 2021).

the property between the Spanish State and the family of the dictator Francisco Franco. [eldiario.es](#) refused to disclose any information about the source, a right guaranteed by article 20.1 of the Spanish Constitution. The main Spanish press associations<sup>29</sup> and the International Federation of Journalists<sup>30</sup> have supported [eldiario.es](#) in its right to protect its sources of information. In addition, in January 2021 the Investigative Court (*Juzgado de Instrucción*) No. 29 of Madrid already suspended the criminal case against this digital media for publishing a scoop on a case of corruption that involved the former president of the Community of Madrid, Cristina Cifuentes. The director of the newspaper and several journalists were then accused, without success, of illegally obtaining academic and personal documents of Ms. Cifuentes.

Also relevant is the complaint against the journalist of the digital newspaper InfoLibre, Alicia Gutiérrez,<sup>31</sup> who went to court in December 2021 to face a complaint filed by the secretary general of the Popular Party, Teodoro García Egea, and the president of the region of Murcia, Fernando López Miras. The alleged crime of Gutiérrez denounced by the

leaders of the PP is “revelation of secrets”, and could carry a sentence of five years in prison for her. The reason was the publication of a scoop on alleged favouritism that allowed a relative of the secretary general to skip the waiting list and be treated with priority in a public hospital in Murcia, information which was verified before its publication. The case reflects what seems to be a pattern of judicial complaints being filed by politicians of the PP against progressive media and journalists who report on their alleged wrongdoings to discredit them, that could qualify as SLAPPs.

Recently, several digital media, including La Marea, El Salto, Kaosenlared, AraInfo, La Última Hora, and Nodo50 suffered several continuous DDoS cyberattacks that caused intermittent drops of their web pages. The affected media outlets described the events as “an attack of an ideological nature” that had the intention of silencing them.<sup>32</sup>

### **Surveillance**

In addition, 2021 has also been marked by the news published by Forbidden Stories, an international journalism network, on

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29 See for example: [Press associations support the right of elDiario.es not to reveal the sources to the judge of the Franco case](#) (October 15, 2021).

30 See for example: [The International Federation of Journalists supports elDiario.es in front of the judge who demands to reveal the sources](#) (October 19, 2021).

31 See for example: [infoLibre defends the public interest in court before the complaint of García Egea and López Miras](#) (December 02, 2021).

32 See for example: [The websites of La Marea and El Salto suffer a computer attack](#) (November 22, 2021).

the Israeli NSO's spyware, Pegasus.<sup>33</sup> This program infected mobile phone of activists, politicians and journalists. The consortium unveiled a list with more than 50,000 phone numbers that from 2016 to 2021 were targeted by NSO clients, mainly authoritarian regimes but also European countries. Several Spanish politicians and journalists were victims of this espionage.

## ***Freedom of expression and of information***

### ***Restrictions on access to information***

According to Reporters Without Borders, the political party VOX insists on its strategy of prohibiting journalists from covering its events such as political meetings or rallies.<sup>34</sup> Photojournalists on the other hand have been denouncing for more than a year that the Ministry of the Interior prevents covering the arrivals of immigrants,<sup>35</sup> while it has stopped giving information about the number of migrants rescued at sea trying to reach our coast, information of public interest that was previously shared.

This year again, the impossibility for journalists to access Foreigners Internment Centers (*Centros de Internamiento de Extranjeros*)<sup>36</sup> has been denounced, which represents a limitation to the right to information and prevents independent monitoring.

### ***Insufficient protection of freedom of expression***

Unlawful restrictions to freedom of expression have been identified by the ECtHR in two judgements issued against Spain in 2021: Case Benítez Moriana e Iñigo Fernández (nº36537/15 and 36539/15, March 9) and Case Erkizia Almandoz (nº5869/17, June 22). The first judgment concludes that the criminal conviction of the applicants for an offense of serious insults to a judge committed publicly (*delito de injurias con publicidad*) amounted to a violation of Art. 10 ECHR in so far as, “while it may prove necessary to protect the judiciary against gravely damaging attacks (...) this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with sufficient basis, on matters of public interest related to the functioning of the justice system”. The second case deals with a conviction for an offense of glorification

33 See for example: [A leak uncovers the use of Pegasus spyware against activists and journalists around the world](#) (July 13, 2021).

34 Reporters Without Borders (RSF) published the new edition of its [World Press Freedom Index 2021](#) (April 21, 2021).

35 See for example: [Javier Bauluz denounces that they are prevented from photographing the disembarkation of migrants in the Canary Islands: “They do not want us to see what is happening”](#) (October 28, 2020).

36 See for example: [An “escalation of violence” against inmates of the Madrid CIE is reported to the Hate Crimes Prosecutor’s Office](#) (July 7, 2021).

of terrorism, considered by the Court as an unlawful restriction of the freedom of speech, given that there had been no direct incitement to violence nor glorification of any specific terrorist action.

From the report of the European Agency for Fundamental Rights (FRA) on Directive (EU) 2017/541 on combating terrorism,<sup>37</sup> published in November, the conclusion can be drawn that the offense of glorification of terrorism contained in the Spanish Criminal Code, which does not require “that the speech or content cause a danger that a terrorist act may be carried out as a result”,<sup>38</sup> and the interpretation given to it by national Courts does not comply with the Directive 2017/541. In a similar sense, the FRA Report points out that the offense of humiliation of victims, which only exists in Spain, may imply a risk to fundamental rights in so far as its wording does not require intent or danger.<sup>39</sup>

In a letter to the Spanish Minister of Justice, the Commissioner for Human Rights of the Council of Europe<sup>40</sup> expressed concern over several provisions of Spain’s criminal legislation, “which have a negative impact, including a chilling effect, on the exercise of freedom of expression”, namely offenses of glorification of terrorism, libels and insults to the Crown, insults to religious feelings and defamation, as

well as over “the excessively wide interpretation which has at times been given by some Spanish Courts to the notion of hate speech”. Therefore, the Commissioner recommends that the Criminal Code be amended and that the Courts make their decisions in line with art. 10 ECHR as interpreted by the Court.

## **Enabling framework for civil society** —

### **Regulatory framework**

During 2021 Government Delegates to the autonomous communities (*Delegados de Gobierno*) and Regional Courts of Justice (*Tribunales Superiores de Justicia Autonómicos*) have held diverging criteria in different regions, thus generating legal uncertainty as regards the conflict of rights between the protection of public health and the exercise of the right to freedom of peaceful assembly.

The Government Delegate to the autonomous community of Madrid prohibited demonstrations and parades organised to commemorate International Women’s Day. The prohibition was up-held by the Regional Court of Justice (*Tribunal Superior de Justicia de Madrid*) on the ground that the protection of public health

37 <https://fra.europa.eu/en/publication/2021/combating-terrorism-rights-impact>

38 See page 59 of the FRA Report.

39 See page 62 of the FRA Report.

40 <https://rm.coe.int/letter-to-mr-mr-juan-carlos-campo-minister-of-justice-of-spain-by-dunj/1680a1c05e>

should prevail over the exercise of the right to freedom of assembly.<sup>41</sup> A request for an interim measure against this judicial decision was filed before the Constitutional Court, which was rejected.<sup>42</sup>

However, in other regions authorities raised no concerns; static demonstrations, as well as cars- or bikes-parades, were allowed provided organisers had established certain protocols (i.e. limited number of participants, masks wearing, social distance).<sup>43</sup> The decision taken by the Government Delegate to Madrid to prohibit the demonstrations on the Women's Day was perceived by civil society as particularly striking, because a large number of demonstrations had taken place in Madrid in the previous months towards which authorities had raised no concerns.<sup>44</sup>

The Law 14/2015 on the Protection of Citizen's security (hereinafter, Law 14/2015) is the legal instrument that most negatively impacts on civic space and on the activities of civil society organisations in Spain. The Law 14/2015 regulates a vast number of issues: among others, general principles governing

the exercise of police powers, personal identification documents and identity checks, body searches by police, control of demonstrations and other public events. It defines the regime of administrative infractions and fines. The Law also contains a provision allowing the police in the autonomous towns of Ceuta and Melilla to prevent illegal border-crossing by migrants.

The process to amend the Law 14/2015, which was initiated in 2019, has been reactivated on November 2021.<sup>45</sup> However, the amendments proposed by the majority of the parliamentary groups do not tackle some of the most restrictive aspects of the text.

- *Identification and identity checks*

An amendment has been proposed to introduce the request that any time an individual is transferred to police premises in order to proceed to an identity check, police agents shall state in written the grounds that motivated the identification. However, there is no proposal to make such a safeguard extensive to identity checks carried out in the street, which

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41 Decisions issued by the Regional Court of Justice can be downloaded [here](#).

42 [https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP\\_2021\\_020/P%201293-2021.pdf](https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2021_020/P%201293-2021.pdf)

43 <https://www.lavanguardia.com/vida/20210308/6265665/espana-8m-prohibiciones-madrid-ausencia-grandes-manifestaciones-covid.html>

44 <https://www.publico.es/politica/8m-son-manifestaciones-han-autorizado-madrid-pandemia.html>

45 [https://www.congreso.es/iniciativas-organo?p\\_p\\_id=iniciativas&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&iniciativas\\_mode=mostrarDetalle&iniciativas\\_legislatura=XIV&iniciativas\\_id=122/000003](https://www.congreso.es/iniciativas-organo?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&iniciativas_mode=mostrarDetalle&iniciativas_legislatura=XIV&iniciativas_id=122/000003)

in many occasions are based on racial profiling and imply serious risks of arbitrariness and discrimination.

- *Freedom of assembly*

- **Spontaneous gatherings**

Complying with recommendations issued by regional and international human rights monitoring bodies, an amendment has been proposed to include an express mention that spontaneous gatherings should not be impeded for the sole reason that they had not been previously notified. However, there are no proposals to eliminate the liability of organizers for failing to notify a demonstration or assembly.

- **Broad definition of organizer or promoter**

There are no proposals to amend the broad definition of organizer or promoter of assemblies currently contained in the Law and according to which, in the absence of prior notice duly signed by an individual or an organisation, authorities may decide who they consider to be the organizer by relying on the slogans chanted, on signs or flags carried by demonstrators, or on “any other elements”.

The parliamentary groups that form the Government coalition (Socialist Party and Unidas Podemos) have proposed to amend the

text of the Law 14/2015 to include liability for organisers of demonstrations who, although complying with the request to notify authorities in advance, declare their gathering to have an objective or message different than their real intentions. Apparently, the abovementioned parties intend to introduce a legal basis to proceed in cases such as a demonstration organised by an extreme-right group, allegedly to protest against the Agenda 2030, but which turned out to be a homophobic march in a mainly gay area in Madrid.<sup>46</sup> Regardless of the underlying intentions of legislators, the adoption of this amendment and the consequent introduction of such a case of liability in the Law 14/2015, without further details and safeguards, may imply serious risks of arbitrariness in the application of this provision.

- *Freedom of expression*

Amendments to the Law have been proposed to make the description of the offense of “unauthorised use of images of police agents on duty” compliant with the ruling of the Constitutional Court on November 19 2020, that held that the reference to “unauthorised images” is a form of censorship and only the use of the images in a way that may endanger protected interests can be lawfully restricted. However, there are already other provisions within the Spanish legal framework (namely, the Law for the civil protection of honour and several articles of the Criminal Code) that allow for the protection of the honour and

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46 [https://www.abc.es/espana/madrid/abci-grupos-neonazis-estan-detras-manifestacion-chueca-202109191942\\_noticia.html](https://www.abc.es/espana/madrid/abci-grupos-neonazis-estan-detras-manifestacion-chueca-202109191942_noticia.html)

integrity of police agents, making this provision contained in the Law 14/2015 totally unnecessary.

- *Administrative offenses for disobedience and disrespect towards law enforcement officials*

No amendments have been proposed to eliminate such offenses or to clarify their definition. The formula used by the Law is open to subjective interpretation and, in practice, has been used by police agents to sanction a vast array of behaviours, occasionally incurring in arbitrariness.

- *Fines*

In addition, no amendments to the Law have been proposed to reduce the amounts of the fines, in spite of the recommendations in this sense issued by, among others, the Venice Commission. (See below, Section “Other systemic issues”)

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** 🟡

Five specific systemic issues have caught the attention of international and regional human rights monitoring bodies in 2021.<sup>47</sup>

### ***Lack of exhaustive investigation of ill-treatment allegations***

The European Court of Human Rights issued two judgements in 2021 against Spain for violation of Art. 3 ECHR, Case González Etayo (nº 20690/17, January 19) and Case López Martínez (nº 32897/16). In both cases, the Court concluded that the judicial investigations following allegations of ill-treatment by police agents had not been exhaustive enough.

Similar conclusions were reached by the Committee for the Prevention of Torture (CPT) of the Council of Europe in its report published on November, following its visit in 2020 to a number of Spanish prisons and police premises. The CPT stressed the need that effective investigations of complaints for abuse and ill-treatment made by detainees and prisoners be systematically carried out.

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47 For more details, please see Rights International Spain, [Balance de los Derechos Humanos en España 2021](#).

### *Citizens' security act as a potentially restrictive instrument*

Since it was approved in 2015, the Spanish Organic Law 4/2015 on the Protection of Citizen's Security (hereinafter, Law 4/2015) has been an object of concern for both civil society organisations and European and international human rights monitoring bodies.

2021 saw again a number of UN mechanisms have issued recommendations to modify the text of the Law 14/2015, or at least to introduce safeguards to limit restrictive effects of its application.

In a joint communication issued by the UN Special Rapporteurs on the Human Rights of Migrants concerning the promotion and protection of the right to freedom of expression, the situation of Human Rights Defenders, and torture and other cruel, inhuman or degrading treatment or punishment,<sup>48</sup> the Rapporteurs expressed concern over the potential restriction of the right to freedom of expression that the Law 14/2015 implies when used to prevent journalists from recording or taking photographs of police agents while on duty, and recommended that the Law be amended in order to make it compliant with the International Covenant on Civil and Political Rights.

On March 22 the Venice Commission issued an Opinion<sup>49</sup> on the Law 14/2015 at the request of the Monitoring Committee of the

Parliamentary Assembly of the Council of Europe. The document focuses on regulations of checks and body searches in public places, policing of spontaneous demonstrations and liability of organisers thereof, severe administrative penalties provided by the Law, and the rejection of migrants at the Spanish border in the autonomous towns of Ceuta and Melilla.

The Commission concluded that the Law 14/2015 has a “repressive potential”, as it contains a number of open-ended provisions which entrust the police with broad powers but do not indicate in which situations these powers may be used or what specific measures can be taken by police agents. It also points out that some offenses are formulated in the Law in an overly extensive manner and hence do not respect the principles of clarity and foreseeability, giving raise to a risk of arbitrariness in the exercise of coercive powers by the police.

The Venice Commission also recommends: (i) adopting detailed regulations to serve as guidance to the police in their daily work, (ii) linking personal checks and external body searches to the purpose of discovery and prevention of offences of a certain gravity, always on the basis of individual suspicion, (iii) specifying in the Law that authorities should tolerate demonstrations, even those which were not notified in advance (“spontaneous assemblies”) and that organisers of demonstrations cannot be brought to liability for the failure to notify the authorities spontaneous gatherings

48 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26327>

49 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)004-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)004-e)

or unforeseeable deviations and, finally (iv) reconsidering the amount of the fines provided by the Law, which can go up to €600,000 in the case of very serious offences.

### ***Pushbacks at the border***

As mentioned above, the Law 14/2015 on the Protection of Citizens' Security contains a provision allowing the police in the autonomous towns of Ceuta and Melilla to prevent illegal border-crossing by migrants.

The UN Committee on Enforced Disappearances in its report on the measures taken by the Spanish Government to implement the provisions of the International Convention for the Protection of all Persons from Enforced Disappearance,<sup>50</sup> issued in September, pointed out that these “pushbacks” of migrants trying to illegally cross the borders at the autonomous towns of Ceuta and Melilla, allowed by the Law 14/2015, prevented the identification of persons in danger of being subject to enforced disappearance, as Spanish authorities are not carrying out exhaustive individual evaluations of each case. Therefore, the Committee recommends that an express prohibition of pushbacks should be introduced within the Law for those cases where there are reasons to believe that there are risks that a person might be subject to enforced disappearance.

The UN Special Rapporteurs in their joint communication, aforementioned, also expressed concern over the use of the Law 14/2015 to authorise or “legitimise” pushbacks of migrants at the border of the Autonomous towns of Ceuta and Melilla, carried out by Spanish police agents without individual examination of specific protection needs, hence violating the principle of *non-refoulement* and, in the case of minors, with disregard to their superior interest, exposing them to potential risks of violence and inhuman, degrading or cruel treatment in Morocco.

### ***Insufficient reparation for the victims of the Civil War and the dictatorship***

The UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, in his Report on follow-up on his last visit to Spain<sup>51</sup> concluded that victims of the Civil War and dictatorship, “have continued to be denied of their rights to truth, justice, full reparation, memory and guarantees of non-recurrence”. He reiterated his recommendation that the amnesty law, in force since 1977, be repealed and noted that, although the bill on democratic memory submitted to the Congress of Deputies “could address many of the concerns raised in the visit report”, it still “leaves several important areas without adequate resolution, specifically regarding obstacles to achieving criminal accountability for serious human rights violations and economic

50 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/ESP/OAI/1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/ESP/OAI/1&Lang=en)

51 A/HRC/48/60/Add.1, August 5, 2021.

liability of the State regarding the reparations owed to those wrongfully convicted.”

In September the UN Committee on Enforced Disappearances issued its Final Observations in response to the additional information provided by Spain. It referred to the proposed bill on democratic memory, urging the State to include measures that allow for effective investigations of serious human rights violations occurred during the Civil War and the dictatorship, recommending in this sense the abrogation of the 1977 amnesty Law.

## **Contacts**

### ***Rights International Spain***

Rights International Spain (RIS) is a Spanish independent, non-profit, NGO working to hold the Spanish State accountable for its obligation to protect and respect human rights and civil liberties through a more effective use of international law principles and mechanisms.

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### ***The Civil Liberties Union for Europe***

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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