

Panama: Harassment from the Judiciary threatens freedom of speech and the press

Executive summary

The Republic of Panama ranks tenth among the 22 countries reviewed in the Chapultepec Index of Freedom of Expression and the Press with 55 points. Although freedoms of expression and the press are generally upheld, some institutional actions tend to undermine them. Offenses against honor are frequently cited to initiate court proceedings, which is perceived as a tool for undue pressure on the media and journalists. One case of illegal wiretapping by means of specialized software, still in litigation, as well as another related to leaked private communications, sound the alarm about tampering in the digital domain, which has been free from censorship to date. Although there is a Law of Transparency and Access to Public Information (Ley de Transparencia y Acceso a la Información Pública) in force, as well as steady progress in implementing an Open Government project, guaranteeing access to public information continues to face major challenges.

Introduction

This study period practically begins with the inauguration of a new government in the Republic of Panama (hereinafter Panama). On July 1, 2019, two months after the general election of May 5, 2019, in which 73% of the electoral roll voted, the new Constitutional President and Vice President took office, as well as the new National Assembly [Legislative] and Central American Parliament (Parlamento Centroamericano, PARLACEN) congresspersons, so did mayors, representatives of townships (corregimientos), and councilpersons. The judicial branch was partially renewed in December with the legislative confirmation of three new justices and six deputy justices to the Supreme Court, nominated by the Executive for the period 2019-2024 (Paz, 2019).

The period covered by this report takes place during the first year of the new administration headed by Laurentino Cortizo Cohen, who, in mid-March 2020 – as well as other heads of State in the region – declared a State of National Emergency to address the health crisis caused by the new coronavirus, namely COVID-19. Journalists, media companies and distributors were exempted from the severe mobility restrictions ordered to deal with the pandemic (Ministerio de Salud, 2020).

In general, the media and journalists work in a climate of freedom in Panama, a country experiencing a high economic growth, with rates close to 4.6% over the last five years. During the 2015-2018 period, poverty rates decreased by about three percentage points, albeit marginally in 2019. Despite these figures, serious social asymmetries prevail in the

country, making it the third most unequal nation in the region according to the World Bank (2020). Similarly, since 2016, Panama has been declining in NGO Transparency International Corruption Perceptions Index (Libertad Ciudadana, 2020).

Results analysis

Overall rating

With 55 points, out of a possible 100, Panama can be considered a country with an environment conducive to freedom of expression, but with partial restrictions, Most Central American countries find themselves in such situation, except Costa Rica, which shows a greater degree of freedom (76.75 points), and Nicaragua, which has severe restrictions (16 points).

The three environments analyzed, Legislative, Judicial and Executive, show moderate influence scores that do not reach 4 points in any case. In relation to the realms reviewed, according to the experts surveyed, the environment that has the greatest influence on restrictions is the Legislative (7.83 points), with persecution against the media and journalists who release information or statements considered offensive by senior officials. The Legislative (7.19 points) and Judicial (7.22 points) environments also appear to be unfavorably assessed regarding free speech, as is the case with the Executive, to a lesser extent.

Panama's Criminal Code (Código Penal) makes slander and defamation offenses against honor. They constitute serious felonies when committed on audiovisual or print media or by means of information technology. In these cases, sentencing ranges [a jail term of] 6-12 months or its equivalent in *per diem* fines – for slander – and 12-18 months in prison or its equivalent in *per diem* fines – for defamation (Ministerio Público, 2016).

There is an exemption or suspended sentence for this type of offense when it involves public servants. In these cases, there is no associated penalty, because it is considered a form of citizen control over officials' performance. However, civil liability is not waived. Therefore, penalties established for offenses against honor are essentially of a pecuniary nature and civil lawsuit awards are not capped (Botero *et al.*, 2017).

Environments

Executive

Of the three environments analyzed, the Executive is rated the lowest by the experts surveyed for this study, with 3.7 points. However, the results also reveal that it does not exert a strong influence on any of the realms assessed. The realm rated the lowest by the respondents was C, namely persecution, with 7.08 points. Likewise, Realm A,

regarding information flow and free speech, appears to have a strong influence, with an unfavorable rating of nearly 7 points.

One of the most publicized cases during the study period, although it corresponds to the presidency of Juan Carlos Varela, is the one known as *VarelaLeaks*, a *faux* website which rose to prominence in November 2019 by disclosing supposed WhatsApp messages from a phone allegedly lost by the former president (EFE Servicios, 2019). These messages revealed conversations that the former president had held with the Attorney General, the Comptroller, other high-ranking officials and businesspersons. Hints at allegedly requesting personal favors, peddling influence, and possibly interfering in the handling of cases at the Attorney General's Office by the former president might be inferred. Following this case, the Attorney General tendered her resignation from office (González, E., 2019 a).

In his defense, former President Varela assured that had lost no phones and, although he admitted that the voice in some of the conversations was his, he said that they had been altered. He attributed the leak to phone tapping with Pegasus software, for the use of which former President Martinelli was criminally prosecuted in the so-called *pinchazos* (wiretaps) case.

Various guilds and associations took a stand on an issue exemplifying an outright violation of personal privacy, and called on the authorities to investigate and punish those responsible. In this regard, the Chamber of Commerce of Panama (Cámara de Comercio de Panamá) and the National Journalism Council (Consejo Nacional de Periodismo, CNP) invited Inter-American Commission on Human Rights Rapporteur for Freedom of Expression Edison Lanza to the country. Then, he underscored: "The Latin American region is experiencing a complex situation and freedom of expression is at the center" (Vega Loo, 2019).

Another realm highlighted by those inquired is D, namely sub-realm 1, with 3.63 points. Although the Executive does not actively restrict the free flow of or access to information, there is a perception that media editorial policies are rewarded or punished by means of advertising budget allocations.

In general, pressure by means of government contracts is notorious. The advertising campaign regarding pandemic, for instance, was conducted by private companies from the concerned sector, which, in turn, were directly awarded these contracts (Noriega, 2020). Although there is no overt censorship, high officials of the Executive sometimes publicly state that the media only report on negative aspects of their performance while they silence others more favorable to the government's image.

At the onset of his term, President Cortizo Cohen met with the members of the National Journalism Council, who underscored that this visit was the first in a decade. During the encounter, the president "made a commitment to comply with the universal principles of freedom of expression and the press, as set forth in the Declaration of Chapultepec, sponsored by the Inter-American Press Association (IAPA) and signed by Panama" (Presidencia de la República de Panamá, 2019).

However, following the declaration of the National State of Emergency regarding the pandemic, some groups have expressed their disagreement with the way the press conferences of the health authority have been conducted. Following the disclosure of some data on alleged corruption in the procurement of medical equipment, these addresses were suspended. However, they were subsequently resumed.

During the period under study, the National Authority for Transparency and Access to Public Information (Autoridad Nacional de Transparencia y Acceso a la Información Pública, ANTAI) made progress in implementing the 4th National Open Government Action Plan (ANTAI, 2020) and, along with the National Authority for Government Innovation (Autoridad Nacional para la Innovación Gubernamental AIG), continues to run the site Datos Abiertos de Panamá (Open Data of Panama), on which some government institutions have been releasing data in open format. ANTAI has also acted on citizen complaints demanding transparency in access to public information.

The government has a Public Radio and TV System of educational and cultural nature (SerTV). Its board of directors, chaired by the Minister of Education, is composed of members of the Executive and Legislative branches, the civil society, and the Comptroller General's Office. It consists of one digital broadcast TV station and three radio stations, one of them AM. The National Assembly and the Panama Canal also have digital broadcast TV channels. All the above TV channels also offer streaming over the Internet.

Legislative

According to the experts surveyed, the legislative environment, which has been under serious criticism in connection with acts of corruption, has behaved in such a manner that has occasionally come to constitute a threat to freedom of expression and the press. In the Chapultepec Index of Freedom of Expression and the Press, it is rated as moderately influential (3.63), just slightly behind the executive branch (3.7). However, the results reveal that it is the only one of the environments with strong influence, especially in sub-realm 1, on persecution.

One of the elements that stands out among the actions linked to this environment is the behavior of some lawmakers who, in use of their immunity, make disparaging statements against the media and journalists, most notoriously the case involving Congressman Sergio Gálvez, who hurled harsh invectives against the director of Radio Panama, journalist Edwin Cabrera. This incident was unanimously condemned by several media and such associations as the Forum of Journalists (Fórum de Periodistas), the CNP, and the Panamanian Broadcast Radio Association (Asociación Panameña de Radiodifusión) (El Siglo, 2019).

During the discussion of constitutional reform proposals, there were warnings about the possibility that amendments of some articles would change their meaning and curtail the protections for freedom of expression contained in Articles 4, 37, and 89 of the Political Constitution in force (González, E., 2019 b). It is noteworthy that these changes never

occurred since, following public demonstrations against the process consultation underway, the National Assembly withdrew and shelved the proposed constitutional reforms and the Executive called for a dialogue to review the content thereof (Bustamante, 2019).

Judicial

The judicial environment obtained the highest rating from the experts surveyed, with 3.04 points. The results reveal that this environment has a strong influence on Realms A and C. For Realm A, the score achieved in the item inquiring on free speech stands out, with 7.22 points; and in the C realm, the score related to persecution, with 6.25 points.

Although the overall score is the lowest among the three environments, it was the realm on which most cases were reported, all regarding judicial harassment. This behavior has been described by NGO Libertad Ciudadana (the Panamanian chapter of Transparency International) as a new form of attack on freedom of expression.

Most of the cases occurred during the period under review are linked to the criminal prosecution of former President of the Republic Ricardo Martinelli. Its extensive coverage resulted in numerous criminal and civil lawsuits against the media and newsmen brought by the former president (Álvarez, 2019).

Nevertheless, there were other cases, such as the criminal litigation filed against Congresswoman Zulay Rodríguez Lu by the Attorney General of the Nation, Kenia Porcell, on alleged offenses against honor (slander and defamation) and against the public administration (abuse of authority by a public servant). The claim, on grounds of two tweets on the representative's social media feed, amounted to slightly over \$1,000,000 in damages (Redacción de La Prensa, 2019 a).

Realms

Realm A

According to those surveyed, this realm is strongly influenced by the three environments to practically the same extent, with 6.51 points for the Legislative, 6.71 points for the Judicial and 6.8 for the Executive. Although it can be stated that full freedom of expression exists in Panama, some specific actions have contributed to this perception during the period under analysis. Among these, those conducted by the National Charity Lottery (Lotería Nacional de Beneficencia, LNB) in December 2019 and by National Assembly Vice President Zulay Rodríguez Lu in January 2020 stand out.

By means of an order, National Charity Lottery Director Gloriela del Río classified as confidential, for a ten-year period, information that by nature and under the Law of

Transparency and Access to Public Information is for public access. This administrative act followed a request for information made by journalists who obtained evidence of alleged acts of corruption linking congresspersons to LNB beneficiaries (Libertad Ciudadana, 2019). In reply to requests from the media, several citizens' organizations, and formal complaints at the Office of the Solicitor General of the Government, ANTAI acted to ensure access to public information and opened *ex officio* administrative proceedings to determine possible violations of the Law on Transparency and Access to Public Information. The LNB finally reversed the order, and partly released the information required (González Pinilla, 2019).

For her part, the vice president of the National Assembly, Zulay Rodríguez Lu (Esq.), in an action regarded as reprisal for the coverage of a case in which she was involved, managed to get the Attorney General's Office to issue an injunction on her behalf against journalist Mauricio Valenzuela, who runs a digital media outlet, alleging violence against women and the family. During attempts at interviewing her, National Assembly security detail threatened to remove the above newsperson from the premises of the parliamentary palace (Vega Loo, 2020).

The complaint filed by the congresswoman was of a criminal nature, but she warned that she would also file a civil lawsuit for slander and defamation. The protective injunction prevents a journalist from approaching the locations where the representative is in attendance, as well as from using technological or electronic media that may disturb her. One month after the injunction was granted, the representative accused the reporter of violating it. The digital media joined forces to emphasize that the injunctive relief granted to the congresswoman restricted the exercise of journalism and freedom of expression (Batista, 2020). Previously, Congresswoman Rodríguez Lu had also hurled invectives against La Prensa newspaper, which were rejected by the National Journalism Council (Redacción de La Prensa, 2019 b).

In Panama, the law sets forth the right to reply, retract, or respond; likewise, the law provides for the right to injunction, whereby the affected party may seek legal protection for their honor. Pursuant thereto, the courts may order the reply, retraction, or response sought and, in case of failure to comply, impose fines on the media outlet in contempt according to the seriousness of the disregard. Nevertheless, the Criminal Code, by making slander and defamation as offenses against honor, provides avenues towards curbing freedom of expression and the press.

Freedom of expression and the press is unrestricted in the digital domain. There is a growing amount of native digital media, as well as a steady increase in the use of social media for forums and discussions on various topics, especially in the wake of the pandemic. Although mobile Internet service is reliable and available in major cities, it is not easily accessible in rural and county areas (Urribarri, 2020 a).

During the electoral campaign, which ended on May 2, 2019, there was criticism from the media regarding the ban period established by the Electoral Tribunal for the release of polls, which was restricted to 48 hours prior to election day, a provision not set forth in the country's Electoral Code (Código Electoral). (Gordon, 2019).

Realm B

This realm appears to be well rated by the experts surveyed for this report, in all three environments. The one that achieved the highest score was the Legislative, with only two; the lowest was the Judicial, with 1.33 points.

In Panama, the fundamental right to freedom of association is enshrined in the Constitution, and there is no mandatory affiliation for journalists. In the country, there exist different unions and associations such as the Journalists' Union of Panama (Sindicato de Periodistas de Panamá), the National Association of Journalists of Panama (Colegio Nacional de Periodistas de Panamá, CONAPE) and the Forum of Journalists for the Freedom of Expression and Information.

Similarly, in Panama there is the National Journalism Council (CNP), an institution in which guilds and associations, media outlets, faculties and schools of mass communication coexist. The CNP has a Journalistic Ethics Committee, a self-regulatory body overseeing the activities conducted by the media outlets that conform the consortium.

There is not a press law in Panama governing the journalistic profession. However, for professional practice in government agencies, clearance that may be issued by the CONAPE or by the Journalists' Union of Panama – a professional suitability of sorts – is required. For exercise in private companies, this suitability is not required. In neither case, a professional university degree is required.

Realm C

This realm was the worst rated by the experts surveyed for this report, in connection with actions of the legislative environment (7.83 points), but also of the executive (7.08 points) and the judicial (6.25 points) environments, all regarding the persecution of media and journalists.

The protracted criminal proceedings against former President Ricardo Martinelli, who was indicted for illegal wiretapping during his government and that eavesdropped on journalists too, among other targets, received extensive coverage. This caused civil and criminal prosecution against media outlets, journalists, cartoonists, tweeters, businesspersons, and even public opinion leaders from several print and broadcast media (Agencia EFE, 2019).

The monies claimed in these cases were extremely high, since the legislation does not cap the amounts for them. A single media company, Corporación La Prensa S.A. (Corprensa), faces 12 civil defamation lawsuits and 22 criminal defamation cases, in which the plaintiffs have claimed a total of US\$85,000,000 in compensatory damages. All of the lawsuits faced by Corprensa were brought by high-profile personalities and former

government officials who claim that their reputation has been damaged. Of these lawsuits, 15, totaling \$46,000,000 claimed, are filed by former president Ricardo Martinelli (Quijano, 2020).

In addition to potentially causing self-censorship, lawsuits of this nature, for such high amounts, endanger the financial stability of the media. Panamanian legislation also allows for the freezing of assets of some media outlets, such as print and digital media, but not broadcasting, a measure that, if applied, could put a halt to the continuous, nonstop operation of the media.

Media and journalist organizations, as well as the NGO Libertad Ciudadana, consider these actions judicial harassment of sorts aimed at encouraging censorship and self-censorship. Although not all of them, several of these complaints have been dismissed or subsequently shelved by judges who have granted injunctive relief on a variety of grounds: It has not been possible to establish the possible commission of a crime; the statute of limitations for the alleged offenses has been reached; the actions upon which the claims are based do not constitute punishable behavior; or it has not been possible to identify, in the case of a tweeter, their identity este (Redacción de La Prensa, 2020).

On 9 August 2019, the trial court found former President Martinelli not guilty of the charges against him and ordered his immediate release (BBC, 2019). The plaintiffs and the lawyers for the former president filed an appeal in cassation. Those allegedly affected by the so-called *pinchazos* seeking to reverse the decision and the defense filed to have the motion dismissed. The decision must be issued by the Criminal Chamber of the Supreme Court of Justice. Upon closing date of this report, the case is still pending.

In the items regarding actions against impunity, all three environments scored zero points.

Realm D

Sub-realm 1 shows a slight (2.06 points for the judicial environment) and moderate influence, with 2.94 and 3.63 points for the Legislative and the Executive, respectively.

Although there have been no shutdown, seizure, or expropriation of media outlets, in the wake of a series of reports published by Grupo EPASA (*Panamá-América*, *Crítica*, and *Día a Día*), questioning the behavior of the Attorney General, spokespersons for the media group reported that the Attorney General's Office was exerting undue pressure and denying them access to public information (Día a Día, 2019). The Attorney General's Office accused the group of disinformation to damage the image of the institution. Journalists from *Panamá-América* newspaper were treated disrespectfully by some prosecutors who refused to give them interviews. In response to a leak warning of a possible raid on the news organization (Panamá América, 2019), the Attorney General's Office issued a statement in denial thereof. This raid did not take place.

Sub-realm 2 shows the best ratings by the experts surveyed for this study, with a total of zero points in all environments. There is no record of the existence of mechanisms seeking to control the media indirectly, such as blocking of digital media platforms, pressure on technological intermediaries or vendors of supplies necessary for gathering, producing, or disseminating news.

Conclusions

This study covers the first year of Panama's new government, emerging from general elections in May 2019. A year that, under normal circumstances, could be considered what some call honeymoon with the press, when the media generally await what the actions of public officials will be. In this case, before the administration's first anniversary, an exceptional event occurred, namely the pandemic caused by COVID-19, leading to the declaration of extreme emergency measures.

According to the experts surveyed for the Chapultepec Index of Freedom of Expression and the Press, the three environments analyzed had a slight, moderate, or strong influence. Only one, the Legislative, albeit with 3.63 general points, shows an influence deemed very strong, with 7.83 points, regarding persecution, with landmark cases of lawmakers who have hurled invectives and disparaged newsmen and the media by using their parliamentary immunity.

The judicial environment, with an overall score of 3.04, appears to be strongly influenced by the realms involving actions encouraging free speech with regards to the vast number of criminal and civil lawsuits against the media and journalists. Although these do not originate from the same environment, just because they are admitted, they cause negative consequences to freedom of expression and the press, by distracting from their role and demanding resources for the payment of legal fees, from both media companies and journalists. A step forward towards the protection of guarantees of the right to free expression and the press would be, not only the repeal of slander and defamation as criminal offenses, but also caps for civil lawsuit awards.

As for the Executive, although it appears with the highest general score among the three, 3.7 points, the results do not reveal a very strong influence on any of the realms. The greatest is that associated with actions against persecution and those related to the discretionary use of resources, specifically advertising budget allocations, which could be directed at rewarding or punishing the media for their editorial and informative policies.

Panama joined the Open Government Partnership in 2012 and to date has concluded three Open Government Plans with a cross-section participation. The fourth plan is currently being implemented. Since 2002, Panama has had a Law of Transparency and Access to Public Information, a reform of which is currently under consideration (Bustamante, 2020). Since 2013, with the creation of ANTAI, there has been a governing body exerting authority over transparency, access to public information, and personal data protection.

According to official figures, Internet coverage is close to 70%, but concentrated in the capital region and through extensive use of prepaid mobile networks. Freedom of expression and the press in the digital domain is unfettered and there is a growing number of digital media that have already established an association gathering them. However, there is concern about increasingly frequent social media campaigns to rarify or manipulate the climate of public opinion, with those responsible remaining unidentified to date.

With regards to the 2019 elections, the Electoral Tribunal of Panama created a specialized unit aimed at monitoring the use of mainstream and social media to comply with relevant provisions of the Electoral Code. Likewise, it deployed a campaign, called Digital Ethical Pact (Pacto Ético Digital), to encourage appropriate use of social media and, in turn, warn against the use of digital disinformation schemes, aimed at manipulating the will of the electorate. The unit detected the use of hubs known as call centers and, thanks to the agreement signed with [social media] platforms, the electoral body was able to impose the respective sanctions, although the procedure was long and complicated in some cases (Urribarri, 2020 b).

The phone tapping and leaks cases known as *Pinchazos* and *VarelaLeaks*, respectively, sounded the alarm about the violation of personal privacy, protected as provided for in the country's Political Constitution. In this regard, an issue that should not be overlooked is the regulation of the Personal Data Protection Law (Ley de Protección de Datos Personales), enacted in March 2019, which must be completed so that the law can come into force in 2021. Similarly, attention should be paid to the possible discussion of the draft bill on cyber-crime proposed by the Attorney General's Office, which could stipulate regulations affecting freedom of expression in the digital realm.

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