

# SPAIN

## By the International Institute for Nonviolent Action (Novact)

### Summary:

*After a first period of de-mobilisation following the establishment of the Gag laws, civil society is now experiencing a new wave of civic participation. Strong social movements have taken to the streets to call for environmental and social justice as well as for the protection of sexual and reproductive rights. These movements have been crucial to voice opposition against far-right groups and parties that have become more visible and prominent in the political sphere in the past years with anti-rights narratives. They have also contributed to responding to social needs of the population exacerbated by the Covid-19 pandemic by providing services to those in need. Nevertheless, during the last year, civil society space has continued to be mainly constrained by the **legislative framework** that has been known in Spain as Gag Laws. These Gag Laws approved in 2015 included a modification of the Penal Code, an Antiterrorist Law, and a Citizens' Security Law (LOSC). The latter is applied in the context of public demonstrations: it restricts the right to freedom of peaceful assembly and freedom of expression and allows for broad interpretations and arbitrary behaviours by police forces. It also grants presumption of truthfulness to security agents violating the right to a fair trial and the right to an effective remedy, which are key principles for the functioning of the rule of law. Additionally, it is applied against journalists covering actions of the law enforcement forces during public demonstrations. As a result, civil society's ability to act as a catalyser of social needs and demands and watchdog has been heavily limited. It is also important to highlight that the Citizens security law has been used as well as the tool to regulate the emergency measures during the Covid-19 pandemic enabling numerous instances of police discretion and abuse. Civil society has been active in monitoring them and supporting victims to access judicial and non-judicial mechanisms for remedy. After many years of pressure from civil society and human rights defenders, the Spanish government has started a **process to reform** the law. In December 2021, the amendments to this law started to be discussed by the Commission of Home Affairs of the Congress. While the reform represents a huge opportunity to enlarge civic space, protect the right to peaceful assembly and strengthen the rule of law in Spain, to date the reform is insufficient. The fact that reform is fast-tracked through accelerated legislative procedure – against international standards – and civil society was not involved in the process is also unpromising.*

*The restrictive legal framework has resulted in the **growing use of administrative sanctions and judicial procedures against peaceful protesters**. The administrative harassment of peaceful protesters through economic sanctions has the effect of discouraging citizens to exercise their right to peaceful assembly to defend their fundamental rights and voice their opinions and needs. An alarming trend regards cases of accusations made against activists for alleged attacks against law enforcement officers based on the presumption of veracity granted to security agents by Art. 52 of the LOSC. Even when these legal proceedings do not lead to a conviction and end in acquittal or dismissal, these proceedings have huge material and symbolic costs for those involved. In some cases, they have led to fines and prison sentences even in the context of insufficient evidence. Thus, these proceedings may encourage the tendency of other associations to self-censor for fear of punishment*

*or refrain themselves from pursuing certain actions (i.e., search and rescue) for fear of reprisal. Excessive use of force and the use of illegal antiriot material against protesters (pellets guns) as well as the unlawful use of kinetic impact projectiles have been a further challenge negatively affecting the right to peaceful assembly. The lack of accountability for excessive use of force and other abuses against protestors is a breach of the rule of law. Evidence shows that migrants, women and LGBT+ community are most vulnerable to violations.*

## The regulatory environment for and implementation of civic freedoms

### **In 2015 the legislative framework has been hardened in its sanctioning and penal instruments based on arguments linked to security and maintenance of public order**

The two main elements in the Spanish legal system that directly affect freedoms of association, expression and assembly are the Organic Law on the Protection of Citizen Security (4/2015), known as "Gag Law" or "*Ley Mordaza*", and the reform of the Penal Code (also implemented in 2015).

The reform of the Penal Code modified, among other elements, the crimes against public order. The parameters to classify behaviors as 'criminal offences' were considerably expanded and, in some cases, the scope of actions penally prosecuted has been widened to include the suspicion of criminal intent. These broader parameters may negatively affect freedom of expression and the right to assembly because, according to international standards, what constitutes a criminal offence is the "action" and not previous acts that are deemed suspicious by the authorities, except in very specific cases. With this reform of the Criminal Code, the incitement or reinforcement of the actions classified as public disorders, as well as the "*distribution or public dissemination, through*

*any means, of messages or slogans that incite the commission"* of such actions are punished.

The Organic Law on the Protection of Citizen Security (LOSC) is conducive of violations of the right of peaceful assembly and association. It uses such an ambiguous and unspecified language that, in practice, is allowing irregular actions in police interventions:

- Article 36.6 introduced a serious penalty between 601 and 30,000 euros for "*disobedience or resistance to the authority or its agents in the exercise of their functions.*" As a result of the vague wording, police forces are granted excessive discretion to assess which behaviours may be considered as disobedience, lack of respect or resistance to authority, without being accompanied by adequate mechanisms of control and accountability. As pointed out by the Commission of Venice in March 2021, the vague terms allow police arbitrariness and undermine legal certainty<sup>1</sup> putting at risk the rule of law.
- Article 52 considers the complaints, attestations or acts formulated by law enforcement agents as a "*sufficient basis*" to impose sanctions, unless there is evidence of the contrary. In practice, this provision functions as a "*presumption of truthfulness*", because it is very difficult to provide evidence to

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<sup>1</sup> Opinion by The Venice Commission (22 March 2021):

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

rebut the police's version. This violates the fundamental right to the presumption of innocence that is enshrined in the Constitution. In addition, it makes it impossible to effectively defend citizens in sanctioning procedures. As a result, it violates the right to a fair trial (Art.6 ECHR) and the right to an effective remedy (Art. 13 ECHR), which are key principles for the functioning of the rule of law.

- Art. 36.23 classifies as "*severe infraction*" the unauthorised use of images, or personal and professional data of authorities or members of the security forces that may endanger the safety of the officers or their families. This article has been used against journalists and activists, especially while covering protests. The wording explicitly punishes the "*improper use of images*" and not "*the capture of images*"; however, media and police officers have repeatedly communicated that it is prohibited to take pictures, generating social alarm.

The original focus of the law was on the policing of mass public demonstrations. During the Covid-19 pandemic the law started to be massively used for the enforcement of health restrictions (confinements, curfews, etc.), including sanctioning social movement and NGOs providing crucial services to citizens in need during the emergency.<sup>2</sup>

### **Bureaurepression: application of Organic Law on the Protection of Citizen Security in the context of public demonstrations**

Civil society organisations have monitored the application of the Organic Law on the Protection of Citizen Security (LOSC):

- In the context of public demonstrations, 'disobedience' and 'disrespect' (Art. 37.4, minor offence, fine from 100 to 600 EUR) have been the two most applied sanctions. According to the data published by the Ministry of the Interior, Article 36.6 of the LOSC has been the fourth reason why the population has been sanctioned with a total of 12,094 sanctions in 2016. In 2018 this figure rose to 249,665 *per annum*.
- Just as an example, in October 2021, the Catalan housing rights movement have documented 364 fines, 351 of which were concerning evictions, from March 2019 to October 2021, for a total value of 206.141 euro. All of them were imposed by the Ministry of Interior and based on the Gag law, specifically on Art. 36.4 (Obstruction), 36.6 (Disobedience) and 37.4 (Disrespect).
- During the Covid-19 pandemic, the Citizens' Security Law has been used, in particular, as the tool to regulate the implementation of the emergency measures. Just in Spring 2020, 1,130,441 fines were imposed just for one of the offences provided by Art. 36.6 (disobedience to the authority). This securitised vision of the management of the health crisis has led to a widespread and arbitrary restriction on the right to freedom of assembly, causing disproportionate

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<sup>2</sup> Report: *Protección de derechos durante el estado de alarma*. Defender a quien Defiende. 2020. Link: [defenderaquiendefiende.org/wp-](https://defenderaquiendefiende.org/wp-)

limitations and legal insecurity for protesters in Spain.<sup>3</sup>

The administrative harassment of peaceful protesters through economic sanctions has the effect of discouraging citizens to exercise their right to peaceful assembly to defend their fundamental rights and voice their opinions and needs.

### **Presumption of truthfulness of the police and criminalisation of the right to protest**

An alarming trend regards cases of accusations made against activists for alleged attacks against law enforcement officers based on the presumption of veracity granted to security agents by Art. 52 of the LOSC. The following examples show how this provision prejudices the right to a fair trial and the right to an effective remedy, which are key principles for the functioning of the rule of law.

- **17 January 2019, Zaragoza:** As part of the regional elections campaign, far-right party Vox held a rally in the Zaragoza auditorium. In response to this event, the anti-fascist movement called a rally in repudiation of the meeting. The rally was attended by some 200 young people and ended with police charges and the arrest of six people in the bars near the university, where some of the demonstrators had taken refuge. The Provincial Court of Zaragoza sentenced on 20<sup>th</sup> January 2021 four of the boys to up to 7 years sentences for their alleged involvement in an altercation with the police, in which they allegedly injured officers, the other two were minors and got one year of probation and a sanction. The accuse includes disorder, attack

against authority and disobedience. The only evidence presented to incriminate the six boys are the statements of the police and a video in which the youngsters do not appear, and over which the court itself affirms that *"the identification of the people appearing not possible."* Therefore, the conviction is based only on police statements, which are assumed to be true, and which also show many ambiguities.

- **19 December 2019, Barcelona:** The Mossos d'Esquadra (the autonomous police force of Catalonia) evicted the occupied social centre El Rec, in the Fort Pienc neighbourhood. During the operation, a young protester was arrested for allegedly assaulting a police officer by having hit him with his elbow. Subsequently, a video denied the version of the police officer against the housing activist<sup>4</sup>. So, in October 2021, the Barcelona High Court concluded, after watching the video, that the offence denounced by the police officer *"does not exist"*. The magistrates stated that the aggression *"has not been corroborated by any other witness and seems to be denied by the images"*, as it was based solely on the word of the police officer. Thanks to the video, the judges decided to investigate the policeman, instead, for the crimes of illegal detention and injuries against the protester. However, the police officer was not suspended.
- **7 October 2021, Madrid:** The Supreme Court sentenced Podemos Member of the Parliament Alberto Rodríguez to a month and a half in

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<sup>3</sup> See ECF response to the 2021 rule of law consultation: <https://civic-forum.eu/wp-content/uploads/2021/03/Rule-of-Law-2021-ECF-2.pdf>

<sup>4</sup> [https://www.eldiario.es/catalunya/video-desmiente-mosso-acusaba-manifestante-agredirle-desalojo\\_1\\_8413463.html](https://www.eldiario.es/catalunya/video-desmiente-mosso-acusaba-manifestante-agredirle-desalojo_1_8413463.html)

prison for allegedly assaulting a police officer during a protest in 2014, even though the aggression was not proven in the trial. The police officer who accused Rodríguez maintained serious contradictions during the hearing. The Supreme Court ruled that the aggression occurred although the police officer's version was the only evidence. The prison sentence against Rodríguez was later replaced by a fine of 540 euros, with the accessory of special disqualification for the right to passive suffrage during the time of the sentence.<sup>5</sup>

Even when these legal proceedings do not lead to a conviction and end in acquittal or dismissal, these proceedings have huge material and symbolic costs for those involved. In some cases, they have led to fines and prison sentences even in the context of insufficient evidence. Thus, these proceedings may encourage the tendency of other associations to self-censor for fear of punishment or refrain themselves from pursuing certain actions (i.e., search and rescue) for fear of reprisal.

### **Draft reform of the Organic Law on the Protection of Citizen Security remains insufficient**

Having sparked strong national and international criticism, in December 2021, the Spanish government proposed a package of amendments to reform the Citizens' Security Law, currently in discussion in the parliament. The civil society was not involved in dialogue on the proposed reform, despite having carried out campaigns and advocacy actions for years to ensure the law safeguards fundamental rights. Despite some positive changes, to date the reform does not challenge the criminalisation of protest and

does not sufficiently address the restrictions of the freedom of expression, assembly, demonstration, and information. There are two main reasons: the offences most used to demobilise the protest are maintained, and the principle of truthfulness of the police is not challenged.

- The sanction for the recording of police images and personal data "*that could endanger the safety of the agents*", is not eliminated but qualified. The recording will still be sanctioned when "*it entails a certain danger*", and it will be the police to decide on this possibility.
- Administrative penalties for lack of respect for the police, disobedience or refusal to identify oneself will continue to be punished with exorbitant economic fines (up to 600,000 EUR depending on the offence).
- The Gag law reform proposal recognises the right to spontaneous demonstration (finally incorporating the jurisprudence from the European Court of Human Rights), but "*provided that it does not lead to violence or disturbance of public order.*" Again, it is up to the police to decide on this.
- The use of rubber bullets by the police is not prohibited, and the reform simply adds that "*less harmful*" means should be used.

The fact that reform is fast-tracked through accelerated legislative procedure – against international standards – and civil society was not involved in the process is also unpromising.

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<sup>5</sup> [https://www.eldiario.es/politica/fiscalia-rebaja-peticion-carcel-alberto-rodriguez-retrasos-proceso\\_1\\_8321787.html](https://www.eldiario.es/politica/fiscalia-rebaja-peticion-carcel-alberto-rodriguez-retrasos-proceso_1_8321787.html)

### **Disproportionate use of police force by the police during demonstrations**

In 2021, the Red Malla Observatory<sup>6</sup> monitored more than 190 cases of attacks on the right to protest (until 24 November 2021), in the form of administrative sanctions, prosecutions, arbitrary arrests and excessive use of force by the police. The groups most affected by these incidents have been the ones fighting for housing rights: in this case, 33% of these incidents reported physical aggressions by police forces.

Examples of such instances include:

- **7 April 2021, Madrid:** Several journalists were assaulted by police officers during a rally held by the far-right party despite having identified themselves as journalists. Videos show, for example, journalists Guillermo Martínez, who was covering the Vox rally for *El Salto Diario*, being hit on the back and thrown on the floor by a group of riot police after having explained he was a journalist. The attack was stopped after the police officers realised other journalists were filming them.<sup>7</sup> Journalists have been a group particularly affected by police violence and repression in the context of public demonstrations since the Law on Citizen Security has been applied in a way that curtails freedom of information.
- **21 July 2021, in Tenerife (Canary Islands):** There were police charges against the first peaceful demonstration of the Caravana

Abriendo Fronteras 2021. The Caravana Abriendo Fronteras (literally, "Opening Borders Caravan") emerged in 2016 as an initiative to defend rights of migrants and publicly denounce border policies in Europe.<sup>8</sup>

The disproportionate use of force is also linked to the improper use of riot-control equipment, which violates the right to physical integrity of the demonstrators, as well as the right to freedom of assembly. In this regard, it has been detected that national protocols for the use of materials such as rubber bullets do not respect international standards for the protection of human rights. On the other hand, on numerous occasions, uses contrary to national regulations have also been detected, which have nevertheless taken place under a regime of complete impunity.

For example:

- **13 February 2021, Linares:** The police fired real gunshots (pellet gun) at demonstrators to disperse them during a police<sup>9</sup> riot.<sup>10</sup> Two people were injured and required hospital recovery. No officer has been prosecuted for the aggression since it was "a mistake".
- **16 February 2021, Barcelona:** A young woman lost an eye due to the impact of a foam bullet during the protests for freedom of expression following the arrest of Pablo Hassel.<sup>11</sup> Although the regulations prohibit firing this type of weapon in the upper body, no officer has been prosecuted for the aggression, citing the

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<sup>6</sup> <https://redmalla.net/#/map>

<sup>7</sup> <https://www.publico.es/sociedad/agresiones-periodistas-vallecas-reportero-convierte-testigo-incomodo.html>

<sup>8</sup> [Migración | La policía carga contra una concentración pacífica por los derechos de las personas migrantes en Tenerife - El Salto - Edición General \(elsaltodiario.com\)](https://www.elsaltodiario.com/migracion-la-policia-carga-contra-una-concentracion-pacificas-por-los-derechos-de-las-personas-migrantes-en-tenerife-el-salto-edicion-general)

<sup>10</sup> <https://www.publico.es/sociedad/archivada-denuncia-excesos-policiales-disturbios-linares-dejaron-heridos-bala.html>

<sup>11</sup> <https://www.europapress.es/catalunya/noticia-mossos-investigados-foam-oyo-manifestante-dicen-cumplieron-protocolos-20211014191630.html>

impossibility of identifying the officer who fired the shot.

Last year, some of the main physical attacks against protesters have been related to the use of kinetic impact projectiles (KIPs).

### **Lack of accountability for abuses by police officers**

A recent study by human rights organisations in Spain concluded that, out of 40 cases of victims of the impact of rubber bullets (15 dead, 11 lost the sight in one eye, and other serious injuries), no police officer responsible for the shot have ever been prosecuted.<sup>12</sup>

This lack of accountability points at an endemic problem of lack of transparency with regards to excessive use of force by public officers: Spain has been condemned by the European Court of Human Rights (ECHR) up to 12 times for failing to investigate complaints of unlawful use of force. In the same way, Amnesty International states that many of the analysed allegations regarding police violence show a lack of impartiality and objectivity during their investigation.

Victims of excessive use of force by the police have to face common obstacles, when they want to report their case and see their rights restored: the impossibility of identifying the police officer; lack of impartiality by the police in collecting the evidence; lack of training on human rights by judicial operators; institutional denial of victims' accounts and low compensation rates. Furthermore, in Spain there is no specialised public prosecutor's office that could attend these cases, nor an external mechanism to investigate them.

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<sup>12</sup> For more information, see: [https://novact.org/wp-content/uploads/2021/06/Final-Informe-Balas-de-Goma\\_compressed1.pdf](https://novact.org/wp-content/uploads/2021/06/Final-Informe-Balas-de-Goma_compressed1.pdf)

### **Migrants, women and LGBT+ community are most vulnerable to rights violations**

The investigation *Repression of the feminist movement in Spain* carried out by Novact and Calala – Fondo de Mujeres in 2021 proves how the repression of women, lesbians and trans protests has intensified with the application of the 2015 reform of the Penal Code and the abusive use of the Citizens' Security Law.<sup>13</sup>

In Spain, there is an issue of systemic discrimination against migrants with an irregular administrative status. The lack of access to their rights has specific implications for the freedom of peaceful assembly of this group of people, given that identifications and sanctions of protesters have become the rule - due to the Ley Mordaza's punitive vision of demonstrations - that threatens them with deportation (if identified or sanctioned). Even those migrants with regular status are sometimes afraid to exercise their civic rights, since being sanctioned could mean that they won't be able to renew their residence permit.

### **Uncertainty for the exercise of the right to peaceful assembly during the Covid-19 pandemic**

The lack of common measures to ensure the protection of the right to peaceful assembly and protest all across Spain resulted in an arbitrary application of restrictions, and an unequal application of the law.

In March 2021, demonstrations on Women's Day (8-M) in Madrid were banned in the name of the health emergency. The trade unions UGT, CCOO, with the support of the Feminist Movement and the 8-M Commission, brought appeals to the Constitutional Court for prohibiting the exercise of fundamental rights (assembly and demonstration). The

<sup>13</sup> For more information, see: <https://calala.org/wp-content/uploads/2021/09/Calala-Novact-Represion-Movimiento-Feminista-Espanya.pdf>

Constitutional Court upheld the ban.<sup>14</sup> The same week, always in Madrid, some far-right movement protests were allowed. Therefore, there has been a 'pick and choose' effect on protests. This discretion, and the legal framework that allows it, is regarded as a serious threat to the right to protest.

### **Growing concerns over breaches of the right to privacy in the context of demonstrations**

Civil society organisations have monitored a growing use of activists and protestors' profiling, as well as unlawful use of intelligence against the principle of presumption of innocence. In some cases, protestors had been detained or sanctioned for their participation in protests by being identified only on the grounds of their activism and participation in previous protests.

In this sense, a further worry by human rights organisations is the growing use of recording peaceful protestors faces by police forces. There is an issue with the right to privacy, and the ownership and use of such information for intelligence.

### **The framework for civic organisations' financial viability and sustainability**

The economic and financial viability is really complicated for CSOs working on rule of law and human rights. Rare funding opportunities exist at the national level, and few opportunities at the regional and local level.

The barriers to access to funding are connected with the kind of activity that civic actors conduct. If the NGO works mainly on charity, there are insufficient but large funding

mechanisms. But if the organisation works on "*sensitive issues*" such as police brutality, human rights violations committed by the state, or work rights, funding mechanisms are extremely rare.

Some calls have been launched to ensure the involvement of civic actors in the recovery strategy. At the same time, the main recovery program, which has been NGUE, is mostly addressed to enterprises, marginalizing civic actors of this possible source of funding.

### **Civil society's responses to challenges to democracy, the rule of law and fundamental rights**

In 2021, protests in the streets have been the main channel used by civil society to make their demands heard in front of challenges to democracy, rule of law and fundamental rights.

Beyond protests in the streets, it is also important to highlight the civil society efforts to organise a coordinated response to the reform process of the Citizen Security Law (LOSC) promoted by the government.

CSOs has mobilised themselves through the *No Somos Delito* platform, a broad coalition of more than 100 organisations and social movements, to advocate for a real reform of the law and to eliminate those articles that impose more severe restrictions to freedom of assembly, freedom of expression and freedom of information, representing a threat to rule of law.

This procedure for reforming the LOSC could potentially be an opportunity to establish

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<sup>14</sup> [The Government Delegation in Madrid prohibits all demonstrations of 8-M | Madrid | THE COUNTRY \(elpais.com\)](https://elpais.com)



mechanisms of control to ensure police accountability.

## Recommendations

The measures to ensure an enabling civic space should focus on two main issues. First of all, the Governments should take measures to ensure that the legal framework that regulates public demonstrations guarantees and promotes the exercise of the freedom of peaceful assembly, freedom of expression and freedom of association. In practice, that means taking into account the opinion of international and European institutions, and civil society recommendations for the reform of the Citizens' Security Law. Secondly, the government should ensure that human rights and international standards are respected in the policing of protests.

Specific measures should include:

- Improving transparency on protocols on policing of protest and use of riot materials: they should be public. The assessment of their compliance with international standards should be provided, and civil society should participate in the elaboration and assessment of these protocols.
- Revision of the public order management model: the government and its security forces should design methodologies to facilitate protests that go beyond a criminalising and punitive approach. De-escalation, mediation, and other ways to solve tensions should be explored. These methodologies should be designed with civil society and experts included in the discussion and on the basis of international standards.
- Developing independent mechanisms of oversight of security forces: public bodies independent from the police

should be investigating incidents of abuse and ensuring accountability.

- Developing accountability mechanisms such as a clear identification of police officers, and ensuring its application.
- Taking into account the non-discrimination principle by enforcing a prohibition of racial profiling, and putting measures in place to make sure that people with an irregular administrative status can exercise their right to protest safely.