

**FREEDOM OF THE PRESS, EXPRESSION, AND  
INFORMATION IN SPAIN**

**CHALLENGES AND OBSTACLES FACED BY THE SPANISH  
NEWS MEDIA IN GATHERING AND DISSEMINATING  
INFORMATION**

**Javier Sierra**

**4 October 2014**

**[corrected text, January 2015]**

**Supported by the Open Society Foundations,  
Millbank Tower, 21–24 Millbank, London SW1P 4QP  
United Kingdom**

# Contents

Introduction .....	3
1. Freedom of the Press and Freedom of Expression .....	5
1.1 Overview of Press Freedom in Spain in Historic Perspective .....	5
1.1.1 The Press during the Transition to and Consolidation of Democracy ...	5
1.1.2 The Worst Crisis of Modern Spanish Journalism .....	6
1.1.3 International Press Freedom Ratings in Spain .....	7
1.1.4. Harassment against Press Freedom in Spain .....	8
1.2 Press Laws in Spain and their Toxic Effect on Freedom of the Press and Expression .....	9
1.2.1 The 1995 Criminal Code .....	9
1.2.2 The 1966 Press and Printing Law .....	13
1.2.3 The 1982 Protection of Honor, Privacy, and Right to a Respectful Image Law .....	15
1.3 Most Relevant Cases against Press Freedom in Spain .....	17
1.3.1 Lawsuit against <i>El País</i> Newspaper Filed by Partido Popular and Five of its Leaders .....	17
1.3.2 Lawsuit against <i>Revista Leer</i> Filed by Juan Cotarelo García .....	19
1.3.3 Appeal by José Luis Gutiérrez against the Kingdom of Spain at the European Court of Human Rights .....	20
1.3.4 Criminal Lawsuit Filed by the Public Prosecutor against Cadena SER's Daniel Anido and Rodolfo Irigo .....	24
1.3.5 Criminal Lawsuit Filed by Manuel Chaves against <i>El Mundo</i> Journalists Francisco Rosell and Javier Caraballo .....	25
1.3.6 The Partido Popular Information Boycott against PRISA .....	26
1.3.7 Other Cases .....	28
1.4 Recommendations .....	28
2. Freedom of Access to Information .....	30
2.1 Overview of Freedom of Information in Spain with a Historic Perspective ...	30
2.2 The Transparency Law and its Flaws .....	33
2.3 Recommendations .....	35
Addendum: Transcript of Interview via Skype with Helen Darbshire, Executive Director of Access Info Europe .....	36
About the author .....	38

## Introduction

Spain is emerging painfully from the worst economic, political, social, and institutional crisis since the bitter years following the Civil War. The Great Recession has turned the most prosperous Spanish society in history and the fourth largest European economy into a country punished by alarming rates of poverty, unemployment, evictions, and migration to other countries.

According to the National Institute of Statistics, 21.6 percent of Spaniards live under the poverty line. In 2012, the average annual income dropped by 3.5 percent in relation to the previous year to €23,123, the lowest level in seven years, and the lowest since the start of the recession.<sup>1</sup> All in all, 700,000 Spanish families live in poverty.<sup>2</sup>

According to UNICEF's annual report, 2.3 million Spanish children live in poverty,<sup>3</sup> the European Union's second highest level,<sup>4</sup> and more than 2.8 million (one in three) are in danger of living in poverty.<sup>5</sup>

Twenty-four percent of Spaniards are unemployed, some 4.43 million people,<sup>6</sup> whereas the index in the Eurozone is only 11.5 percent.<sup>7</sup> Among the young, the unemployment rate hits a mind-blowing 53.8 percent, the highest in the Eurozone.<sup>8</sup> This has triggered a diaspora unheard of since the 1950s and 1960s. In 2012, out of the almost 60,000 Spanish migrants who left the country, 14,000 were young—23 percent.<sup>9</sup>

Regardless of this tragic reality, the lean times have also brought positive aspects, such as the unmasking of a long list of scandals,<sup>10</sup> some of them at the highest levels of Spain's political life, which during more prosperous times were either ignored or unknown to the public. In recent years, however, the popular outrage in a country punished by a wave of poverty has become the social force behind the uncovering of a sea of corruption among Spanish politicians.

And Spanish society, thanks to the immense entrepreneurial work of the news media, has learned that Luis Bárcenas, former treasurer of the party in power, Partido Popular (Popular Party), distributed dirty money among party leaders in exchange for favors to the companies that supplied the funds, and that among the beneficiaries of this corrupt enterprise was Prime Minister Mariano Rajoy, who received €90,000 between 2009 and 2010, according to *El Mundo* newspaper.<sup>11</sup>

The so-called Bárcenas Case is the most emblematic instance of corruption of the crisis, and the fact that it was uncovered with such an amount of detail is due to the brilliant work first by *El*

---

<sup>1</sup> See <http://www.expansion.com/2013/11/20/economia/1384943345.html>.

<sup>2</sup> See [http://elpais.com/elpais/2014/10/06/planeta\\_futuro/1412582536\\_876774.html](http://elpais.com/elpais/2014/10/06/planeta_futuro/1412582536_876774.html).

<sup>3</sup> See <http://www.elmundo.es/espana/2014/06/24/53a8ba69ca474139768b456b.html>.

<sup>4</sup> See <http://www.ipsnews.net/2014/04/soaring-child-poverty-blemish-spain>.

<sup>5</sup> See <http://www.elmundo.es/espana/2014/09/08/540d9fb1268e3e18298b4577.html>.

<sup>6</sup> See <http://online.wsj.com/articles/spain-unemployment-rate-drops-as-job-creation-gathers-pace-1406191306>.

<sup>7</sup> See [http://www.finfacts.ie/irishfinancenews/article\\_1028246.shtml](http://www.finfacts.ie/irishfinancenews/article_1028246.shtml).

<sup>8</sup> See [http://europa.eu/rapid/press-release\\_MEMO-14-530\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-530_en.htm).

<sup>9</sup> See [http://www.huffingtonpost.es/2013/08/17/crisis-emigracion\\_n\\_3771982.html](http://www.huffingtonpost.es/2013/08/17/crisis-emigracion_n_3771982.html).

<sup>10</sup> See <http://www.lavanguardia.com/politica/20130120/54362118190/procesos-corrupcion-investigacion-curso-espana.html>.

<sup>11</sup> See <http://www.elmundo.es/elmundo/2013/07/15/espana/1373891151.html>.

*Mundo* and then by *El País*. If an international version of the Pulitzer Prize existed, these two newspapers would deserve it.

Spaniards have also been astonished to see how, for the first time in history, a member of the royal family, Princess Cristina, was summoned to testify before judges regarding her alleged involvement in another notorious corruption scheme known as the Nóos Case. Iñaki Urdangarín, her husband and the main suspect, has been indicted for embezzlement, fraud, collusion, and money laundering.<sup>12</sup>

This extraordinary journalistic work has, however, been hampered by what the Madrid Press Association calls a “dramatic situation,” referring to rampant unemployment, loss of advertising revenues, and the disappearance of countless news media outlets. According to its 2013 Annual Report on the Journalistic Profession, 87.9 percent of the journalists who took part in the survey said the current crisis is affecting their normal professional performance, including more responsibilities, less money, less time and freedom to do their work, and more pressures to self-censor.<sup>13</sup>

This study includes a detailed review of the situation regarding freedom of the press, freedom of expression, and freedom of information in Spain. It also identifies the major obstacles that hinder the free practice of journalism in times when the Fourth Power’s vigilance is more necessary than ever.

This report also emphasizes the urgent need to modernize Spanish legislation in order to meet international press freedom standards. After conducting a profound analysis of the laws that hamper the practice of journalism and access to public information, this report recommends, among other things, the following reforms:

- The decriminalization of the offenses of insult, slander, libel, and defamation (also known as crimes against one’s honor) included in the 1995 Criminal Code.
- The elimination of the 1966 Press and Printing Law.
- The elimination of the 1982 Law for the Protection of Honor, Privacy, and Right to a Respectful Image.
- The improvement of the 2013 Transparency Law.

---

<sup>12</sup> See <http://www.usatoday.com/story/news/world/2014/02/08/spain-princess-fraud-court/5309647>.

<sup>13</sup> Madrid Press Association (Asociación de la Prensa de Madrid, APM), Annual Report on the Journalistic Profession, 2013, p. 38 (hereafter, APM, Annual Report).

# 1. Freedom of the Press and Freedom of Expression

## 1.1 Overview of Press Freedom in Spain in Historic Perspective

### 1.1.1 The Press during the Transition to and Consolidation of Democracy

Freedom of the press, freedom of expression, and freedom of information are well protected by the Constitution, which was approved in a national referendum on 6 December 1978. Article 20 acknowledges and protects, among other things, the following rights: “To express and freely disseminate thoughts, ideas and opinions through spoken word, in writing or by any other means of communication” and “to communicate or receive truthful information through any means of communication.”<sup>14</sup>

Article 20 also guarantees that “exercising these rights shall not be restricted by any type of censorship.” This provision in particular constitutes a complete contrast with General Franco’s *Fuero* from 1945,<sup>15</sup> which restricted this fundamental human right in many ways. The Constitution broke with 40 years of authoritarian rule and opened the doors to allow the news media to express themselves freely and the Spanish people to be duly informed about the crucial issues necessary to take part fully in a brand new democracy.

In fact, the news media—especially those from Madrid and Barcelona—played a fundamental role in the introduction of democracy and, more importantly, in the preservation of democratic rule.<sup>16</sup> This almost unanimous dedication and even stubbornness aimed at securing the advance of democratic Spain took a heavy, even bloody, toll on a few publications, such as *El País*, *El Pápus*, *Doblón*, and *Diario de Navarra*, which were the targets of several attacks during the parliamentary drafting of the Constitution between August 1977 and October 1978.<sup>17</sup>

On 23 February 1981, during the attempted coup that paralyzed the country and threatened the fledgling Spanish democracy, the vast majority of the news media—especially the journalists who witnessed the storming of the Spanish Parliament and who broadcast it live to the world—acted with presence of mind and courage to oppose the military rebellion.<sup>18</sup> *El País*, for instance, distributed an early edition of the paper under the following headline: “Coup d’État: *El País* with the Constitution,” declaring “Long Live the Constitution!”<sup>19</sup> hours before King Juan Carlos I denounced the mutiny and supported democratic rule on national television.<sup>20</sup>

Since then, the news media have experienced extraordinary changes in both numbers and quality. In addition, the dominance of Madrid’s centralized media was weakened by the unprecedented

---

<sup>14</sup> See <http://www.derechoshumanos.net/constitucion/index.htm#T1>.

<sup>15</sup> See [http://www.historiacontemporanea.com/pages/bloque6/el-regimen-de-franco-i-19391959/documentos\\_historicos/leyes-fundamentales-fuero-de-los-espaaoles](http://www.historiacontemporanea.com/pages/bloque6/el-regimen-de-franco-i-19391959/documentos_historicos/leyes-fundamentales-fuero-de-los-espaaoles).

<sup>16</sup> See [http://es.wikipedia.org/wiki/Historia\\_de\\_la\\_prensa\\_esp%C3%B1ola\\_en\\_democracia](http://es.wikipedia.org/wiki/Historia_de_la_prensa_esp%C3%B1ola_en_democracia).

<sup>17</sup> See <http://www.uclm.es/AB/humanidades/seft/pdf/actividades/12/ALBACETEPRENSATRANSICION2012.pdf>.

<sup>18</sup> See <http://www.uclm.es/AB/humanidades/seft/pdf/actividades/12/ALBACETEPRENSATRANSICION2012.pdf>.

<sup>19</sup> See <http://wdg00.epimg.net/estaticos/pdf/23F/23f-edicion-especial.pdf>.

<sup>20</sup> See <http://wdg00.epimg.net/estaticos/pdf/23F/23f-edicion-especial.pdf>.

rise of regional media outlets fostered by the transfer of political power to the autonomous regions with an insatiable appetite for local news.<sup>21</sup>

From the early 1990s, the internet triggered a profound transformation of the Spanish news media, especially in the written press, often with traumatic results that forced dramatic reductions in newsroom personnel. This period is also defined by the gradual political radicalization of the news media, some in favor of the center-left Spanish Socialist Workers' Party (Partido Socialista Obrero Español, PSOE), others siding with center-right People's Party (Partido Popular, PP), and many others supporting nationalist ambitions in several regions, especially Catalonia and the Basque Country.<sup>22</sup>

### **1.1.2 The Worst Crisis of Modern Spanish Journalism**

Without a doubt, the most traumatic period in the recent history of Spanish journalism started in September 2008 alongside the worst economic, political, and social crisis since the post-Civil War years. A ferocious recession, eventually a depression, began to undermine the foundations of Spanish society, at that time the most prosperous in its history. And the news media suffered enormously under these circumstances.

“The crisis has impoverished and weakened traditional news media,” maintains Juan Luis Cebrián, chairman of Grupo PRISA. “As their debt increases and their resources diminish, they grow more dependent on the largesse of powerful special interests.”<sup>23</sup>

A poll of 1,748 news media professionals in autumn 2013 by the Madrid Press Association (Asociación de la Prensa de Madrid, APM) paints a realistic picture of the disaster this sector has experienced in the last six years. At the end of 2011, 32,600 people worked in the Spanish news media, and since then 20 percent of those jobs were lost. By September 2013, the number of unemployed media workers was 10,560.<sup>24</sup> And since 2008, half of the advertising revenues have vanished,<sup>25</sup> along with a long list of newspapers, magazines, radio and television networks, and internet sites.

“The media have suffered an undeniable deterioration because their lack of resources—which in the case of the media come almost exclusively from advertising revenues, whether from state or private sources—has triggered fear in their newsrooms and made them more dependent on special interests,” adds Carmen del Riego, APM chairwoman.<sup>26</sup>

“There is no doubt that the economic crisis has made the news media and journalists in general more vulnerable to political power and special interests,” agrees Elsa González, chairwoman of the Federation of Associations of Spanish Journalists (Federacion de Asociaciones de Periodistas

---

<sup>21</sup> See <http://www.saladeprensa.org/art731.htm>.

<sup>22</sup> See <http://www.saladeprensa.org/art731.htm>.

<sup>23</sup> Interview with Juan Luis Cebrián, chairman of Grupo PRISA, 21 November 2013 (hereafter, Interview with Juan Luis Cebrián).

<sup>24</sup> APM, Annual Report, p. 11.

<sup>25</sup> APM, Annual Report, p. 58.

<sup>26</sup> Interview with Carmen del Riego, chairwoman of APM, 25 January 2014 (hereafter, Interview with Carmen del Riego).

de España, FAPE). “Also, the quality of the information has suffered and that has generated a certain deterioration in press freedom.”<sup>27</sup>

This bleak economic picture, in fact, has translated into an alarming decline of the working conditions of Spanish journalists. The APM study reveals that 77 percent of respondents consider their journalistic independence as being poor or very poor,<sup>28</sup> and 56 percent acknowledge that they have been under pressure to modify the content of their information on some (23.9 percent), several (17.8 percent), and many (14.3 percent) occasions.<sup>29</sup>

“Little pressure is needed for the news media ‘to be careful during their coverage of scandals’ so as not to ‘upset’ those who can decide whether you get any piece of the state advertising pie,” states Ms Riego. “Either by imposition of the advertiser or because of self-censorship, truth is without any gag laws, without any political pressure, the news media have become less free or have been more careful to write about certain stories.”<sup>30</sup>

“The direct effects of the recession on media companies have combined with the consequences of the paradigm shift triggered by the digital revolution,” says Borja Martínez, editorial coordinator of *Revista Leer*. “That’s why the press has been exposed to a triple crisis: of resources, of model and intellectual.” Mr Martínez adds that in a desperate attempt to attract readers and audience, the media have relaxed their vigilance toward the powerful, “and taking advantage of the economic emergency, powerful political interests are acting with greater opacity, eluding explanations and behaving with ever greater arrogance toward journalists.”<sup>31</sup>

Few documents have underlined the precarious situation of Spanish press freedom better than FAPE’s Manifesto in Defense of Journalism,<sup>32</sup> issued in November 2012 and endorsed by the Spanish Parliament in May 2013.<sup>33</sup>

“If we state that Spanish journalism is going through the worst crisis in its history, no one can accuse us of exaggerating,” the manifesto declares. “We may be accused of being repetitive because we at FAPE have been denouncing this disaster time and again in recent years. In our denunciations, we have stated and state again, as the foundation of our position, that our country will pay a high price if it witnesses the deterioration of the press without acting to solve this situation. Letting journalism die is tantamount to letting democracy die, because the news media contribute to democracy by promoting a civic debate, the exchange of ideas and acting as a witness to abuses of power.”<sup>34</sup>

### 1.1.3 International Press Freedom Ratings in Spain

The deterioration described above has had obvious repercussions on the international reputation of the freedom of the press and freedom of expression in Spain. In the 2014 World Press Freedom

---

<sup>27</sup> Interview with Elsa González, chairwoman of FAPE, 2 December 2013 (hereafter, Interview with Elsa González).

<sup>28</sup> APM, Annual Report, p. 42.

<sup>29</sup> APM, Annual Report, p. 42.

<sup>30</sup> Interview with Carmen del Riego.

<sup>31</sup> Interview with Borja Martínez, editorial coordinator of *Revista Leer*, 5 December 2013 (hereafter, Interview with Borja Martínez).

<sup>32</sup> See [http://fape.es/manifiesto-de-la-fape-en-defensa-del-periodismo\\_fape-818799721466.htm](http://fape.es/manifiesto-de-la-fape-en-defensa-del-periodismo_fape-818799721466.htm).

<sup>33</sup> See [http://www.fape.es/el-congreso-respalda-el-manifiesto-de-la-fape-en-defensa-del-periodismo\\_fape-81882271.htm](http://www.fape.es/el-congreso-respalda-el-manifiesto-de-la-fape-en-defensa-del-periodismo_fape-81882271.htm).

<sup>34</sup> See [http://fape.es/manifiesto-de-la-fape-en-defensa-del-periodismo\\_fape-818799721466.htm](http://fape.es/manifiesto-de-la-fape-en-defensa-del-periodismo_fape-818799721466.htm).

Index of Reporters Without Borders,<sup>35</sup> Spain was rated 35th (one place better than in 2013), just above countries such as Antigua and Barbuda, Lithuania, and El Salvador.

In its 2013 Index, RSF included the following reasons for such a low rating: a greater politicization in the selection of the director of the state's broadcasting entity, the lack of a law of access to information (although later that year such a law was passed), and journalists being forced to attend press conferences without follow-up questions, calling this practice "indecent," "unacceptable," and "intolerable."<sup>36</sup>

Also, Freedom House rated Spain 52nd in its 2014 World Press Freedom Ranking, alongside the Solomon Islands and Ghana, with a score of 27 points, very close to the embarrassing "partly free" status.<sup>37</sup>

#### **1.1.4 Harassment against Press Freedom in Spain**

A good piece of evidence regarding the delicate situation of press freedom in Spain is the statement issued in November 2013 by the FAPE board of directors, in which they call for an end to "the harassment against journalists," including physical attacks.<sup>38</sup>

"These attacks," denounced FAPE, "add up to lawsuits against media outlets, press conferences without follow-up questions, video statements or statements issued via social media and other multimedia vehicles politicians use as a means to turn information into propaganda."<sup>39</sup>

And it adds: "We have also received complaints from several press associations about undue pressure and warnings to professionals who publish information regarded by politicians as affronts to their particular interests. We journalists are not only obligated to keep the public informed. We must also exercise our role as watchdogs of political powers, and this role is fulfilled through the questions we ask on behalf of the public."<sup>40</sup>

And it concludes by saying: "Given this situation, FAPE urges the government and all public officials to make a commitment to assist journalists instead of continuing piling up obstacles to keep the public from being informed. This attitude weakens democracy, of which the press is a fundamental component."<sup>41</sup>

Unfortunately, this indictment is based on hard facts, including the great number of incidents—such as baseless, frivolous lawsuits—that make it harder for the Spanish news media to fulfill their duty.

---

<sup>35</sup> See <https://rsf.org/index2014/en-index2014.php>.

<sup>36</sup> See <http://www.elmundo.es/elmundo/2013/02/08/comunicacion/1360324903.html>.

<sup>37</sup> See <http://freedomhouse.org/report/freedom-press-2014/press-freedom-rankings#.U6mFYo1dXMd>.

<sup>38</sup> See [http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas\\_fape-818815771464.htm](http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas_fape-818815771464.htm).

<sup>39</sup> See [http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas\\_fape-818815771464.htm](http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas_fape-818815771464.htm).

<sup>40</sup> See [http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas\\_fape-818815771464.htm](http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas_fape-818815771464.htm).

<sup>41</sup> See [http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas\\_fape-818815771464.htm](http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas_fape-818815771464.htm).



“In a democratic society,” says Elsa González, chairwoman of FAPE, “public officials must be especially subject to the permanent scrutiny and criticism of the news media. It is our obligation, our reason to exist.”<sup>42</sup>

Making use of the rich arsenal of so-called “laws to protect one’s honor” in Spanish legislation is one of the most common ways to harass and hamper the work of the news media. Section 1.3 of this study includes several cases, perhaps the most relevant in the recent history of Spanish journalism.

When the Spanish Parliament endorsed the 2013 Manifesto in Defense of Journalism, it clearly expressed its “conviction that the democratic system requires the existence of a free, independent, strong and diverse news media.”<sup>43</sup>

## **1.2 Press Laws in Spain and their Toxic Effect on Freedom of the Press and Expression**

To protect such freedom, however, it is vital that both the Senate and the Chamber of Deputies decriminalize or eliminate the so-called “laws to protect one’s honor,” a punitive arsenal that all too often is used by public and elected officials to silence the news media or to hamper their duty to keep the public informed.

Unfortunately, the tendency to invoke these speech silencers is nothing new in Spanish democracy. This problem already existed in the Transition years of the 1970s and 1980s.

Asked how many times he and his publication have been subject to this judicial harassment, Juan Luis Cebrián, chairman of PRISA and former editor-in-chief of *El País*, responded as follows: “A great deal of times. I was part of *El País* during its first 14 years, and in those years I think I declared in front of the judges more than 200 times. I was indicted six times, one of them by a court-martial, and I was found guilty of contempt and sentenced to prison, even though it was suspended. I was on parole for five years and had a criminal record during those five years.”<sup>44</sup>

The very spirit of these laws rejects the recommendations and jurisprudence of international courts and institutions, such as the European Court of Human Rights (which is binding for Spain), the Parliamentary Assembly of the Council of Europe, and the United Nations Commission on Human Rights.

Let us now analyze the content, toxicity, and retrograde character of the criminal laws of defamation, libel, slander, and insult, and the civil “laws to protect one’s honor.”

### **1.2.1 The 1995 Criminal Code**

In essence, the Criminal Code countenances and protects sanctions related to defamation, libel, slander, and insults aimed at the Royal Crown, a legal concept so archaic it dates back to the Roman Empire.<sup>45</sup> In other words, journalists risk not only excessively punitive fines, but also

---

<sup>42</sup> Interview with Elsa González.

<sup>43</sup> See [http://www.fape.es/el-congreso-respalda-el-manifiesto-de-la-fape-en-defensa-del-periodismo\\_fape-81882271.htm](http://www.fape.es/el-congreso-respalda-el-manifiesto-de-la-fape-en-defensa-del-periodismo_fape-81882271.htm).

<sup>44</sup> Interview with Juan Luis Cebrián.

<sup>45</sup> See <http://www.wpcf.org/site/docs/pdf/Publications/Escondiendose%20del%20Pueblo.pdf>.

imprisonment just by fulfilling their duty to keep the public informed about subjects of social interest.

The Criminal Code dedicates a whole title, the 11th, to “crimes against one’s honor” (Articles 205–216). Article 206 is very clear: “Slander shall be punished with prison sentences of six months to two years or with a fine worth the monthly earnings of six to 24 months, if they are widely disseminated and, in other cases, with a fine of six to 12 months.” Article 209 punishes “grave slander” and includes fines of up to 14 months.<sup>46</sup>

Chapter 3 of this title, “General Dispositions,” includes the most toxic provisions against press freedom—what Article 211 calls dissemination “with publicity when they are propagated by a printing press, broadcasting or by any other means of similar efficacy.” Articles 213 and 214 place special emphasis on the suspension of the defendant, which can be up to two years, and the publication of a “retraction (...) in the same media outlet where the slander or libel was published, including the same or similar space where the original was published.” Article 216 specifies that the publication of the legal decision shall be “charged to the defendant.” The entire title, moreover, establishes that the burden of proof rests firmly on the defendant.<sup>47</sup>

Article 215 deserves special attention because it shows particular deference to defendants who happen to be public officials, establishing that “the judge or public prosecutor shall act on his own initiative when the offense is directed at a public official, authority or agent and is related to the discharge of his duties.”<sup>48</sup>

Moreover, Title 2 of the Criminal Code establishes the archaic concept of the “cascade effect;” that is, the indictment of not only the author of the article or statement, but also the whole hierarchy of the outlet that issued it. Articles 28 and 30 place the responsibility on the following subjects: “Those who actually wrote the text or produced the piece in question, and those who influenced him to do it; the editors of the publication or program that issued the piece; the executives of the publication or program that issued the piece; the executives of the publishing, or broadcasting company, and the executives of the company that recorded, reproduced or printed the piece.”<sup>49</sup>

Finally, Title 2 of the Criminal Code countenances one of the most obsolete principles of any legislation of any country—the crime of insult (*desacato*). Even though the 1995 reform of the Criminal Code eliminated the crime of insulting a public official, two articles protecting the Royal Crown from slander and libel were retained. Clause 3 of Article 490 states:

Those who slander or libel the King or any of his forebears or descendants, the Queen or the Queen consort, the Regent or any member of his family, or the Crowned Prince, while in discharge of their duties shall be punished with a prison sentence of six months to two years should the slander or libel be grave, or with a fine worth the earnings of six to 12 months if they are not.<sup>50</sup>

And the two clauses of Article 491 state the following:

---

<sup>46</sup> See [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.12t11.html#12t11](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t11.html#12t11).

<sup>47</sup> See [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.12t11.html#12t11](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t11.html#12t11).

<sup>48</sup> See [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.12t11.html#12t11](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t11.html#12t11).

<sup>49</sup> See [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.11t2.html#11t2](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.11t2.html#11t2).

<sup>50</sup> See [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.12t21.html#c2](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t21.html#c2).

1. Slander and libel against any of the persons mentioned in the previous article, outside the stated conditions, shall be punished with a fine worth the earnings of four to 20 months.
2. A fine worth the earnings of six to 24 months shall be imposed on those who use the image of the King or any of his forebears or descendants, the Queen or the Queen consort, the Regent or any member of his family, or the Crowned Prince, in any manner that could damage the reputation of the Royal Crown.<sup>51</sup>

It must be emphasized that the existence of these laws of defamation, slander, libel, and insult, and the “laws to protect one’s honor,” such as those explained below, defy an array of jurisprudence and recommendations by international human rights courts and commissions.

The European Court of Human Rights (ECHR) has repeatedly stated that laws that criminalize defamatory or insulting statements have an intimidatory effect both on those who provide the information and on those who receive it due to the threat of exorbitant fines or prison sentences. Examples are provided in the following ECHR decisions: *Castells v. Spain*,<sup>52</sup> *Nilsen & Johnsen v. Norway*,<sup>53</sup> *Barfod v. Denmark*,<sup>54</sup> and *De Haas & Gijssels v. Belgium*.<sup>55</sup>

Specifically in the case of *Castells v. Spain*, the judges declared: “The dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”<sup>56</sup>

Even though it is true that Article 10 Section 2 of the European Convention on Human Rights permits interference with freedom of expression, the ECHR insists that this section must be strictly interpreted and that it must obey three parameters:

1. It must be prescribed by law.
2. It must have a legitimate purpose.
3. It must be necessary in a democratic society.<sup>57</sup>

Practically in every principal case—*Gutiérrez Suárez v. Spain*,<sup>58</sup> *Dalban v. Romania*,<sup>59</sup> *Bladet Tromso & Stensaas v. Norway*,<sup>60</sup> *De Haes & Gijssels v. Belgium*,<sup>61</sup> *Castells v. Spain*,<sup>62</sup> and several more—the Court invalidated attempts to restrict information or press commentary based on these provisions.

The demand that the defendant must carry the burden of proof—as Title 11 states—defies ECHR decisions and violates Article 10 of the European Convention on Human Rights. In its decision on *Thorgeirson v. Island*,<sup>63</sup> the ECHR stated the following: “Insofar as the applicant was required to

---

<sup>51</sup> See [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.12t21.html#c2](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t21.html#c2).

<sup>52</sup> See <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57772>, paragraph 34.

<sup>53</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58364>, paragraph 39.

<sup>54</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57430>, paragraph 25.

<sup>55</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58015>, paragraph 33.

<sup>56</sup> See <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57772>.

<sup>57</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57523>.

<sup>58</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98844>, paragraph 27.

<sup>59</sup> See <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-58306>, paragraph 46.

<sup>60</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58369>, paragraph 50.

<sup>61</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58015>, paragraph 33.

<sup>62</sup> See <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57772>, paragraph 34.

<sup>63</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57795>.

establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task."

The European Court also rejects special protection for public or elected officials, which is included in Articles 215, 490, and 491 of the Spanish Criminal Code. In its decision on *Jerusalem v. Austria*, it stated:

The Court recalls that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism.<sup>64</sup>

Likewise, the Parliamentary Assembly of the Council of Europe, in Resolution 1,577 (2007), urged its members to decriminalize sanctions for defamation by adopting, among other things, the following recommendations:

- **Abolishing prison sentences for defamation without delay.**
- **Removing from their defamation legislation any increased protection for public figures.**
- Defining the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law and to ensure that civil law provides effective protection of the dignity of persons affected by defamation.
- Setting reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk.<sup>65</sup>

Finally, the United Nations Commission on Human Rights is even more forceful in its recommendations to decriminalize defamation, slander, libel, and insult laws. In its 2000 Annual Report, the Commission states that it is "crucial" that defamation laws neither be used nor abused to hinder public debate about subjects of social interest, and in paragraph 52 it establishes the following principles:

- **Defamation laws should be eliminated in favor of civil statutes** because the latter offer sufficient protections for personal reputation.
- Defamation sanctions should not be excessive and provoke an intimidating effect on the freedom of opinion and expression, and on the right to seek, receive and provide information; **criminal sanctions, particularly prison sentences, must never be applied and punitive fines must be strictly proportional to the real damage caused.**
- **Government entities and public officials should not file criminal lawsuits;** the only purpose of defamation, slander, libel and insult laws should be protecting reputations and not avoiding criticism directed at the government or even to keep the social order as other laws fulfill this purpose.
- Defamation laws should reflect the importance of an open debate about subjects of public interest and the principle that **public figures should be required to withstand a greater degree of criticism than private citizens.**<sup>66</sup>

"The media is an activity that can be regulated simply by general regulations and laws," maintains Juan Luis Cebrián, chairman of PRISA. "Any press law is a law against the press."<sup>67</sup>

---

<sup>64</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59220>.

<sup>65</sup> Parliamentary Assembly of the Council of Europe, Resolution 1,577 (2007), at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>.

<sup>66</sup> See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/102/59/PDF/G0010259.pdf>.

<sup>67</sup> Interview with Juan Luis Cebrián.

“I always thought that the best press law is the one that is not written,” agrees Elsa González, chairwoman of FAPE. “The Constitution clearly guarantees in Article 20 the right of a citizen to receive balanced and truthful information. And that supersedes any other lower statute.”<sup>68</sup>

In view of this long list of recommendations and jurisprudential evidence in favor of decriminalizing its defamation laws, Spain ought to follow the lead of the European states that have taken this step: Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Moldavia, Romania, the Ukraine, and the United Kingdom.

### 1.2.2 The 1966 Press and Printing Law

If there is one single law in Spain that exemplifies the principle that “the best press law is the one that is not written,” as Ms González claims, then it has to be the 1966 Press and Printing Law,<sup>69</sup> also known as Franco’s Press Law and the Fraga Law. In 1966, Manuel Fraga Iribarne, the then minister of information and tourism during the dictatorship, sponsored this law to “modernize” other statutes even more primitive in nature, which autocratic censors used at their discretion after the Civil War.

Almost 50 years later, this rancid stain on Spain’s 21<sup>st</sup> century democratic credentials remains in its legislation, and regardless of frequent reforms it still retains legal features that lack any positive purpose in any advanced nation. This and the 1982 Protection of Honor, Privacy, and Right to a Respectful Image Law are designed to protect any person who may feel offended by the truth.

For a start, Article 1 warns that freedom of expression will be exercised according to the provisions of the 1945 *Fuero*,<sup>70</sup> also known as the Dictatorship’s Constitution. Fortunately, the law explains that the *Fuero* “has been eliminated by (...) the Spanish Constitution of 27 December 1978.” The article, nevertheless, remains in the text.

Article 4.1 uses paternalistic language, bestowing on the administration ample powers regarding printed contents, establishing that “the Administration may be consulted about the content of any kind of publication by any person who may be responsible for its distribution. The approving response or no response at all by the Administration would exonerate said person from any responsibility in the distribution of the content.”

The image of an editor or producer thinking twice as to whether whatever he or she is about to disseminate could unsettle the “Administration” clashes with the very spirit of Article 20 of the Spanish Constitution and leaves the door wide open for self-censorship.<sup>71</sup>

Likewise, Articles 39 and 65 establish the “cascade effect,” by which a long list of members of the editorial hierarchy may be made liable for violating these provisions. Clauses 1 and 2 of Article 65 state the following:

---

<sup>68</sup> Interview with Elsa González.

<sup>69</sup> See [http://noticias.juridicas.com/base\\_datos/Admin/114-1966.html](http://noticias.juridicas.com/base_datos/Admin/114-1966.html).

<sup>70</sup> See [http://www.historiacontemporanea.com/pages/bloque6/el-regimen-de-franco-i-19391959/documentos\\_historicos/leyes-fundamentales-fuero-de-los-espaaoles](http://www.historiacontemporanea.com/pages/bloque6/el-regimen-de-franco-i-19391959/documentos_historicos/leyes-fundamentales-fuero-de-los-espaaoles).

<sup>71</sup> See [http://www.servat.unibe.ch/icl/sp00000\\_.html](http://www.servat.unibe.ch/icl/sp00000_.html).

- The civil responsibility stemming from the offense, when the action cannot be taken against the persons listed in Art. 15 of the Criminal Code, shall fall on the media company, the publisher, the printing company and the importer of foreign editorial materials.
- The civil responsibility of illicit acts or omissions, not criminally punishable, shall fall on the authors, directors, printers and importers of foreign publications, in solidarity.

Finally, Article 69 establishes non-criminal yet draconian sanctions, including banning the defendants from practicing their professions for up to six months, along with punishing fines.

During their testimony before a Spanish Senate committee in February 2006, World Press Freedom Committee (WPFC) representatives urged the Spanish Parliament to completely invalidate this law, calling it “illegal”—because it contravenes Article 19 of the Universal Declaration of Human Rights<sup>72</sup> and Article 10 of the European Convention on Human Rights<sup>73</sup>—and a “complete failure” in its attempt to protect the honor of a person or the state.

“These sanctions are plainly meant to punish the speaker rather than restore an injured party’s reputation,” the representatives declared. “The simple fact is that one cannot restore the reputation of an inanimate being such as the State through the imposition of civil damages. The existence of a possible suspension of publishing or broadcasting activities in Article 69, as well as the ‘cascade effect,’ plainly contemplate that the effect of this law is to punish the actor. Thus, this law is not narrowly tailored to any legitimate aim to be derived from restricting the right of free speech,”<sup>74</sup> as is required by ECHR jurisprudence in several cases, such as *Dalban v. Romania*,<sup>75</sup> *Bladet Tromsø & Stensaas v. Norway*,<sup>76</sup> *Castells v. Spain*,<sup>77</sup> and *De Haes & Gijssels v. Belgium*.<sup>78</sup>

This law is one of the statutes used to indict and prosecute journalist José Luis Gutiérrez on civil insult charges—a concept explained in section 1.2.3 of this study<sup>79</sup>—stemming from an article published in 1995 by his newspaper, *Diario 16*, about the seizure in southern Spain of five tons of hashish on a truck belonging to the Moroccan Crown. King Hassan II, invoking this archaic law and feeling his honor besmirched, filed a lawsuit against Mr Gutiérrez, the author of the article, Rosa María López, and the publishing company. The legal action succeeded at all four stages of the Spanish justice system.

Almost 15 years later, Mr Gutiérrez achieved a historic victory at the ECHR, which ruled that the Kingdom of Spain had violated Article 10 of the European Convention on Human Rights and Mr Gutiérrez’s right to express himself freely. The very unjust and archaic nature of the Press and Printing Law greatly contributed to Mr Gutiérrez’s resounding triumph. (Section 1.3.3 analyzes this case in detail.)

---

<sup>72</sup> See <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=spn>.

<sup>73</sup> See <http://www.derechoshumanos.net/Convenio-Europeo-de-Derechos-Humanos-CEDH/index.htm>.

<sup>74</sup> Testimony of the WPFC before the Committee on Information Society and Knowledge of the Spanish Senate, 9 February 2006.

<sup>75</sup> See <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-58306>, paragraph 46.

<sup>76</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58369>, paragraph 50.

<sup>77</sup> See <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57772>, paragraph 34.

<sup>78</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58015>, paragraph 33.

<sup>79</sup> Amicus Curiae Brief submitted by the WPFC and six other press freedom groups at the ECHR, 9 January 2009, paragraph 16 (hereafter, WPFC, Amicus Curiae Brief).

Francisco Javier Iglesias Pinagua, the lawyer who represented Mr Gutiérrez at the ECHR, considers that this and the 1982 Protection of Honor Law “are incompatible with true freedom of the press.”

“They are gag laws, precisely designed to keep independent journalists from fulfilling their role as the Fourth Power and keep those in power accountable as dictated by the Spanish Constitution,” maintains Mr Iglesias Pinagua. “It’s hard to achieve transparency when a statute of this caliber hovers over the heads of journalists, a statute that also holds the editor-in-chief responsible for the actions of the entire publication.”<sup>80</sup>

Mr Iglesias Pinagua, along with Mr Gutiérrez, unsuccessfully tried to lobby the Spanish Parliament to annul these two laws, and he believes the only solution to this problem will come from another ECHR decision generated by an initiative of the Spanish news media.

“Another option is to obtain a ruling from some international court, such as the European Court, that denounces the contradiction between these laws and the European Convention on Human Rights and the Universal Declaration,” explains Mr Iglesias Pinagua. “If there had been a true united front by the Spanish news media to change this situation, it would have happened already. It is illogical that a law which guarantees a fundamental right under the Constitution is still regulated by a pre-Constitutional statute.”<sup>81</sup>

### **1.2.3 The 1982 Protection of Honor, Privacy, and Right to a Respectful Image Law**

This law—also known as the 1982 Honor Law—is a close cousin of the 1966 Press and Printing Law as they share similar flaws. This one was, moreover, the other law the Moroccan Crown invoked to indict journalists José Luis Gutiérrez and Rosa María López in Spain, accusing them of having “illegally hampered H.M. Hassan II’s right to have his honor respected.” (See section 1.3.1.)

In its amicus brief, written by press freedom international expert Kevin Goldberg and submitted on behalf of Mr Gutiérrez and Ms López at the ECHR, the WPFC maintains that this type of law to protect one’s honor leaves the news media and their obligation to inform the public unprotected.

“They turn fundamental conventions of free speech upside down by failing to protect the right of the press to impart information to a public that has a right to receive that information, by singling out criticism of government officials for punishment when that criticism is entitled to the most protection, and by providing no protection for truthful speech simply because that speech may be perceived as shocking or offensive,” reads the amicus.<sup>82</sup>

Offering less restrictive alternatives in the Civil Code, the amicus rejects the premises of this law and quotes the ECHR in *Barfod v. Denmark*, which establishes that, “the court cannot overlook the great importance of not discouraging members of the public for fear of criminal or other sanctions from voicing their opinions on matters of public concern.”<sup>83</sup>

---

<sup>80</sup> Interview with Javier Iglesias Pinagua, José Luis Gutiérrez’s attorney at the ECHR, 10 January 2014 (hereafter, Interview with Javier Iglesias Pinagua).

<sup>81</sup> Interview with Javier Iglesias Pinagua.

<sup>82</sup> WPFC, Amicus Curiae Brief, paragraph 39.

<sup>83</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57430>, paragraph 29.

Again, it must be reiterated that the demand that the defendant must carry the burden of proof—as this law stipulates—constitutes a challenge to ECHR decisions and a violation of Article 10 of the European Convention on Human Rights, as stated in *Thorgeirson v. Island*.<sup>84</sup>

Finally, the amicus considers that “the continued existence in Spain of what we can call civil insult laws, such as the Protection to Honor, Privacy and Right to a Respectful Image Law, serves no purpose, as there is no widespread, problematic criticism of the government or government officials in Spain.”<sup>85</sup> In the *Gutiérrez Suárez v. Spain* case, furthermore, the article that triggered the whole controversy happened to be completely true.<sup>86</sup> (See section 1.3.1.)

It is important to reiterate that during the WPFCA Senate testimony, its representatives also urged the Spanish Parliament to completely annul this law, calling it “illegal”—because it contravenes Article 19 of the Universal Declaration of Human Rights<sup>87</sup> and Article 10 of the European Convention on Human Rights<sup>88</sup>—and a “complete failure” in its attempt to protect the honor of an individual or the state.

Just like the 1966 Press and Printing Law, this statute is not narrowly tailored to any legitimate aim to be derived from restricting the right of free speech, as required by ECHR jurisprudence in cases such as *Dalban v. Romania*,<sup>89</sup> *Bladet Tromsø & Stensaas v. Norway*,<sup>90</sup> *Castells v. Spain*,<sup>91</sup> and *De Haes & Gijssels v. Belgium*.<sup>92</sup>

For Borja Martínez, *Revista Leer* magazine editorial coordinator, these laws clearly have a pernicious effect.

“These laws function as indirect instruments of censorship. They offer those in power a means to guarantee self-control by the journalists, and at the same time, they provide an assurance of impunity in situations that only the press can denounce,” states Mr Martínez, who experienced firsthand the judicial harassment suffered by his uncle, José Luis Gutiérrez, as a direct consequence of the existence of these laws.<sup>93</sup>

On the other hand, for Carmen del Riego, chairwoman of the Madrid Press Association, these laws are a necessary assurance: “I don’t think either of these laws—the Press Law is practically eliminated—is a threat to press freedom, quite the opposite. I see them as much a protection for press freedom and freedom of information as a protection for the right of citizens to their honor, privacy and respectful image.”<sup>94</sup>

And regarding the revocation or reform of these laws, she adds: “FAPE, to which I belong as chairwoman of the Madrid Press Association, has never considered any actions of this kind because we don’t see any dangers for press freedom or freedom of information.”<sup>95</sup>

---

<sup>84</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57795>.

<sup>85</sup> WPFCA, Amicus Curiae Brief, paragraph 16.

<sup>86</sup> See <http://hudoc.echr.coe.int/sites/fra-press/pages/search.aspx?i=003-3149870-3496721>.

<sup>87</sup> See <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=spn>.

<sup>88</sup> See <http://www.derechoshumanos.net/Convenio-Europeo-de-Derechos-Humanos-CEDH/index.htm>.

<sup>89</sup> See <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-58306>, paragraph 46.

<sup>90</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58369>, paragraph 50.

<sup>91</sup> See <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57772>, paragraph 34.

<sup>92</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58015>, paragraph 33.

<sup>93</sup> Interview with Borja Martínez.

<sup>94</sup> Interview with Carmen del Riego.

<sup>95</sup> Interview with Carmen del Riego.



This attitude frustrates Mr Martínez, who witnessed how the ECHR decision in favor of Mr Gutiérrez neither taught the state bureaucracy any lessons nor motivated the news media to act.

“If the journalists themselves have been incapable of fighting for the elimination of laws that limit press freedom, no one should expect the judiciary or the political powers in general to feel threatened by such a European Court decision,” says Mr Martínez. “The Hassan decision was an embarrassment for the Kingdom of Spain, and the answer of those in power—silence—was also embarrassing. Nothing has been done legislatively or judicially in this respect to keep prosecutions like that one, as legal as they may be, from repeating themselves, quite the opposite. Journalists and commentators, accused only of opinion offenses, continue being the targets of more than questionable lawsuits.”<sup>96</sup>

Perhaps the recipe for achieving the necessary reforms of the Spanish legislature should at least include the strategy Mr Iglesias Pinagua and his client turned into the most resounding triumph for Spanish press freedom ever: “First, José Luis Gutiérrez’s tenacity, and his rejection of any outcome that did not include the acknowledgement of the injustice he suffered,” states Mr Iglesias. “Second, linking the responsibility of the Spanish State, and its four judicial stages, to force us to take the case to the European Court, where it was revealed the very important role a free and independent media play in the rule of law, and the attempt of the State to hinder that press freedom by creating an outrageous system of self-protection. And third, it was very important the international support we got throughout the process.”<sup>97</sup>

### **1.3 Most Relevant Cases against Press Freedom in Spain**

What follow are several of the most notorious cases of press freedom abuses in Spain. These are attempts to silence or impede the work of journalists and their outlets as they tried to fulfill their duty to keep the public informed. Most of these cases involve the invocation of criminal or civil laws or both, taking advantage of obsolete judicial principles—such as criminal defamation statutes and civil insult—which contravene many of the fundamental positions and principles embraced by the international press freedom and freedom of information movements.

#### **1.3.1 Lawsuit against *El País* Newspaper Filed by Partido Popular and Five of its Leaders**

The Bárcenas Case epitomizes more than any other the extent of the culture of corruption among the political class in Spain, including the leadership of the party in power, Partido Popular (PP). The scandal exploded in January 2013,<sup>98</sup> when the Madrid daily *El Mundo* reported that Luis Bárcenas, who had been the PP treasurer for two decades, had distributed large sums of cash among the party leaders in exchange for favors for the companies that had provided the funds.

On 31 January 2013, *El País* newspaper of Madrid started publishing photocopies of the under-the-table accounting (“Accounting B”),<sup>99</sup> covering a period between 1990 and 2008. According to the documents, one of the recipients was Mariano Rajoy, the current prime minister, who allegedly received monthly payments of up to €25,200 over a period of 11 years. Later, it was revealed that Mr Bárcenas had accumulated €47 million of dirty money in Swiss bank

---

<sup>96</sup> Interview with Borja Martínez.

<sup>97</sup> Interview with Javier Iglesias Pinagua.

<sup>98</sup> See <http://www.elmundo.es/elmundo/2013/01/18/espana/1358536985.html>.

<sup>99</sup> See [http://politica.elpais.com/politica/2013/01/30/actualidad/1359583204\\_085918.html](http://politica.elpais.com/politica/2013/01/30/actualidad/1359583204_085918.html).

accounts.<sup>100</sup> According to testimony by Mr Bárcenas himself,<sup>101</sup> Mr Rajoy and the current president of the Castilla-La Mancha Region, María Dolores Cospedal, each received €90,000 of dirty money between 2009 and 2010.

The documents obtained by *El País* revealed payments to three former PP general secretaries, Angel Acebes, Javier Arenas, and Francisco Alvarez Cascos; and to two vice-secretaries, Rodrigo Rato and Jaime Mayor Oreja. In March 2013, Messrs Oreja, Rato, and Arenas, along with the PP itself, filed a lawsuit against *El País* on charges of violating their honor and “against the author of the published false documents, who, according to said media outlet, is Luis Bárcenas, although he has publicly denied it to the Anti-Corruption Public Prosecutor.”<sup>102</sup>

The lawsuit also demanded €500,000 in damages, accusing *El País* of a lack of professionalism and insisting that only a very “few times has a lawsuit regarding attacks against someone’s honor had such grave consequences for the plaintiffs as those that the behavior of the defendant has provoked.”<sup>103</sup>

The virulence of the PP accusations failed to intimidate *El País*. In fact, the paper greeted the lawsuit as a “gift” that increased its prestige and visibility.

“When the party in power files a lawsuit against a media outlet, I, who have been working in newspapers for 52 years, don’t consider it as pressure, I consider it as a gift,” declares Juan Luis Cebrián, chairman of PRISA, the parent company of *El País*. “I told them, if it were a lie, then it would be normal for them to demand a rectification, but it was they, the PP, the ones who knew all along that what we published was true. I think it was a gift that increased our popularity.”<sup>104</sup>

As the media storm intensified, Mr Bárcenas’ insistence on denying the whole imbroglio started to run out of steam, as did the PP’s insistence on blaming the messenger. Finally, the whole edifice collapsed when Mr Bárcenas himself was imprisoned on 27 June 2013. The presiding judge ordered his unconditional imprisonment without bail, alleging there was a risk of his fleeing the country after receiving a warning from the Swiss government, who indicated that Mr Bárcenas had been laundering money due to be shipped out to Uruguay and the United States.<sup>105</sup>

Mr Bárcenas was indicted on the following charges: tax fraud, bribery, money laundering, falsifying documents, and swindling. Pressure became so intense, including a police investigation which confirmed that Mr Bárcenas was indeed the author of the published documents,<sup>106</sup> that he finally confessed to his crimes.<sup>107</sup>

In the two following months, October and November, the PP and its leaders decided to drop the lawsuit, alleging that “the reason to file a lawsuit against *El País* now lacks the legal foundations that it initially had,”<sup>108</sup> because Mr Bárcenas had acknowledged his culpability.

---

<sup>100</sup> See [http://politica.elpais.com/politica/2013/01/30/actualidad/1359583204\\_085918.html](http://politica.elpais.com/politica/2013/01/30/actualidad/1359583204_085918.html).

<sup>101</sup> See <http://www.elmundo.es/elmundo/2013/07/15/espana/1373891151.html>.

<sup>102</sup> See [http://politica.elpais.com/politica/2013/03/06/actualidad/1362565932\\_159482.html](http://politica.elpais.com/politica/2013/03/06/actualidad/1362565932_159482.html).

<sup>103</sup> See [http://politica.elpais.com/politica/2013/03/06/actualidad/1362565932\\_159482.html](http://politica.elpais.com/politica/2013/03/06/actualidad/1362565932_159482.html).

<sup>104</sup> Interview with Juan Luis Cebrián.

<sup>105</sup> See <http://www.rtve.es/noticias/20130627/extesorero-del-pp-luis-barcenas-ingresa-prision-madrilena-soto-del-real/699422.shtml>.

<sup>106</sup> See <http://www.rtve.es/noticias/20130426/policia-dice-barcenas-autor-papeles-se-atribuian/650882.shtml>.

<sup>107</sup> See <http://www.rtve.es/noticias/20130731/claves-del-caso-barcenas/604147.shtml>.

<sup>108</sup> See [http://politica.elpais.com/politica/2013/11/21/actualidad/1385060122\\_417755.html](http://politica.elpais.com/politica/2013/11/21/actualidad/1385060122_417755.html).

Mr Cebrián may consider these legal actions as a “gift,” and indeed the humiliation for both the party in power and its leaders was intense. PRISA and *El País*, nevertheless, faced this legal challenge at a great cost, including money and human resources, assets that otherwise would have been invested in the fundamental activity of this or any other news media outlet—keeping the public informed.

The stubborn and frivolous use of the justice system to intimidate and punish a news outlet for publishing proven facts has been left unpunished, at least for now. Many other Spanish outlets could not have afforded such a vigorous legal response. And who knows how many would have succumbed to the pressure of corrupt officials and abandoned their investigations and duty to keep the public informed, fearful of financial ruin or a prison sentence.

### **1.3.2 Lawsuit against *Revista Leer* Magazine Filed by Juan Cotarelo García**

In February 2008, Juan Cotarelo García filed a lawsuit against the publishing arm of *Revista Leer* magazine,<sup>109</sup> claiming “slanderous statements” and “honor violations” against his deceased mother, allegedly contained in the 2006 edition of a book entitled *The Generation of 1956: The University Community against Franco*. The book, whose first edition was published in 1981, quoted press reports alleging that Mr Cotarelo’s mother, who died in 2002, had had an adulterous relationship in the 1950s with a man who eventually became a notorious police officer during the Franco dictatorship.

The plaintiff demanded €100,000 in reparations, the publication of the text of the legal decision in four newspapers, and the withdrawal of the entire edition of the book. Since the author of the book, Pablo Lizcano, had died in 2009 during the judicial process, Mr Cotarelo, invoking the 1966 Press and Printing Law,<sup>110</sup> demanded sanctions against Mr Lizcano’s widow, the article’s author Rosa Montero, and *Revista Leer* magazine’s publishing arm.

As described previously, the Press and Printing Law offers the plaintiff the option to invoke the “cascade effect”; that is, indicting not only the author of the book, but also his heirs and the publishing company.

The lawsuit, however, contained several legal flaws, which prompted *Revista Leer* magazine, in an October 2011 editorial, to call the legal action “surreal” and “totalitarian.”<sup>111</sup> Most importantly, Mr Cotarelo had wasted almost three decades since the publication of the first edition and the opportunity to correct the passage in question, which Mr Lizcano had offered to do before the publication of the second edition.

Finally, Judge Eduardo Fontán Silva of Madrid’s court of first instance ruled the lawsuit null and void because the statute of limitations had expired 27 years after the first edition had been published. *Revista Leer* magazine applauded the decision and did not mince words in evaluating the merit of the legal action:

The lawsuit is a monument to the most macabre judicial surrealism. It’s a defense of one’s honor legal action against a dead person—Pilar Cotarelo Botana, the plaintiff’s mother, deceased since 2002—against another dead person—Pablo Lizcano, author of the book and deceased since 2009— [...] and

---

<sup>109</sup> See <http://www.revistaleer.com/226/tribunales.html>.

<sup>110</sup> See [http://noticias.juridicas.com/base\\_datos/Admin/114-1966.html](http://noticias.juridicas.com/base_datos/Admin/114-1966.html).

<sup>111</sup> *Revista Leer*, October 2011, p. 2.

against the author's widow—writer and journalist Rosa Montero. And since it's a book first published in 1981, the statute of limitations expired almost 30 years ago.<sup>112</sup>

The consequences, often grotesque, of the existence of laws such as the 1966 Press and Printing Law are the best testimony for them to be removed from Spanish legislation.

### **1.3.3 Appeal by José Luis Gutiérrez against the Kingdom of Spain at the European Court of Human Rights**

The Spanish judiciary's harassment of journalist José Luis Gutiérrez describes better than perhaps any other example how far this system is willing to go to reject the conditions and standards of press freedom accepted by advanced nations around the world. The case deserves a detailed explanation to analyze the state of press freedom in Spain. Its happy ending at the ECHR must not hide, however, the unjust nature of a judicial torment that lasted 15 years, conducted through all four stages of the legal system, which took a severe emotional and financial toll on its victim.

It all started on 18 December 1995,<sup>113</sup> when the banned *Diario 16* newspaper published an article by reporter Rosa María López regarding the seizure of almost five tons of hashish aboard a truck belonging to Dominios Reales, a company belonging to the Moroccan Crown. The article, based on the police report, was featured on the front page under the headline: "A Moroccan Royal Family Company Implicated in Drug Trafficking."

Six months later, the Moroccan Crown, alleging that the article had injured the monarch's honor, filed a lawsuit against INPRESA, the publisher of *Diario 16* newspaper, which closed in 2001, Mr Gutiérrez (editor-in-chief), and Ms López (author). In 1997 and 1999, the courts of first and second instance found the defendants guilty of having "illegally encroached HM Hassan II's right to have his honor respected." The decision included the payment of an undetermined fine (which could have been as high as €1 million), the publication of "the complete text of the decision in the newspapers that shall be eventually determined," and the payment of legal costs.<sup>114</sup>

Mr Gutiérrez and his attorneys appealed to the Supreme Tribunal, which upheld the decision in June 2004, alleging that even though the information in the article was truthful, the headline was "disparaging and untruthful." The WPFC then issued an open letter to the five magistrates who had ruled in the case, expressing its "total rejection" of the decision and calling it "yet another episode in the long judicial harassment suffered by these journalists."<sup>115</sup>

The plaintiffs used two of the most retrograde laws in Spanish legislation: the 1966 Press and Printing Law, along with its "cascade effect"; and the 1982 Law of Protection of Honor, Privacy, and Right to a Respectful Image, which places the burden of proof on the journalist.

The open letter called these laws an attack "on the fundamental press freedom principles that are emblematic of democratic societies throughout the world," denouncing the magistrates for assuming "the role of newspaper editors with power to determine what can and cannot be published."

---

<sup>112</sup> See <http://www.revistaleer.com/226/tribunales.html>.

<sup>113</sup> See <http://lahemerotecadelbuitre.com/piezas/el-rey-de-marruecos-hassan-ii-demanda-al-director-de-diario16-jose-luis-gutierrez-por-vincularle-con-el-trafico-de-drogas>

<sup>114</sup> See [http://www.ifex.org/spain/2004/07/16/wpfc\\_calls\\_on\\_judicial\\_authorities](http://www.ifex.org/spain/2004/07/16/wpfc_calls_on_judicial_authorities).

<sup>115</sup> [http://www.ifex.org/spain/2004/07/16/wpfc\\_calls\\_on\\_judicial\\_authorities/](http://www.ifex.org/spain/2004/07/16/wpfc_calls_on_judicial_authorities/)

And it added: “Laws such as those used by the Spanish courts against Gutiérrez and López impede the free flow of ideas and thoughts. They also foster self-censorship among journalists who fear being forced to pay devastating fines for just doing their jobs.” The letter finally urged the Spanish judiciary “to reconsider this decision and declare the sentence null and void, thus bringing to an end nine years of unfair punishment for journalists Jose Luis Gutiérrez and Rosa María López.”

The letter—unexpected by the Spanish judges as the entire process had been conducted without any international intervention—triggered a storm of reaction in the Spanish news media<sup>116</sup> and in other sectors of society. It stirred up so much controversy that the Supreme Tribunal was compelled to defend itself from “a media campaign” against Magistrate Clemente Auger, who presided over the Civil Law Chamber which had ruled in the case.<sup>117</sup>

In July 2004, Mr Gutiérrez stated that he would appeal to the Constitutional Tribunal—the highest in the land—calling the decision “nonsensical” and denouncing the fact that “we have been found guilty because of a piece of information that was true and a headline that was allegedly offensive to someone’s honor.”<sup>118</sup>

In November of that year, the Coordinating Committee of Press Freedom Organizations—an entity that comprises several of the world’s most influential press freedom groups<sup>119</sup>—joined the condemnation against the Spanish magistrates by issuing a statement rejecting “a judicial assault on press freedom in Spain which almost during a decade has denied two journalists their right to free speech.” The Committee finally “urged the Spanish judicial system to reconsider this decision and declare the sentence null and void, thus bringing to an end nine years of unfair punishment for José Luis Gutiérrez and Rosa María López.”

The urgings and the pleas achieved little. And to the astonishment of the international press freedom movement, on 15 November 2006 the First Chamber of the Constitutional Court rejected Mr Gutiérrez’s appeal on his behalf and that of Lopez’s, alleging that, “the applicants cannot invoke the protection of Art. 20.1 d) CE because they did not correctly explain the disparaging content of their statement; and therefore, it cannot be considered as truthful.”<sup>120</sup> The magistrates who presided over the proceedings were María Emilia Casas Baamonde, Javier Delgado Barrio, and Manuel Aragón Reyes.

After the rejection by the four stages of the Spanish judiciary, Mr Gutiérrez was forced to resort to his last point of recourse, the European Court of Human Rights (ECHR). And in April 2007, with the support of the world’s most influential press freedom organizations,<sup>121</sup> he filed his appeal before the Strasburg Court. In January 2009, the WPFC submitted an amicus brief on his behalf at the Court, rationalizing a solid compilation of arguments backed by international jurisprudence supporting his right to press freedom.

---

<sup>116</sup> See <http://www.elmundo.es/elmundo/2004/07/17/comunicacion/1090058363.html>.

<sup>117</sup> See <http://www.libertaddigital.com/sociedad/el-supremo-denuncia-una-campana-contra-la-sentencia-que-condeno-al-ex-director-de-diario-16-1276242233>.

<sup>118</sup> See <http://www.elmundo.es/elmundo/2004/07/20/comunicacion/1090324402.html>.

<sup>119</sup> See [http://www.ifex.org/spain/2004/11/10/coordinating\\_committee\\_of\\_press](http://www.ifex.org/spain/2004/11/10/coordinating_committee_of_press).

<sup>120</sup> Decision by Section 1 of the First Chamber of the Constitutional Court on Appeal No. 4990-2004, 15 November 2006.

<sup>121</sup> See <http://www.elmundo.es/elmundo/2007/05/07/comunicacion/1178554105.html>.

The amicus was also endorsed by the following members of the Coordinating Committee of Press Freedom Organizations: Committee to Protect Journalists, International Association of Broadcasting, International Federation of the Periodical Press, International Press Institute, Inter-American Press Association, and the World Association of Newspapers.

Written by the WPFC's Senior Counsel Kevin Goldberg, the amicus put forward the following argument:

Laws punishing speech that reports on, comments about or criticizes public officials have no place in a democratic society. Whether these laws impose onerous penalties for defamatory speech or take the form of "insult laws" (or as they are known in Spanish-speaking nations, *desacato* laws), they are intended only to punish news media, journalists or other persons who may seem to have insulted or disparaged a public leader or official.<sup>122</sup>

Furthermore, the document also focused on another fundamental principle of press freedom supported by ECHR jurisprudence, namely that public officials should receive less, and not more, protection from alleged insults from common citizens. This arbitrary protection, in many cases exclusive to a select group of public officials, dates from the time of the Roman Empire, which instituted it to shield the emperor from public criticism.<sup>123</sup>

Announcing the submission of the amicus brief, the WPFC urged the Court "to declare Mr Gutiérrez's case null and void, to reinstate his good name, to order the Spanish State to eliminate the two laws that were used to indict and sentence him, and to order the Spanish State to financially compensate him after more than a decade of unjust judicial harassment."<sup>124</sup>

On 1 June 2010, the ECHR accepted almost all of the WPFC's proposals. In a historic decision that put an end to 15 years of judicial harassment against Mr Gutiérrez, the Court determined that the Kingdom of Spain had violated Article 10 of the European Convention on Human Rights, which protects the right to freedom of the press and freedom of expression.<sup>125</sup>

The decision determined that "the restriction on the applicant's freedom of expression had not been proportionate to the potential seriousness of the damage to the reputation in question," and agreed with the applicant that "the information in question was a matter of general interest. The Spanish public had the right to be informed about drug trafficking in which the Moroccan royal family appeared to be involved, a matter that had moreover been the subject of an investigation before the Spanish criminal courts."

Rejecting the main allegation by the Spanish courts—that the headline was insulting—the ECHR stated that "it was not its task [ECHR's], or that of the domestic courts, to determine which journalistic techniques should be used and that journalistic freedom covered recourse to a degree of exaggeration."

Both the text and the decision coincided on several crucial points with the international alliance's amicus brief, including several passages where the ECHR used practically the same language as the legal document, including the following:

---

<sup>122</sup> See [http://ifex.org/spain/2009/01/22/wpfc\\_submits\\_written\\_comments\\_before/es](http://ifex.org/spain/2009/01/22/wpfc_submits_written_comments_before/es).

<sup>123</sup> See <http://www.wpfc.org/CampaignAgainstInsultLaws.html>.

<sup>124</sup> See [http://www.ifex.org/spain/2009/01/22/wpfc\\_submits\\_written\\_comments\\_before](http://www.ifex.org/spain/2009/01/22/wpfc_submits_written_comments_before).

<sup>125</sup> See <http://hudoc.echr.coe.int/sites/fra-press/pages/search.aspx?i=003-3149870-3496721>, and <http://www.elmundo.es/elmundo/2010/06/01/comunicacion/1275409380.html>.

- The role of the press as a watchdog of democracy.<sup>126</sup>
- Public officials should exhibit more tolerance to public scrutiny.<sup>127</sup>
- Restrictions to the news media need to be proportional and possess a legitimate purpose.<sup>128</sup>
- Journalistic freedom includes a degree of exaggeration and even provocation.<sup>129</sup>

Free of an unjust yoke that had burdened him for 15 years, Mr Gutiérrez issued the following statement about his historic victory:

This decision by the European Court of Human Rights is a magnificent endorsement for freedom of the press and expression and comes precisely at a time when the democratic press around the world is under attack from many fronts by totalitarian and anti-democratic forces. It also sides with the international movement of press freedom, the most important of all human rights, who denounced the existence of Franco's Press and Printing Law, a law that is still embarrassing democratic Spain. To all those who supported me, from the World Press Freedom Committee, which started the international denunciations of my case, to the International Press Institute and all the other members of the Coordinating Committee of Press Freedom Organizations, I owe a debt of gratitude for their support and the splendid amicus brief they submitted to the Strasburg Court.<sup>130</sup>

On 21 May 2012, less than two years after the announcement of the ECHR victory that rid him of what he used to call "my stations of the cross,"<sup>131</sup> José Luis Gutiérrez died of a heart attack at his Madrid home. His victory is a monument to the perseverance and journalistic conviction that allowed him to win a war in which he lost almost all the battles. The Spanish state now owes him not only an official apology, but also its commitment to annul the laws it used to persecute him in an attempt to silence him.

The road to reform, however, is riddled with obstacles, both official and journalistic in nature, as Borja Martínez, editorial coordinator of *Revista Leer* magazine, has stated. "José Luis's victory in Strasburg did not achieve the repercussion a decision of that caliber would have obtained in any other democratic country," he laments. "There are several reasons for this relative silence: the tacit acceptance of the journalistic profession of pre-constitutional laws that hinder their work, which gives away their scant understanding of fundamental values such as freedom of expression; a certain manner, typically Spanish, of understanding journalism from a partisan point of view, which punishes the dissident who rejects such a malicious game, and personal grudges of important opinion voices who systematically silenced him and even justified his judicial harassment."<sup>132</sup>

The attorney who fought his case at the ECHR, Javier Iglesias Pinagua, also doubts that the decision served as a lesson for Spanish bureaucracy, denouncing the official silence regarding the humiliation at the European Court.

---

<sup>126</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98844>, paragraph 25.

<sup>127</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98844>, paragraph 26.

<sup>128</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98844>, paragraph 27.

<sup>129</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98844>, paragraph 36.

<sup>130</sup> See [http://www.ifex.org/spain/2010/06/02/gutierrez\\_vindicated](http://www.ifex.org/spain/2010/06/02/gutierrez_vindicated).

<sup>131</sup> See <http://www.revistaleer.com/214/editorial.html>.

<sup>132</sup> Interview with Borja Martínez.

“Unfortunately, the same way there were a lot of reactions by the Spanish news media, including abundant commentary and analysis, we did not see the same from the State bureaucracy. There was not one single official statement about it,”<sup>133</sup> he says.

What a sad tribute to a journalist who taught a historic lesson to a bureaucracy impervious to the international standards of freedom of the press and freedom of expression.

#### **1.3.4 Criminal Lawsuit Filed by the Public Prosecutor against Cadena SER’s Daniel Anido and Rodolfo Irago**

In 2003, a Popular Party (Partido Popular, PP) official revealed a list of people who had signed up as PP members in an allegedly illegal manner. The website of Cadena SER Radio posted the list, indicating that it was part of a campaign led by party sympathizers.

Eventually, the Madrid office of the public prosecutor filed a criminal lawsuit against Daniel Anido, SER’s news director, and Rodolfo Irago, head of news gathering, for “revelation of secrets,” and in December 2009, Judge Ricardo Rodríguez found both guilty, sentencing them to 21 months in prison and to pay fines worth €148,000, and suspending them from working as news media executives.<sup>134</sup>

The decision triggered a wave of indignation, both nationally and internationally,<sup>135</sup> because of the exorbitant nature of the punishment and the puzzling invocation of the Criminal Code to deal with the publication of a piece of news of undeniable social and journalistic interest.

Cadena SER stated that the sentence “has caused at least perplexity and constitutes a clear attack on constitutional principles of freedom of expression and information and carries an unprecedented risk for the performance of the journalistic profession.”<sup>136</sup>

The International Federation of Journalists (IFJ) rejected the decision, calling it “outrageous,” and stating the following: “That a court in a leading democracy can commit such a flagrant violation of press freedom is astonishing and deeply troubling.”<sup>137</sup>

Judge Rodríguez’s nonsensical decision not only ignored the fact that a PP official had already publicly denounced the irregularities, but he also opined that disseminating this piece of news through a website was wrong because “the internet is not a social means of communication.”<sup>138</sup> And to top it all off, his decision criticized the approach and focus of the article, dictating how it should have been written, thus taking upon himself the very function of a news editor.<sup>139</sup>

---

<sup>133</sup> Interview with Javier Iglesias Pinagua.

<sup>134</sup> See [http://www.cadenaser.com/sociedad/articulo/director-jefe-informativos-ser-condenados-informar/csrsrpor/20091223csrsrsoc\\_3/Tes](http://www.cadenaser.com/sociedad/articulo/director-jefe-informativos-ser-condenados-informar/csrsrpor/20091223csrsrsoc_3/Tes).

<sup>135</sup> See [http://www.cadenaser.com/sociedad/articulo/director-jefe-informativos-ser-condenados-informar/csrsrpor/20091223csrsrsoc\\_3/Tes#despiece1](http://www.cadenaser.com/sociedad/articulo/director-jefe-informativos-ser-condenados-informar/csrsrpor/20091223csrsrsoc_3/Tes#despiece1).

<sup>136</sup> See [http://www.cadenaser.com/sociedad/articulo/director-jefe-informativos-ser-condenados-informar/csrsrpor/20091223csrsrsoc\\_3/Tes#despiece1](http://www.cadenaser.com/sociedad/articulo/director-jefe-informativos-ser-condenados-informar/csrsrpor/20091223csrsrsoc_3/Tes#despiece1).

<sup>137</sup> See [http://www.ifex.org/spain/2010/01/07/cadena\\_ser\\_journalists\\_sentenced](http://www.ifex.org/spain/2010/01/07/cadena_ser_journalists_sentenced).

<sup>138</sup> See [http://www.cadenaser.com/sociedad/articulo/internet-medio-comunicacion/csrsrpor/20091224csrsrsoc\\_6/Tes](http://www.cadenaser.com/sociedad/articulo/internet-medio-comunicacion/csrsrpor/20091224csrsrsoc_6/Tes).

<sup>139</sup> See [http://www.cadenaser.com/sociedad/articulo/director-jefe-informativos-ser-condenados-informar/csrsrpor/20091223csrsrsoc\\_3/Tes#despiece1](http://www.cadenaser.com/sociedad/articulo/director-jefe-informativos-ser-condenados-informar/csrsrpor/20091223csrsrsoc_3/Tes#despiece1).



The IFJ, urging the Spanish judiciary to overturn the sentence, directed some strong words at Judge Rodríguez: “Journalism in the modern world comes in various forms and through different platforms. A magistrate who does not understand how the truth and the values of journalism remain immutable no matter the mode of transmission is not someone who can deliver justice in the information age.”<sup>140</sup>

Fortunately, in June 2010, the Provincial Court of Madrid accepted the defendants’ appeal and completely overturned the sentence, alleging that, “the illegal list of sympathizers posted on the Cadena SER website cannot be considered as part of any file or any list of affiliates to Partido Popular; therefore, there could not have been any crime of revelation of secrets.”<sup>141</sup>

The case, which received ample international attention, illustrated up to what point Spanish judges are willing to abuse the Criminal Code to silence the news media by means of inconsistent and even outrageous allegations, such as questioning whether the internet is a means of communication. The decision also showed a lack of judicial sophistication regarding the international standards of freedom of the press and expression.

### **1.3.5 Criminal Lawsuit Filed by Manuel Chaves against *El Mundo* Journalists Francisco Rosell and Javier Caraballo**

in November 2001, the Andalusian edition of *El Mundo* newspaper published an article about the surveillance directed at Miguel López Benjumea, the then director of a savings and loans institution, allegedly in retaliation for his rejection of the Andalusian government’s banking policies.<sup>142</sup> Mr López Benjumea hired a private detective to find out who had ordered the surveillance. The private detective later filmed the confession of a man saying that the surveillance had been ordered by three members of the Andalusian government, including the president, Manuel Chaves. Finally, two copies of the film disappeared in mysterious circumstances; one apparently went missing, and the other was stolen from the courthouse office where it was being kept.

Mr Chaves reacted by filing a criminal lawsuit of extreme harshness against the editor-in-chief of the Andalusian edition, Francisco Rosell, and his chief copy editor, Javier Caraballo, for slander and injury to his honor. Invoking Articles 30, 208, and 209 of the Criminal Code, Mr Chaves and his three co-plaintiffs demanded the maximum sentence—the payment of a €2 million fine and prison sentences if they rejected or could not afford the payment. Moreover, the presiding judge imposed a record bail for a slander and libel process: €700,000. Chaves also invoked the “cascade effect” of the law to incriminate not only the author of the article, Mr Caraballo, but also Mr Rosell and two more defendants connected to *El Mundo*.<sup>143</sup>

Furthermore, once the judiciary had banned Mr Chaves from continuing with the criminal process because of his privileged position as head of the Andalusian government, he opted to do so as a private citizen.<sup>144</sup>

---

<sup>140</sup> See [http://www.ifex.org/spain/2010/01/07/cadena\\_ser\\_journalists\\_sentenced](http://www.ifex.org/spain/2010/01/07/cadena_ser_journalists_sentenced).

<sup>141</sup> See [http://www.cadenaser.com/sociedad/articulo/daniel-anido-rodolfo-irago-absuelto/csrsrpor/20100617csrsrsoc\\_4/Tes](http://www.cadenaser.com/sociedad/articulo/daniel-anido-rodolfo-irago-absuelto/csrsrpor/20100617csrsrsoc_4/Tes).

<sup>142</sup> *El Mundo*, Andalusian edition, 13 January 2013, p. 18.

<sup>143</sup> WPFC, open letter to Manuel Chaves, 4 December 2007 (hereafter, WPFC, open letter to Manuel Chaves).

<sup>144</sup> WPFC, open letter to Manuel Chaves.

The WPFC, in an open letter to regional Prime Minister Chavez, expressed “profound concern” and labeled the lawsuit as “an attack on press freedom and on the human rights of the journalists and, more importantly, on the public themselves.” And it added: “The exorbitant amount of the demanded penalties and the bail constitute worrisome aggravating circumstances in this abusive attempt to silence a media outlet which acted professionally and ethically in its obligation to keep its readers informed about a subject of obvious public interest.”<sup>145</sup>

The WPFC found especially regrettable the fact that Mr Chaves chose the Criminal Code in his attempt to silence the journalists. “International human rights jurisprudence recommends that all laws that allow criminal penalties for defamation, particularly those that are applied against journalists and media outlets, ought to be decriminalized in all the countries where they exist, including Spain,” the letter stated. “Likewise, they maintain that any fines that were to result from civil proceedings ought to be applied in a sensible way so they do not become intimidatory weapons that impede the necessary flow of information in a democratic society.”

On 21 December 2007, Judge Francisco José Guerrero of the Seville Criminal Court exonerated the defendants, indicating that, “it should not be demanded from a piece of news absolute certainty or truthfulness, but only a diligent attitude,” adding that the information was “correct” and that it dealt with “facts of public relevance without any subjective judgment.”<sup>146</sup>

Regardless of the public scolding, Mr Chaves appealed the decision, alleging that the information contained “a reckless rejection of the truth” that “exceeded all limits” and calling the defendants’ film “a gross fakery.”<sup>147</sup>

On 11 January 2010, Chamber Four of the Provincial Court of Seville rejected the appeal and upheld the previous decision exonerating the defendants, putting an end to the judicial harassment against the *El Mundo* journalists.<sup>148</sup> The court called the plaintiffs’ arguments against the lower court’s sentence “slanted and conceited,” adding that the decision to publish the story was “not gratuitous.” In an opinion almost as harsh as the terms of the lawsuit, the court called Mr Chaves’s understanding of freedom of information “dangerous, if not harmful.”<sup>149</sup>

By then, Mr Chaves was no longer the prime minister of Andalusia; his career had skyrocketed, and he had become the third deputy prime minister of the Spanish government. The fact that the justice system did not hesitate to rule against him speaks volumes about democratic progress in Spain. But at the same time, the case in general reminds us that in the case of Spanish state bureaucracy, all too often there still exists a lack of understanding of the concept of freedom of the press and expression, along with an abuse of laws to silence uncomfortable or critical voices.

### **1.3.6 The Partido Popular Information Boycott against PRISA**

On 24 March 2007, Jesús de Polanco, the then chairman of PRISA, the country’s largest media group, was criticized during a stockholders meeting because his corporation was perceived as “a source of partisan power.” Mr de Polanco responded that PRISA “tries to be neutral” and added a couple of sentences that triggered a storm of controversy in Spain.

---

<sup>145</sup> WPFC, open letter to Manuel Chaves.

<sup>146</sup> See <http://www.elmundo.es/elmundo/2007/12/21/espana/1198227420.html>.

<sup>147</sup> See <http://www.elmundo.es/elmundo/2010/01/12/andalucia/1263291353.html>.

<sup>148</sup> See <http://www.elmundo.es/elmundo/2010/01/12/andalucia/1263291353.html>.

<sup>149</sup> See [http://estaticos.elmundo.es/documentos/2010/01/12/sentencia\\_elmundo.pdf](http://estaticos.elmundo.es/documentos/2010/01/12/sentencia_elmundo.pdf).

“There are those who wish to return to the Civil War years,” he said. “We just witnessed a demonstration of pure and hard Francoism. If those gentlemen [referring to Partido Popular] recover the power, they will bring a will of revenge that I for one find very scary.”<sup>150</sup>

Two days later, Partido Popular (PP) declared an information boycott against the entire media group by means of an official statement that, among other things, declared: “The PP will ignore all requests for interviews, talk shows and programs of Grupo PRISA and of other companies controlled by Jesús de Polanco.”<sup>151</sup>

The statement, addressed “especially to the stockholders, advertisers and clients” of PRISA, said that Mr de Polanco’s words “go way beyond a legitimate editorial positioning” and that “it compromises the capacity of any of the members of the group to inform in a truthful and objective way.”

PP leader Mariano Rajoy, at that time in opposition, said he was “hugely offended” by the “attack” on Mr de Polanco, adding that “there has never been anything like it in Spain before.”<sup>152</sup> Mr Rajoy, then in Germany at a convention of European center-right parties, concluded that “the offended ones are us, and we will certainly defend ourselves.” A few days later, PP intensified its “defense” by withdrawing advertising and institutional notices from media outlets belonging to PRISA, even though the advertising funds came from the public coffers.<sup>153</sup>

The PP reprisals elicited protests by international press freedom groups, including the WPCF. In an open letter to Mr Rajoy, the Committee expressed its “profound concern” for what they called “an attack against freedom of the press and expression and against the right of citizens to be duly informed.”<sup>154</sup>

The statement criticized the PP decision, declaring that “even though it is true that Mr de Polanco’s statements can be interpreted as offensive, you, as a public official and head of one of your country’s most influential political parties, ought to accept, more willingly than any other regular citizen, the slings and arrows of the criticism of the rest of society.”

Finally, the letter urged Mr Rajoy “to retract your statement and declare a new, open debate through all media outlets in Spain.” And he eventually did so, after having received a national and international reprimand, including one by several fellow leaders of his party.<sup>155</sup>

In reality, the boycott ended up benefitting its target, as Juan Luis Cebrián, the current chairman of PRISA, concludes: “The effects for us were nothing but beneficial. First, because of the absurdity of attempting to boycott the country’s largest newspaper and largest radio network; and second, because it underlined the loyalty of our users, of our readers and listeners. The boycott also followed a line of clumsy, ignorant behavior in dealing with public criticism.”<sup>156</sup>

---

<sup>150</sup> See <http://www.elmundo.es/elmundo/2007/03/22/comunicacion/1174588707.html>.

<sup>151</sup> See [http://elpais.com/diario/2007/03/24/espana/1174690809\\_850215.html](http://elpais.com/diario/2007/03/24/espana/1174690809_850215.html).

<sup>152</sup> See <http://www.lne.es/general/1586/rajoy-siente-enormemente-ofendido-criticas-polanco/505096.html>.

<sup>153</sup> See [http://elpais.com/diario/2007/03/27/espana/1174946419\\_850215.html](http://elpais.com/diario/2007/03/27/espana/1174946419_850215.html).

<sup>154</sup> See [http://preview.ifex.org.nmsrv.com/spain/2007/04/02/opposition\\_party\\_refuses\\_to\\_give](http://preview.ifex.org.nmsrv.com/spain/2007/04/02/opposition_party_refuses_to_give).

<sup>155</sup> See [http://elpais.com/elpais/2007/03/28/actualidad/1175069823\\_850215.html](http://elpais.com/elpais/2007/03/28/actualidad/1175069823_850215.html).

<sup>156</sup> Interview with Juan Luis Cebrián.

### 1.3.7 Other Cases

Several other cases also merit a mention as examples of clear abuses of the Spanish judiciary seeking to inflict an unjust punishment on journalistic practice. Here are three of them:

- In February 2013, journalists Albano Dante and Marta Sibina, owners of *Cafè amb Llet* magazine, were fined €10,000 for posting a video on YouTube titled “*The Biggest Robbery in Catalonia’s History*,”<sup>157</sup> in which they uncovered corrupt dealings in the Catalan public healthcare system. Even though several of the people featured in the video were indicted for alleged corruption crimes, the presiding judge sentenced the journalists on “injuries to someone’s honor” charges, imposing the fine and ordering them to withdraw the video. Fortunately, a year later, the Barcelona Provincial Court declared the sentence null and void, thus saving the modest publication from bankruptcy.<sup>158</sup>
- Journalist Gerardo Rivas was also exonerated of libel charges<sup>159</sup> brought by the far-right Falange Española de las JONS party based on an article he wrote accusing the group of “having a long history of crimes against humanity.” During a long legal process, which the defendant called “Kafkaesque,” Mr Rivas received the support of more than 400 national and international personalities, including experts on Spanish history Paul Preston and Ian Gibson.<sup>160</sup>
- In October 2013, Madrid Court No. 3 decided to disregard slander and libel lawsuits brought against two *El Mundo* reporters, Eduardo Inda and Esteban Urrieztieta, by the regional prime minister of Catalonia Artur Mas and the former prime minister Jordi Pujol. The legal actions were based on an article by the two reporters which quoted police reports alleging that Mas and Pujol possessed secret bank accounts in Switzerland to finance a corrupt operation. The presiding judge ruled that the journalists acted in a “reasonable way” about facts that were “newsworthy and of undoubted interest.”<sup>161</sup>

## 1.4 Recommendations

Based on this detailed study of the current freedom of the press and expression situation in Spain, we offer the following recommendations to the local, regional, and national authorities, especially the Spanish Parliament, which is in charge of reforming or revoking the laws, titles, and articles that hinder the work and professional duty of journalists to keep citizens duly informed about subjects of public relevance:

- The decriminalization of slander, libel, and insult laws included in Title 11, Articles 205 through 216, and Articles 28 and 30 of Title 2 of the Criminal Code, following the jurisprudence and recommendations of international entities that Spain acknowledges and accepts, such as the European Court of Human Rights (ECHR), the Parliamentary Assembly

---

<sup>157</sup> See <http://www.youtube.com/watch?v=yNJyw2hQ2PI>.

<sup>158</sup> See <http://www.publico.es/504410/absuelven-a-la-revista-cafe-amb-llet-que-publico-casos-de-corrupcion-en-la-sanidad-catalana>.

<sup>159</sup> See <http://www.elplural.com/2014/01/17/la-falange-de-las-jons-fracasa-en-su-intento-de-procesar-al-colaborador-de-elplural-com-gerardo-rivas>.

<sup>160</sup> See <http://www.publico.es/politica/457774/declara-como-imputado-el-periodista-que-acuso-a-falange-de-crimenes-contra-la-humanidad>.

<sup>161</sup> See <http://www.lavanguardia.com/politica/20131024/54391630821/archivadas-querellas-jordi-pujol-mas-puig-el-mundo.html>.

of the Council of Europe (PACE), and the United Nations Commission on Human Rights (UNCHR).

- The elimination of the crime of insult against the Crown, specified in Chapter 2, Articles 490 and 491 of the Criminal Code, following the recommendations of international entities that Spain acknowledges and accepts, such as the ECHR, PACE, and UNCHR.
- The elimination of the 1966 Press and Printing Law and the 1982 Protection of Honor, Privacy, and Right to a Respectful Image Law, following the recommendations of international entities that Spain acknowledges and accepts, such as the ECHR, PACE, and UNCHR.
- The elimination of all the dispositions and titles that contain the “cascade effect,” including Articles 39 and 65 of the 1966 Press and Printing Law, and Articles 28 and 30 of the Criminal Code, following the recommendations of international entities that Spain acknowledges and accepts, such as the ECHR, PACE, and UNCHR.
- The elimination of exorbitant or onerous civil sanctions that bring about self-censorship among journalists and substituting them with sanctions strictly proportional to the real damage caused, following the recommendations of international entities that Spain acknowledges and accepts, such as the ECHR, PACE, and UNCHR.
- The immediate end of press conferences without questions, whether they are in person or via closed circuit, or any other stratagem to keep journalists from having direct access to public figures who choose to use the news media to disseminate news or information.
- The immediate end of harassment against journalists as demanded in the 11 March 2013 statement by the Federation of Associations of Spanish Journalists.<sup>162</sup>

---

<sup>162</sup> See [http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas\\_fape-818815771464.htm](http://www.fape.es/la-fape-insta-a-que-cese-el-hostigamiento-a-los-periodistas_fape-818815771464.htm).

## 2. Freedom of Access to Information

### 2.1 Overview of Freedom of Information in Spain with a Historic Perspective

Historically, the transparency train has rushed passed Spain's station without stopping. In the last 20 years, the international transparency culture has grown exponentially to unprecedented levels, and over 100 nations have joined a movement that used to comprise only the Scandinavian countries and the United States.

Spanish bureaucracy insisted on watching this train pass behind a barrier of opacity and secrecy. And the Spanish public, pushed by centuries of inertia and recently by unprecedented prosperity, resisted looking beyond the public office counter, that proverbial curtain which protected official dealings from external scrutiny. However, this national attitude neglected the fact that the benefits of a transparent society are enormous for any country.

“The pioneer countries in the acknowledgement and regulation of the right to access to information rank among the most developed in the world from a democratic perspective,” says university professor and freedom of information expert Emilio Guichot Reina.<sup>163</sup>

Sweden approved its first transparency law in 1766 (250 years ago), and by the end of the 1970s, Finland, Denmark, and Norway followed suit. Later, during the peak years of the adoption of freedom of information laws by many countries, Spain included some ostensibly weak transparency provisions—Articles 3.5, 35, and 37<sup>164</sup>—in its 1992 Law Regulating Public Administrations, although these provisions do not meet the test of an access to information law as in most cases access is only available to those with a direct interest in the particular administrative file.<sup>165</sup> This situation persisted until December 2013, even though the Constitution contains provisions for citizens to be involved in the country's governance in Articles 9.2, 23.1, 48, and 105.<sup>166</sup> The Constitution also provides for freedom of expression, which international human rights tribunals have ruled includes a right of access to information from public bodies, but to date Spanish courts have not recognized the existence of this right in domestic law.

Moreover, the lack of legal channels for gaining due access to the bureaucratic system defied several conventions and recommendations of international entities, which in some cases are binding for the Spanish state. These include Article 19 of the Universal Declaration of Human Rights,<sup>167</sup> Article 10 of the European Convention of Human Rights,<sup>168</sup> and the European Union Charter of Fundamental Rights.<sup>169</sup>

---

<sup>163</sup> Emilio Guichot Reina, “Transparencia y acceso a la información pública en España: análisis y propuestas legislativas” (Transparency and access to public information in Spain: Analysis and legislative proposals), Documento de trabajo 170/2011, p. 8.

<sup>164</sup> See <http://wika2.blogspot.com/2012/01/ley-de-transparencia-una-necesidad-o.html>.

<sup>165</sup> See [http://noticias.juridicas.com/base\\_datos/Admin/130-1992.html](http://noticias.juridicas.com/base_datos/Admin/130-1992.html).

<sup>166</sup> See <http://wika2.blogspot.com/2012/01/ley-de-transparencia-una-necesidad-o.html>.

<sup>167</sup> See <http://www.humanrights.com/es/what-are-human-rights/universal-declaration-of-human-rights/articles-01-10.html>.

<sup>168</sup> See <http://www.derechoshumanos.net/Convenio-Europeo-de-Derechos-Humanos-CEDH/articulo10CEDH.htm>.

<sup>169</sup> See

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combating\\_discrimination/133501\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/133501_en.htm)

This barrier of opacity and secrecy, however, was about to be met with an unprecedented storm of public indignation. Prodded by the Great Recession that started in September 2008, and thanks to the ongoing campaign for an access to information law (which was launched in 2006) as well as the initiative and courage of the news media, Spaniards finally realized to what extent this culture of opacity had corrupted their public institutions. (See the Introduction to this study.)

“In a way, the crisis is good for Spaniards in terms of dealing with corruption. People are much less tolerant of corruption and recognize the need to put solid measures in place to deal with this,” maintains Helen Darbishire, executive director of Access Info Europe (AIE).<sup>170</sup>

These measures ended up becoming the Transparency Law, approved 9 December 2013, which is analyzed in *section 2.2*.

Corruption and the perception of a corrupt nation is taking a heavy toll on Spain, a country heavily dependent on foreign investments. A columnist for *El País* wrote in December 2013 that “A University of Las Palmas institute has recently put a price tag on what corruption is costing Spain: €40 billion, the same amount as the European bailout of Spain or the increase in Rajoy’s 2014 national budget. This estimate takes several factors into account, from the reduction in foreign investments to the loss of profits caused by investors’ loss of faith.”<sup>171</sup> The state is putting an enormous effort into promoting Marca España or Brand Spain,<sup>172</sup> an official campaign “to improve the image of our country both domestically and beyond our borders for the common good.”<sup>173</sup>

“If we see the countries that were hit the hardest by the crisis—Spain, Italy, Greece, Cyprus—these are the countries with the worst transparency regimes in Europe,” states Ms Darbishire.<sup>174</sup>

The CPI, however, draws a distinction between general administrative corruption, which is minimal with alas some notorious exceptions, and political corruption. In the presentation of the Index on 3 December 2013, one of the spokespersons, Silviana Bacigalupe, stated that, “In Spain no one would dare try to bribe a policeman, because he would be arrested,” and added that the avalanche of corruption scandals stems almost exclusively from the financing of local governments and the political parties.<sup>175</sup>

Even so, Spain is on a slippery slope, according to Professor Manuel Villoria of University Rey Juan Carlos. “In Poland—rated one slot above Spain—there were 3,000 sentences for corruption last year (2012). Here there were about 90. Indeed, there is impunity in Spain,”<sup>176</sup> Villoria told *El País* during the presentation.

---

m. Note that this is not binding on Spain when it comes to having an access to information law; it only creates a right at the level of the European Union.

<sup>170</sup> Interview with Helen Darbishire, executive director of Access Info Europe, 9 December 2013 (hereafter, Interview with Helen Darbishire).

<sup>171</sup> Joan Ridaó Martín, “O corrupción o democracia”, *El País*, 6 December 2013, at [http://elpais.com/elpais/2013/12/05/opinion/1386247673\\_070851.html](http://elpais.com/elpais/2013/12/05/opinion/1386247673_070851.html)

<sup>172</sup> See <http://marcaespana.es/#>.

<sup>173</sup> See <http://marcaespana.es/en/quienes-somos/que-es-marca-espana.php>.

<sup>174</sup> Interview with Helen Darbishire.

<sup>175</sup> See [http://politica.elpais.com/politica/2013/12/03/actualidad/1386057383\\_204944.html](http://politica.elpais.com/politica/2013/12/03/actualidad/1386057383_204944.html).

<sup>176</sup> See [http://politica.elpais.com/politica/2013/12/03/actualidad/1386057383\\_204944.html](http://politica.elpais.com/politica/2013/12/03/actualidad/1386057383_204944.html).

This impunity derives from a lack of transparency that, according to Ms Darbshire, is systemic in Spain.

“I do think it’s systemic, that there is a lack of a culture of transparency, the fact that there still exists a pre-Constitution secrecy law signed by Franco,” says Ms Darbshire, referring to the 1968 Law on Official Secrets.<sup>177</sup> “There is a lack of understanding and knowledge of what transparency is and how it works elsewhere in Europe.”<sup>178</sup>

Juan Luis Cebrián, chairman of PRISA, agrees with Ms Darbshire: “I think there is a problem in Spain that is neither recognized by Partido Popular nor by any other party, that corruption is systemic. Corruption in Spain is widespread, especially in local and autonomous administrations, and it’s not only because there are greedy individuals, who will always be there, but because the system favors this situation.”<sup>179</sup>

In 2007, AIE submitted a request to the Ministry of Justice, asking what Spain was doing to fulfill the international conventions against corruption and bribery. AIE interpreted the Ministry’s great delay in responding as “administrative silence;” that is, purposefully ignoring the request. AIE took its case to the courts, and after a long, fruitless process, it landed at the Supreme Tribunal, which in May 2012 upheld the decision of a lower court and forced AIE to pay €3,000 to cover the legal costs of the process.<sup>180</sup>

What really shocked national and international NGOs was not the decision itself to punish a request for information, but the arguments used by the Supreme Court to justify its decision:<sup>181</sup>

- The purpose of the request was not to obtain information but to exert “political control.”
- There is already an access to information law in Spain, referring to the restrictive and insufficient provisions of the 1992 Law Regulating Public Administrations.
- And the lack of response by the Justice Ministry was considered to be “irrelevant.”

“The Supreme Court said, ‘it’s the role of the MPs to control the activities of the government’; that is, they don’t recognize the role of civil society in a democracy,” Ms Darbshire reported.<sup>182</sup>

Months later, the Constitutional Court rejected AIE’s appeal. After exhausting all national means of legal recourse, AIE has lodge the case with the European Court of Human Rights, arguing a violation of the Article 10 right to freedom of expression of which access to information is an inherent part; the case has yet to be ruled admissible.

On 13 September 2013, the Constitutional Tribunal refused to admit another AIE case regarding the rejection by the Ministry of Defense of a request for information about the number of Spanish Armed Forces casualties in the Iraq and Afghanistan wars and about reports of discrimination in the Armed Forces.<sup>183</sup> AIE has announced that it will take this case to the UN Commission on Human Rights.

---

<sup>177</sup> See [http://noticias.juridicas.com/base\\_datos/Admin/19-1968.html](http://noticias.juridicas.com/base_datos/Admin/19-1968.html).

<sup>178</sup> Interview with Helen Darbshire.

<sup>179</sup> Interview with Juan Luis Cebrián.

<sup>180</sup> See [http://www.ifex.org/spain/2012/10/31/ngo\\_fined](http://www.ifex.org/spain/2012/10/31/ngo_fined).

<sup>181</sup> See <http://www.access-info.org/es/espana/297-caso-ministerio-justicia>.

<sup>182</sup> Interview with Helen Darbshire.

<sup>183</sup> See <http://www.access-info.org/es/espana/499-appeal-echr-defensa>.



Helen Darbshire laments the fact that the Spanish public and elected officials don't understand that the world has changed, and that citizens demand this right to access to information. "You can get more information out of the Slovenian or Serbian government or the Romanian or the Polish government in requests sent from Madrid than we get from the Spanish government."<sup>184</sup>

## 2.2 The Transparency Law and its Flaws

In the midst of this situation, as mentioned before, Spanish society demanded the adoption of effective measures to fight corruption, and for many the promised transparency law looked like torrential rain after a very long drought.

The country's two major parties, Partido Popular (PP) and Partido Socialista Obrero Español (PSOE), promised to approve a transparency and access to information law during the 2011 general election campaign. (The PSOE had promised this measure in 2004 and again in 2008.) The PP candidate and current prime minister Mariano Rajoy said he wanted to establish "respect for society's interest and service to the common good" so that "when politicians are mentioned they are thought of as honest people."<sup>185</sup>

Finally, after 20 months of debates and delays, the Spanish Parliament passed the 2013 Law of Transparency, Access to Public Information, and Good Governance.<sup>186</sup> Civil society and the news media aimed strong criticism at the government for neglecting the long list of recommendations that had been suggested during the seven years of campaigning in favor of an effective law in accordance with international standards of transparency and governance.

In spite of this, José Luis Ayllón, state secretary for parliamentary relations and the government official in charge of drafting the law, days before the final passage, said: "This is one of the most debated laws in recent legislative sessions. In many aspects, it's superior to those of other countries. That's the advantage you get when you arrive last."<sup>187</sup>

How good is this law compared to other countries? According to the Global Right to Information Rating,<sup>188</sup> the Spanish law ranks 66th among the 90 nations with a law of access to public information, scoring 70 points out of 150. Thus Spain scored worse than China (72), a Communist dictatorship, and much worse than countries such as Ethiopia (114) and Bangladesh (109). At least Spain was rated better than France (64) and Italy (57).

Helen Darbshire expressed disappointment with the final version: "The Spanish Government has missed a historic opportunity to adopt an access to information law in line with international standards, instead adopting a law that will have minimal positive impact on open government and do little to change a bureaucratic culture of secrecy in which over 50 percent of requests from the public go unanswered."<sup>189</sup>

---

<sup>184</sup> Interview with Helen Darbshire.

<sup>185</sup> See <http://www.noticias.com/rajoy-quiero-que-cuando-se-hable-de-politicos-se-piense-en-honradez.1328340>.

<sup>186</sup> See [http://noticias.juridicas.com/base\\_datos/Admin/517991-l-19-2013-de-9-dic-transparencia-acceso-a-la-informacion-publica-y-buen.html#a18](http://noticias.juridicas.com/base_datos/Admin/517991-l-19-2013-de-9-dic-transparencia-acceso-a-la-informacion-publica-y-buen.html#a18).

<sup>187</sup> See [http://politica.elpais.com/politica/2013/09/13/actualidad/1379102604\\_736003.html](http://politica.elpais.com/politica/2013/09/13/actualidad/1379102604_736003.html).

<sup>188</sup> See [http://www.rti-rating.org/country\\_rating.php](http://www.rti-rating.org/country_rating.php).

<sup>189</sup> See <http://www.access-info.org/es/espana/521-comment-spanish-law>.

Moreover, Coalición Pro Acceso (CPA), an alliance of 68 organizations and one of the NGOs that pushed hardest for a strong law, also rejected it and lamented that, “the final text is insufficient as it features grave shortcomings and contradictions; therefore, the law is born obsolete and lags way behind international standards<sup>190</sup>.”

Among Spanish civil society organizations—including CPA, and Fundación Salvador Soler (with its think-tank CIECODE),<sup>191</sup> among others—and intergovernmental organizations including the Organisation for Security and Cooperation in Europe (OSCE), a consensus exists regarding the law’s flaws and weaknesses.

The following points are a summary of an analysis of the law by AIE,<sup>192</sup> CPA,<sup>193</sup> and TI:<sup>194</sup>

- It considers access to information as a normal right, not as a fundamental one, contravening ECHR decisions<sup>195</sup> and international treaties signed by Spain.
- It excludes several public institutions that receive public funding.
- It excludes a clear set of sanctions for those who break the law.
- It preserves the legal principle of “administrative silence,” by which the lack of response to requests ought to be interpreted as a rejection.
- It limits access to information, including a long list of subjects such as economic interests, monetary policy, and protection of the environment.
- It includes the Transparency and Good Governance Council appointed by the government itself, which compromises its independence and executive authority.
- Moreover, it is not known whether the council will have any executive authority.
- It excludes public administrations from publishing inventories of their assets, requiring them only to reveal their real estate properties.
- It established an implementation period of one year for the central government and two years for autonomous and local administrations.

TI takes the view that a flawed transparency law is better than no law at all. Ms Darbishire is less convinced, and points out that implementation has so far been very poor.

“I have never seen a country, even countries that have adopted bad or weak access to information laws, where the law does not help. So I am not totally pessimistic in that respect,” she says.<sup>196</sup>

Ms Darbishire stresses that for the first time ever, Spanish society will have the opportunity to request information in accordance with the law, and adds: “And when journalists or civil society don’t get access, then we will be able to use that in campaigning to put pressure on the government to change the culture.”<sup>197</sup>

---

<sup>190</sup> See <http://www.proacceso.org/actual>.

<sup>191</sup> See <http://www.unmundosalvadorsoler.org/ciecode/inicio.aspx>.

<sup>192</sup> See [http://www.access-info.org/documents/Access\\_Docs/Advancing/Spain/Indicadores\\_del\\_Proyecto\\_de\\_Ley\\_de\\_Transparencia\\_y\\_Buen\\_Gobierno.pdf](http://www.access-info.org/documents/Access_Docs/Advancing/Spain/Indicadores_del_Proyecto_de_Ley_de_Transparencia_y_Buen_Gobierno.pdf).

<sup>193</sup> See <http://www.proacceso.org/actual>.

<sup>194</sup> See [http://www.transparencia.org.es/LEY\\_DE\\_TRANSPARENCIA/Posici%C3%B3n\\_TI-E\\_sobre\\_nueva\\_Ley\\_Transparencia.pdf](http://www.transparencia.org.es/LEY_DE_TRANSPARENCIA/Posici%C3%B3n_TI-E_sobre_nueva_Ley_Transparencia.pdf).

<sup>195</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955>.

<sup>196</sup> Interview with Helen Darbishire.

<sup>197</sup> Interview with Helen Darbishire.

In a statement issued after the final version of the law was revealed, TI also underscored its positive aspects, considering that, “it will constitute an important social advance and a fundamental channel to improve citizen participation and the quality of democracy in Spain.”<sup>198</sup>

Others, however, acknowledge the government’s good intentions, but express their frustration with the final result of a long legislative process.

“The government has tried to catch up with our neighboring countries, trying both to smother a certain social outrage stemming from recent scandals, particularly those associated with the Royal Crown. It’s a failed law because it comes from a failed system: as long as corruption remains institutionalized, it will have a perfectly legal façade,” says Borja Martínez, editorial coordinator of *Revista Leer* magazine.<sup>199</sup>

“I think it’s a failure,” concludes Mr Cebrián. “I think the government’s intentions were good. But that happened before the Bárcenas scandal exploded. And the opacity of the government and the party in power has been so great (...) that the intended transparency and a credible law could have been possible only as long as the government was willing to show some contrition.”<sup>200</sup>

### 2.3 Recommendations

The flaws and shortcomings of the Transparency Law presented in this study can also be tacitly interpreted as part of the necessary recommendations for improving it so that it complies with international standards. Our stated recommendations coincide with CPA’s “Ten Principles,”<sup>201</sup> a compilation of proposals resulting from the comparative study of the laws in 80 countries using the Council of Europe’s Convention on Access to Official Documents as a model.<sup>202</sup>

The Spanish Law of Transparency needs to be reformed according to the following principles:

1. Access to information is a fundamental right for every person.
2. The right shall be applicable to every public entity, all the branches of power, and all those private entities engaged in public functions.
3. The right of access to information shall be applicable to all information that is generated, received, or in possession of public entities, regardless of how it is archived.
4. The request process shall be simple, quick, and free.
5. Public officials shall be obligated to help information applicants.
6. All information in possession of the state shall be public, with the exception of cases involving issues such as national security and the prevention or investigation of crimes.
7. Denial of access to information shall be limited and duly explained.
8. All persons shall have the right to appeal rejections or the lack of response by the authorities.
9. Public entities shall make available basic information without being prompted by any requests.
10. The right to access to information shall be guaranteed by an independent entity.

---

<sup>198</sup> See [http://www.transparencia.org.es/LEY\\_DE\\_TRANSPARENCIA/Posici%C3%B3n\\_TI-E\\_sobre\\_nueva\\_Ley\\_Transparencia.pdf](http://www.transparencia.org.es/LEY_DE_TRANSPARENCIA/Posici%C3%B3n_TI-E_sobre_nueva_Ley_Transparencia.pdf).

<sup>199</sup> Interview with Borja Martínez.

<sup>200</sup> Interview with Juan Luis Cebrián.

<sup>201</sup> See <http://www.proacceso.org/los-diez-principios>.

<sup>202</sup> See <http://www.access-info.org/en/laws-and-constitutions/5-council-of-europe-intro-section>.

# **Addendum: Transcript of Interview via Skype with Helen Darbishire, Executive Director of Access Info Europe**

26 December 2013

**1. What are the fundamental flaws, the three or four things that you find most striking about the Transparency Law (*Ley de Transparencia*)?**

It doesn't recognize [access to information as] a fundamental right and a lot of the problems flow from that. I still think the most fundamental problem is Article 18, "sobre las causas de inadmisión" (on grounds of inadmissibility), which excludes a lot of information from the scope of the right (the text of the law was published in the official bulletin on 8 December). Also the lack of oversight and the fact that it will not come into force until next year at the state level and not until 2015 at the regional level. It's a very slow process. And there is no political will to be transparent right now.

**2. Can you name names? Who are the real architects of this failure? Or is it just systemic and everybody agrees that this law should be weak and ineffective?**

No, you can't name names, I do think it's systemic, that there is a lack of culture of transparency, the fact that there still exists a pre-Constitution secrecy law signed by Franco. Even to be generous, there hasn't been any progress since the 1970s, unlike much of the world. So it's a cultural and systemic problem. There is a lack of understanding and knowledge of what transparency is and how it works elsewhere in Europe. It's true that there is a political will not to be transparent, yet I don't think there is a desire not to be transparent. I think they genuinely believe that this is a set course. But I don't think they get it, and it's not only the politicians. I mean, the Constitutional Court has rejected two complaints that we made to it, arguing that there is no right to access of information. The Supreme Tribunal said, "es el papel de los diputados de controlar las actividades del gobierno." That is, they don't recognize the role of civil society in a democracy.

**3. Is the culture of transparency alien to the bureaucratic culture?**

Yes. It's alien to the bureaucratic culture. There were attempts to improve transparency in the regional Basque government of Patxi López, and there has been some experimentation in some parts of Catalonia. There are attempts to change this culture. But at the state level, at the central government, there is very little indication of participatory processes or transparent processes or of accountability. Yes, it's an inherent problem.

I also think civil society has not sufficiently demanded the change. And this is an important dimension to it. Until Access Info was founded and created, seven years ago, the Coalición Pro Acceso, there was no civil society movement in favor of access to information and transparency. It has been an educational process for the NGOs, the journalists to understand what this means. And I still think that if people haven't worked in countries that have access to information laws, if they don't really understand how it works, it's very difficult to grasp. They compare requests filed in Spain with requests filed in the UK, and there is a world of difference in the way the request is treated. And the amazing thing is when a Spanish customer from Spain asks for information from the UK government, they get better treated and more information than if they do asking from their own government. And now they have this program which says, look, guys, we are lagging behind. And the typical reaction that I get going asking to Spanish officials when I mention the law in Slovenia or the law in Mexico, they tell me people in those countries will not get answers from their governments. So they don't understand that the world has changed, that citizens demand this right, they go

to court, they fight for it, and they get it. You can get more information out of the Slovenian or Serbian government or the Romanian or the Polish in requests sent from Madrid than we get from the Spanish government. I think this is a Latin-Europe problem as well. Italy has a poor access to information and France is not super-impressive. So there is a bureaucratic culture of southwestern Europe that has not been yet reformed.

**4. How do you think this ineffective law is going to affect the ability of journalists to go in there and investigate?**

In possibly three ways. First, we are going to get some proactive publication getting more information. Secondly, some requests will be answered and that's good. I have never seen a country, even countries that have adopted bad or weak access to information laws, like Bulgaria in 2000, where the law does not help. And journalists use it and they go to court. Even countries with poor access to information, these laws generally do help. So I am not totally pessimistic in that respect. And when journalists or civil society don't get access, then we will be able to use that more in campaigning to put pressure on the government to change the culture. And in the absence of the law it's very difficult because when they answer a request, well they don't have to. And Access Info Europe is the only organization that has gone to court over this. And changing this is a long and frustrating process. But having a law in place helps increase the pressure for reform. So I think journalists will get some information and it will contribute to changes in the culture.

**5. The law establishes something called "negative administrative silence." What does this mean?**

It means that if you don't get an answer, you'll assume that it's a refusal. But that's not totally unusual. It's a particular problem in a country like Spain with a high level of administrative silence, more than 50 percent, because there is no real incentive to answer. And when people don't answer, the burden is on the member of the public. So I think it's very problematic in the Spanish context.

**6. If it's part of the culture, is corruption rampant because of this culture of silence?**

I think the crisis has reduced people's tolerance. Previously, there was a lot of "well, we all are getting rich, are getting better," so people were ready to accept that but not now. They are suffering. In a way, the crisis is good for Spaniards in terms of dealing with the corruption. People are much less tolerant with corruption and recognize the need to put in place solid measures to deal with this. Ideally, we will have a press that will respond to that and will do something that will really change things. Unfortunately, the current government is so implicated it's really amazing they still are in power. It's really hard to know how things will go. But I think in the end people will learn some hard lessons. And that's the role of civil society and journalists, to ensure that these lessons are learned in terms of public integrity and transparency. But it's going to take a while. If we see the countries that were hit the hardest by the crisis, Spain, Italy, Greece, Cyprus, these are the countries with the worst transparency regimes in Europe. I don't think it's a coincidence and we are really going to have to address the transparency and the crisis.

**7. What are your recommendations for Spanish bureaucracy in terms of progress with regard to freedom of information?**

Reforming the Access to Information Law, implementing it properly, there has to be a serious commitment to transparency.

## **About the author**

Javier Sierra lives in Washington, DC, and is a journalist and international expert on the freedom of the press, the freedom of expression, and the freedom of information. As a journalist, he worked as deputy regional editor at Associated Press Television News, as producer and reporter at CNN en Español, as chief copy editor at Univision News, and as editor at United Press International. He has worked as the World Press Freedom Committee's (WPFC's) projects director for 14 years, leading the organization's efforts especially in Latin America and Europe to eliminate or reform laws that impede or hamper the work of journalists to keep society informed. The WPFC—as a result of campaigns in Spain and other parts of the world in which Mr Sierra actively cooperated—was twice nominated along with other press freedom groups for the Príncipe de Asturias Prize for International Cooperation in 2006 and 2009.

Mr Sierra has lectured on press freedom at several fora, including the Plenary Session of the Organization of American States, the Coordinating Committee of Press Freedom Organizations, the American Society of Newspaper Editors, and the Foundation for Advanced Education and Sciences. He is regularly featured as a press freedom expert on international radio and television networks, such as CNN en Español, Voice of America, RT Network, and others. He has cooperated with other human rights groups, such as the Center for Justice and Accountability, the International Center for Journalists, and the Crimes of War Project.