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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SPAIN

JUDGMENT OF THE CONSTITUTIONAL COURT OF SPAIN OF

19 NOVEMBER 2020*

**translation provided by the Spanish authorities*

CONSTITUTIONAL COURT

Plenary. Judgment no. 172/2020, of 19 November 2020[1]

ECLI:ES:TC:2020:172

The Plenary of the Constitutional Court, composed of Judge Juan José González Rivas, President; Judge Encarnación Roca Trías; Judges Andrés Ollero Tassara, Santiago Martínez-Vares García, Juan Antonio Xiol Ríos, Pedro José González-Trevijano Sánchez, Antonio Narváez Rodríguez, Alfredo Montoya Melgar, Ricardo Enríquez Sancho, Cándido Conde-Pumpido Tourón; and Judge María Luisa Balaguer Callejón, has handed down

IN THE KING'S NAME

the following

JUDGMENT

In the appeal of unconstitutionality No. 2896-2015, brought by ninety-seven members of the Socialist Parliamentary Group, eleven members of the Parliamentary Group *La Izquierda Plural* [United Left (IU), *Iniciativa per Catalunya Verds-Esquerra Unida i Alternativa* (ICV-EUiA) and *Chunta Aragonesista* (CHA)], four members of the Parliamentary Group *Unión Progreso y Democracia* and two members of the Mixed Parliamentary Group of the Congress of Deputies, against Articles 19.2, 20.2, 36.2 and 23, and 37.1 in relation to Articles 30.3 and 37.3 and 7, as well as the first final provision of Organic Law 4/2015, of 30 March, on the Protection of Public Security. The Government and the Congress of Deputies have appeared and made allegations. The rapporteur was Judge Juan José González Rivas, President of the Court.

II. Legal Grounds

1. *Subject-matter of the appeal of unconstitutionality*

The purpose of the present constitutional procedure is to decide on the appeal of unconstitutionality lodged by ninety-seven members of the Socialist Parliamentary Group, eleven members of the Parliamentary Group *La Izquierda Plural* [United Left (IU), *Iniciativa per Catalunya Verds-Esquerra Unida i Alternativa* (ICV-EUiA) and *Chunta Aragonesista* (CHA)], four members of the Parliamentary Group *Unión Progreso y Democracia* and two members of the Mixed Parliamentary Group of the Congress of Deputies, against Articles 19.2, 20.2, 36.2 and 23, and 37.1 in relation to arts. 30.3 and 37.3 and 7, as well as the first final provision of Organic Law 4/2015, of 30 March, on the Protection of Public Security (hereinafter, "OLPPS"), for the violation of Articles 9.3, 10.1, 15, 18.1, 20.1 d), 2 and 5, 21, 23, 24.1, 25.1 and 106, all of them from the Spanish Constitution.

The State Attorney, on behalf of the Spanish Estate, has requested this Court to dismiss the appeal of unconstitutionality in its entirety, on the grounds summarized in the background. Similarly, and for the reasons set out in the background, the lawyer acting on behalf of the Congress of Deputies has requested the dismissal of the appeal with regard to the unconstitutionality of the first final provision of the Organic Law on the Protection of Public Security for violation of Article 23.2 of the Spanish Constitution (hereinafter, "SC").

[1] Hereinafter, judgments of the Constitutional shall be referred to as " STC/SSTC"

The purpose of the present appeal is limited to the prosecution of the grounds for unconstitutionality alleged with regard to the abovementioned provisions of the Organic Law on the Protection of Public Security. This law has been amended by Royal Decree-Law 14/2019, of 31 October, whereby urgent measures are adopted for reasons of public security in matters of digital administration, public sector procurement and ICT; it is a specific reform, limited to giving a new wording to section 1 of Article 8 - relating to the National Identity Card - and therefore has no relevance for the purposes of this constitutional procedure.

2. *Order in the assessment of the grounds for the appeal*

In accordance with the grounds for the objection raised by the appellants, the issues raised shall be examined in the following order: firstly, the complaints raised in relation to the "external body searches" of Article 20.2, regulated in the framework of general powers of the security police, first Section of Third Chapter of the Organic Law on the Protection of Public Security, from the perspective of the right to personal privacy of Article 18.1 SC, in conjunction with the right to human dignity (Article 10) and the right to physical and moral integrity (Article 15 SC). Hereinafter, there will be an examination of the claims of unconstitutionality raised against a number of provisions included in the sanctioning system of Section Two of Chapter V of Organic Law on the Protection of Public Safety.

The assessment will be divided into two sections, taking into account the substantive complaints made by the complainants in relation to (i) Articles 36.2 and 37.1, in conjunction with Articles 30.3 and 37.3 and 7 OLPPS, from the perspective of the right to peaceful assembly (Article 21 SC); and (ii) with Article 36.23, in conjunction with Article 19.2 OLPPS, taking into account the fundamental right of freedom of information [Article 20.1 (d) SC]. Finally, an assessment will be made of the grounds of unconstitutionality attributed to the special regime of Ceuta and Melilla in the First Final Provision of Organic Law on the Protection of Public security, whereby the Tenth Additional Provision of Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration was inserted. Firstly, the procedural grounds which, in the appellant's view violate Article 23.2 SC due to the lack of any connection with the amended rule. Secondly, the substantive reasons resulting from the adoption of a particular system of rejection at the frontier that could be in conflict with *Articles 9.3, 24 and 106 SC.*

3. *Preliminary issues on the subject-matter of the challenged Law: public safety and public security.*

A few considerations should be made about the purpose of Organic Law on the Protection of Public Security, namely on the notion of public security as a legal asset of a collective nature –its scope and limits- whose protection is the responsibility of the State, subject to the Constitution and the law (Article 1.1).

(a) The significance of security, which is guaranteed by the State for all citizens, in the development of a democratic society is undeniable; this is underlined by the Organic Law on the Protection of Public Security which states in its preamble that "freedom and security are a key combination for the proper functioning of an advanced democratic society, security being an instrument for guaranteeing rights and freedoms and not an end in itself". The Constitution itself has conferred relevance on the concept by using the notion of the "public security" in Article 104.1 SC, when defining the mission of the Security Forces and Corps – the protection of the free exercise of rights and liberties and the guaranteeing of the safety of citizens -, as well as "public safety" in Article 149.1.29 SC, by conferring exclusive powers in this matter on the State, without prejudice to the possibility of creating police forces by Self- governing Communities.

The Organic Law on the Protection of Public Security states that the security of citizens is "an essential requirement for the full exercise of fundamental rights and public freedoms" (Article 1.1), and defines it as a set of actions aimed at "protecting people and goods and

maintaining the peace of mind of citizens" (Article 1.2). The legislature offers a concept of safety of citizens that substantially coincides with the one developed by this court to define public safety as a substantive concept for delimiting powers. This is because for the State legislature the concepts of safety of citizens and public safety seem to be synonymous, underpinned by considerations derived from "doctrine and case-law".

This approach makes it necessary to define, first, the notion of public security versus public safety, for the sole purpose to facilitate the subsequent examination of the operational measures provided for in the Organic Law on the Protection of Public Security; namely, whether or not such measures meet the protective purpose of the legal asset so-called "public security". Understanding the protected legal asset by a provision requires, in addition to inferring the intention of the legislature, also examining the purpose of the law in which it is included and its content. It must be borne in mind that public security has been repeatedly included in many of the offences as a requirement for its commission, either in a generic way –its impairment or disturbance – or by limiting it to endangering the life or integrity of people or property. Furthermore, the idea of public security –"and related concepts"- in the legislature's opinion – must be interpreted, as stated in the preamble to the Organic Law on the Protection of Public Security "avoiding generic definitions that justify an expansive intervention on citizens on account of undefined threats and avoiding administrative arbitrariness and a generic power to impose penalties".

b) Since our first judgments and for the purpose of defining the substantive scope of the powers reserved to the State by Article 149.1.29 SC, we have gradually shaped the notion of public safety. In order to determine its scope at the outset, more precise or strict than that of the traditional notion of "public order", and to focus public safety on the activity aimed at "the protection of people and goods (safety strictly interpreted) and the maintenance of the peace or order of citizens, which are inextricably linked and mutually conditioned purposes" (STC 33/1982, of 8 June, LG 3; followed by SSTC 117/1984, of 5 December, LG 4, and 123/1984, of 18 December, LG 3), which comprises a "plural and diversified set of actions, different in nature and content but aimed at the same guiding purpose of the legal asset thus defined (STC 104/1989, of 8 June, LG 3).

In the negative, "not all security of persons and goods, nor all regulations aimed at achieving [public safety] or preserving its maintenance, can be covered under the heading of 'public safety, since if that were the case, practically all the rules of the system would be rules of public safety, and therefore within the power of the State" (STC 59/1985, 6 May, LG 2 in fine; doctrine later reiterated in SSTC 313/1994, 24 November, LG 6; 40/1998, 19 February, LG 49, or 148/2000, 1 June, LG 5, among others). Thus, we have gradually defined the relationship between public safety and state powers on the basis of healthcare (SSTC 33/1982, of 8 June, LG 3; 15/1989, of 26 January, LG 3; 54/1990, of 20 March, LG 3, or 313/1994, of 24 November, LG 6); or with the powers of the Self-Governing Communities in the field of civil protection [SSTC 133/1990, of 19 July, LG 4 c); 31/2010, 28 June, LG 78; 155/2013 of 10 September, LG 4, or 58/2017 of 11 May, LLGG 3 c) and 8), the environment (SSTC 49/2013 of 28 February, LG 12, and 45/2015 of 15 March, LG 6), the enforcement of prison legislation (STC 108/1998 of 8 June, LG 5), or "public entertainment" (STC 148/2000 of 1 June, LG 10), to mention but a few.

In the area of public security, we have included "all those measures or precautions which, aiming at the protection of persons and goods, have the even more specific purpose of avoiding serious potential risks of disturbance of the public order and public peace" (STC 148/2000, LG 10). Thus, we have included "national security" (STC 184/2016, of November 3, LG 3); "cyber security" (STC 142/2018, of December 20, LG 4); "video surveillance systems" (STC 31/2010, LG 109); measures aimed at the prevention of the most potentially dangerous actions in the field of public entertainment (STC 148/2000, LG 6); or some of the typical actions of the administrative police –such as making the exercise of certain activities subject to licensing - [STC 235/2001, of 13 December, LG 9 a)].

We have repeatedly stated that police activity - that is to say, that carried out by the security forces referred to in Article 104 SC - and the administrative functions which are supplementary to and inseparable from it, are "part of the broader field of public safety" (SSTC 59/1985, LG 2 in fine; 104/1989, LLGG 3 and 4; 313/1994, LG 6; 40/1998, LG 46, and 175/1999, of 30 September, LG 5, among others). Nevertheless, “we have said that ‘however relevant they may be, these police activities, strictly speaking, or these police services, do not exhaust the substantive scope of what is to be considered public safety [...]. Other aspects and functions other than those of the security bodies and forces, and attributed to different administrative bodies and authorities [...] undoubtedly comprise that material scope' (STC 104/1989, of 8 June, LG 3)" (STC 148/2000, LG 6).

The case-law of this court has also underlined that “it cannot be maintained that any regulation on activities relevant to public security must always and in any case be included within the scope of the functions of police forces or similar, being obvious that administrative actions can be regulated in this respect which, while responding to purposes of “public safety”, do not fall within the scope of the duties of such corps” [STC 235/2001, LG 8 a)]. Therefore, the material concept of public safety “may go beyond the regulation of actions taken by the “security police”, that is to say, the functions of the security forces and corps” (STC 86/2014, of 24 June, LG 4).

c) Considering the above, public security is presented to us as a material sphere that is part of public safety but in no way equivalent or synonymous. Public security is a legitimate aspiration of any democratic society, expressed as an individual or collective desire. As a legal asset whose protection corresponds to the State, public security can be interpreted as a condition in which all citizens enjoy a situation of peace and stability in coexistence that allows them to freely and peacefully exercise the rights and freedoms granted by the Constitution and the law (STC 55/1990, 28 March, LG 5), which can be achieved through preventive and repressive actions. Thus, the legislature justifies the intervention of the authorities given “the existence of a specific threat or objectively dangerous behaviour which, reasonably, is likely to cause real harm to public security and, specifically, to infringe individual and collective rights and freedoms or to alter the normal functioning of public institutions" (Article 4.3 OLPPS); a prior intervention in order to achieve public security, which is different from the subsequent sanctioning activity.

This concept of public security must be interpreted taking into account the aims pursued (Article 3 OLPPS) and the governing principles of action by the public authorities (Article 4 OLPPS). The aims, insofar as they specify or define the protected legal asset - that is, the aspect of public security whose legal protection is sought - allow us to state that there is a main protected legal asset - public security - together with secondary or specific legal assets that differ in each of the typified administrative offences. Actions or omissions that violate these unique protected legal assets will be a violation of public security, and will be punishable provided that the remaining elements of the type are present. With the aim of guaranteeing public security, the legislator provides for a set of measures and actions which, due to their intensity and nature, may affect the exercise of the rights and freedoms of citizens. For this reason, the measures must be interpreted and applied "in the most favourable way possible for the full effectiveness of fundamental rights and public freedoms, particularly the rights of assembly and demonstration, freedom of expression and information, freedom of association and the right to strike" (Article 4.1, second paragraph, OLPPS).

In the implementation of the measures, the Security Forces and Corps will play an essential, but not exclusive, role. They will be guided by "the principles of legality, equal treatment and non-discrimination, opportunity, proportionality, effectiveness, efficiency and accountability", without prejudice to the relevant administrative and judicial control (Article 4.1, first paragraph, OLPPS).

Public security as an activity aimed at "ensuring an environment of coexistence in which it is possible to exercise rights and freedoms by eradicating violence and removing the obstacles that oppose their fulfilment" (preamble to the Organic Law on the Protection of Public Security) is

an integral part of the broadest notion of public safety; a part of great importance and endowed with its own profiles but which, however, does not cover all the aspects that define the material scope of public safety. This seems to be admitted even by the legislature, when he expressly excludes from the scope of application of the Organic Law in question aspects that, on the contrary, form part of public safety (air, maritime, railway, road or transport security, but safeguarding those provisions on national defence and the regulation of states of alarm, emergency and siege, in any case, Article 2.3).

4. *Challenges regarding "external body searches"*

a) As the background has shown, the first provision to be challenged is Article 20.2 OLPPS, relating to the practice of external body searches by security forces and corps. In any case, it is necessary to reproduce the entire wording of Article 20 of the OLPPS, not only for a better understanding of the claims of lack of constitutionality raised but also for the systematic interpretation of that provision,. It reads as follows:

> "1. External and superficial body searches of the person may be carried out when there are rational indications to assume that they may lead to the discovery of tools, objects or other items relevant to the exercise of the investigative and preventive functions entrusted by law to the security forces and corps.
>
> 2. Unless there is an emergency situation due to a serious and imminent risk for the agents:
>
> (a) The search shall be carried out by an officer of the same sex as the person being searched.
>
> (b) And if it requires parts of the body normally covered by clothing to be left visible, it shall be carried out in a reserved place out of sight of third parties. A written record shall be kept of this procedure, the reasons for it and the identity of the officer responsible for it.
>
> 3. External body searches shall respect the principles of Article 16 (1) and the principle of minimum interference and shall be carried out in a way that causes the least harm to the privacy and dignity of the person concerned, who shall be immediately and comprehensibly informed of the reasons for the search
>
> 4. The searches referred to in this Article may be carried out against the will of the person concerned, by adopting the necessary measures of constraint, in accordance with the principles of adequacy, necessity and proportionality".

A reading of the controversial provision highlights that we are facing the regulation of the practice of external and superficial body searches on persons, establishing as an entitling premise the existence of "rational indications" to assume that they can lead to the discovery of some tools, objects or other relevant items in the exercise of the police functions of investigation and prevention (section 1). The way in which these searches are carried out is regulated in section 2 - object of challenge - although the conditions foreseen for their practice can be suspended from when "an emergency situation exists due to a serious and imminent risk for the agents". In section 3, the principles that in any case must be respected by body searches are made explicit; namely, in addition to those provided for in Article 16.1 OLPPS - proportionality, equal treatment and non-discrimination on the basis of any personal or social condition or circumstance - the principles of minimum interference and of least harm to the privacy and dignity of the person concerned. Finally, section 4 provides for the possibility of using compulsion if it has to be carried out against the will of the person concerned, adopting the minimum necessary measures in accordance with the principles of adequacy, necessity and proportionality.

The appellants argue that the contested provision permits external and superficial body searches - which may even involve total or partial strip search - without any requirement of urgency or necessity, or the requirements of proportionality and reasonableness. For this reason, in their opinion, Article 20.2 OLPPS infringes the right to personal privacy (Article 18.1 SC), in close connection with the right to personal dignity (Article 10.1 SC) and the right to physical and moral integrity (Article 15 SC)).

In response to these claims, the State Attorney argues the convenience, on the one hand, of a systematic interpretation of Article 20 OLPPS, in order to emphasize that we are dealing with a regular police action for the prevention of crime, the regulation of which is necessary; and, on the other hand, to delimit the scope of application of the provision on the assumption that its purpose is not to cover complete nudity. On the basis of case-law of the Constitutional Court and the European Court of Human Rights, it concludes that the regulation of body searches in the Organic Law for the Protection of Public Security complies with the threefold principle of proportionality: (i) it provides for their necessity -protection of public security-; (ii) their basis and justification -avoiding arbitrary and unmotivated action-; and (iii) the way they are carried out, with maximum respect for the principles of non-interference, non-discrimination and protection of the fundamental rights affected, in particular the right to personal privacy (Article 18(1) SC) and to the dignity of the individual (Article 10(1) SC)).

The arguments set out above bring us to the main issue of establishing whether or not the external body searches provided for in Article 20.2 OLPPS entail, in their current form, an infringement of the right to personal privacy (Article 18.1 SC) and, possibly, of the rights to personal dignity (Article 10.1 SC) and physical and moral integrity (Article 15 SC).

b) We must begin our examination by recalling our doctrine on the right to personal privacy (Article 18.1 SC), which is the main right affected by any measure of interference or bodily inspection, thus acting as a rule of constitutionality. Doctrine which, as far as body searches are concerned, is based on STC 207/1996, of 16 December, followed, among others, by SSTC 25/2005, of 14 February, and 206/2007, of 24 September.

The inspections and body searches -as we have stated- "consist of any kind of recognition of the human body, either for the determination of the accused (wheeled recognition procedures, dactyloscopic or anthropomorphic examinations, etc.) or of circumstances relating to the commission of the offence (electrocardiograms, gynaecological examinations, etc.) or for the discovery of the object of the crime (anal or vaginal inspections, etc.)", and therefore "the fundamental right to bodily privacy (Article 18.1 SC) may be affected if it concerns intimate parts of the body, as was the case examined in STC 37/1989 (gynaecological examination), or if it affects privacy" [STC 207/1996, LG 2 a)]. All this is in contrast to the so-called body interventions "consisting of the extraction of certain external or internal elements from the body to be submitted to an expert's report (blood, urine, hair, nails, biopsies, etc.) or exposure to radiation (X-rays, CT scans, MRIs, etc.).) with a view to ascertaining certain circumstances relating to the commission of or participation in the punishable act by the accused", since in these cases "the right which is generally affected is the right to physical integrity (Article 15 SC), in so far as it involves an injury or impairment of the body, even of its external appearance" [STC 207/1996, LG 2(b)]

Thus defined, body searches or inspections may affect the fundamental right to privacy (Article 18.1 SC), in two ways: as a right to bodily privacy and, from a broader perspective, as a right to personal privacy of which the former is a part (STC 37/1989, of 15 February, LG 7). The right to bodily privacy under constitutional protection "is not a physical entity but a cultural one, and therefore established by the dominant criterion in our culture of bodily reserve, so that cannot be interpreted as forced intrusions into privacy those actions which, because of the parts of the body on which they are conducted or the instruments by which they are done, do not constitute, according to healthy criteria, a violation of the person's reserve or modesty" [all, STC 57/1994, of 28 February, LG 5 B)]. Thus, in application of the above doctrine, we have found that "it is unquestionable that the complete nudity of the individuals affect the scope of their constitutionally

protected corporal intimacy, according to the dominant social criterion in our culture" (STC 196/2006, of 3 July, LG 5), and that "even being in a relationship of special subjection [prison environment], individuals, against their will, cannot see themselves in the situation of exposing and exhibiting their naked body to another person, since this would break their corporal intimacy" (STC 57/1994, LG 7).

Moreover, the right to personal privacy, as a fundamental right linked to the individual's personality and deriving from the human dignity (Article 10.1 SC), implies "the existence of an area of a personal and private sphere as opposed to the action and knowledge of others, necessary to maintain a minimum quality of human life, according to the standards of our culture" (SSTC 231/1988, of 2 December; 197/1991, of 17 October; 20/1992, of 14 February; 219/1992, of 3 December; 142/1993 of 22 April, 117/1994 of 25 April and 143/1994 of 9 May), and referred preferably to the strictly personal sphere of private or intimate life (SSTC 142/1993 of 22 April and 143/1994 of 9 May)' [STC 207/1996 of 16 December 1996, LG 3(B), followed by STC 25/2005 of 14 February 2005, LG 6]. This "confers on the individual the legal power to impose on third parties the duty to abstain from any intrusion into the intimate sphere and the prohibition to make use of it" (STC 206/2007, of 24 September, LG 4); since "it is up to each individual to limit the scope of personal and family privacy reserved for the knowledge of others" (STC 196/2006, of 3 July, LG 5).

In view of the above, it must be discarded that external and superficial body searches regulated in Article 20 OLPPS may be characterised as 'bodily interventions' likely to affect the right to physical integrity (Article 15 SC); on the contrary, they may affect the right to personal privacy and, in so far as their practice requires “exposing parts of the body usually covered by clothing” [section 2(b)], they may also affect the right to bodily privacy (Article 18(1) SC). However, we have consistently stated that these are not rights which can be regarded as absolute and any impairment of such rights cannot be described as constitutionally unjustified or unreasonable.

The right to privacy in its dual dimension, physical and personal, is not absolute "since it yields to constitutionally relevant interests, provided that the reduction to be experienced is shown to be necessary to achieve the legitimate aim foreseen, is proportionate to achieve it and, in any case, is respectful of the essential content of the right" (STC 25/2005, of 14 February, LG 6); or, in other words, that "the cutback that it must undergo is based on a legal provision that has a constitutional justification and is proportionate", or "that there is effective consent authorising it" (STC 206/2007, of 24 September, LG 5. Clarifying the previous doctrine, the constitutional case-law sets the following requirements that provide an objective and reasonable constitutional explanation to the interference in the right to privacy: (a) the existence of a constitutionally legitimate purpose; (b) the existence of a specific legal provision for the measure restricting the right, which cannot be authorised solely by regulation [*reglamentos*] (principle of legality); (c) that, as a general rule, it is agreed by means of a reasoned court decision - although without ruling out the possibility that, in certain cases, for proven reasons of urgency and need, and with the appropriate legislative authorisation, such actions may be ordered by the judicial police; and (d) that it is suitable, necessary and proportionate to achieve the purpose pursued (STC 206/2007, 24 September, LG 6; with reference to SSTC 207/1996, 16 December, LG 4; 234/1997, 18 December, LG 9; 70/2002, 3 April, LG 10; and 25/2005, 14 February, LG 6).

c) Having explained our constitutional doctrine, we must now proceed to verify whether the provision of Article 20.2 OLPPS is compatible with the provisions of Article 18.1 SC by fulfilling the requirements required by our doctrine to consider that the possible sacrifice of the fundamental right responds to an objective and reasonable constitutional justification. Or, on the contrary, as the appellants claim, the right to personal privacy is infringed by allowing body searches to be carried out which may involve the partial or total undressing of the individuals concerned, without such action being reported to the Public Prosecutor's Office or to the judicial authority. This requires, as the State Attorney stressed in its written submission, a systematic reading of that provision.

The practice of external and superficial body searches, insofar as they limit the personal and/or bodily privacy of individuals in the context of relationships of general subjection, may be protected, as we have already said, for "justified reasons of general interest duly provided for by law"; that is, for a constitutionally legitimate purpose, specifically set and established in a legally binding rule/under a legal instrument with the status of a law [STC 207/1996, LG 4 A) and B)].

In the present case, the "existence of rational signs" allowing the discovery or the acquisition of "tools, objects or other items" relevant to the exercise of the investigation and prevention functions legally entrusted to the security forces and corps (Article 20.1 OLPPS), in order to preserve public security. External body searches seek to "preserve the security and coexistence of citizens" [Article 3 c) OLPPS], thereby ensuring the proper development and effectiveness of police action, in connection with the "prevention of the commission of crimes or administrative offences" [Article 3 h) OLPPS]. Furthermore, this measure is also legally covered by Article 282 of the Criminal Procedure Act, when it sets out that the judicial police have the duty to verify crimes and carry out “the necessary legal measures to ascertain them and discover who the offenders are, and collect, for all purposes, instruments or evidence of the crime which may be in danger of disappearing, placing them at the disposal of the judicial authority”; and in letters (f) and (g) of Article 11.1 OLSFC, relating to the functions of preventing the commission of criminal acts and securing the instruments, effects and evidence of the crime.

Moreover, the same section 1 of Article 20 OLPPS refers to "external and superficial body search", which seems to refer to the lighter or less invasive form of personal intimacy; that is, the practice of pat-down searches consisting of the external superficial exploration over the clothed body, or other personal objects. However, section 2(b) - the object of challenge - provides for the possibility that body searches may involve "exposing parts of the body usually covered by clothing", and provides for this practice "in a reserved place out of sight of third parties"; the partial undressing of persons affected by the body search or pat-down is therefore permitted. Beyond the assessment that such a forecast deserves, at this point we can state that Article 20 OLPPS does not cover, as the State Attorney has rightly pointed out, the cases of strip searches of individuals affected by body searches; in other words, the possibility that we are faced with such an invasive intervention of bodily privacy as would be the carrying out of strip searches of those affected must be excluded (a question addressed in relation to the prison environment in STC 57/1994, of 28 February, LG 6, and confirmed, among others, by SSTC 204/2000, of 24 July, LG 4; 218/2002, of 25 November, LG 4; 196/2006, of 3 July, LG 5, or 171/2013, of 7 October, LG 4).

d) As we have repeatedly stated, a common and constant requirement for the constitutionality of any measure limiting fundamental rights, including those involving interference with the right to privacy, is established by rigorous compliance with the principle of proportionality, which although it does not confer an autonomous canon of constitutionality on our system, is "a principle that can be inferred from certain constitutional provisions, being in the field of fundamental rights in which it is commonly and particularly applicable, and as such operates as a criterion of interpretation that allows for the prosecution of possible violations of specific constitutional rules" (STC 215/2016, 15 December, LG 8).

Accordingly, in order to verify whether a measure restricting the fundamental right to personal and/or bodily privacy such as that provided for in Article 20. 2 b) OLPPS exceeds the considerations made as to proportionality, three conditions must be met: "suitability of the measure to achieve the constitutionally legitimate aim pursued (suitability test), that the measure is necessary or essential for that purpose, namely that there are no other less burdensome measures which, without imposing any sacrifice of fundamental rights or with a minor sacrifice, are equally suitable for that purpose (necessity test), and, finally that the implementation of the law will bring more benefits or advantages for the general interest than harm to other goods or interests in conflict, or, in other words, that the sacrifice imposed on the fundamental right will not be excessive in relation to the seriousness of the facts and the existing concerns (proportionality test strictly speaking)" (STC 206/2007, LG 6).

The contested provision merely notes that a body search may "require" the exposition of parts of the body usually covered by clothing. The premise that would enable this measure of search or pat-down with "partial strip search", which is more intense in the degree of impairment of the right to bodily privacy -insofar as, according to a healthy criterion, it may imply a violation of reserve or modesty of the individual-, would be none other than that provided, in general, in Article 20.1 of the OLPPS: that is, the existence of "rational signs" that may lead to the discovery of tools, objects or items relevant to the fulfilment of the police functions of investigation or prevention.

With regard to objects whose search may justify police action, Article 18.1 of the OLPPS provides that law enforcement officers may carry out the necessary inspections on individuals - and also on property and vehicles - to prevent “the illegal carrying or use of weapons, explosives, dangerous substances, or other objects, instruments, or means that generate a potentially serious risk for persons, which could be used to commit a crime or alter public safety” on public roads, places and premises. In terms of the facts or circumstances that may trigger police intervention, Article 16.1 OLPPS specifies that they shall only be necessary when they are required to investigate and prevent crimes, as well as for the sanctioning of criminal and administrative offences. The said police intervention shall be, in any case, justified - according to Article 4.3 OLPPS - "by the existence of a specific threat or objectively dangerous behaviour that is reasonably likely to cause real harm to public security and, in particular, to infringe individual and collective rights and freedoms or to alter the normal functioning of public institutions.”

If the functions of investigation and prevention of Articles 20.1 and 16.1 are linked with the facts and circumstances of Article 18.1, we can assume that external and superficial body searches may be carried out, which may even involve partial strip search, when there are rational signs that the aforementioned objects are being carried and may be used with the aim of committing a crime or offence, or of altering public security. This action satisfies the compliance with the principle of proportionality, as it responds to a legitimate aim - the prevention of the commission of crimes or administrative offences and the preservation of public security and coexistence - and is suitable and necessary for its achievement.

Furthermore, with the exception of emergency situations - where there is a serious and imminent risk for the officers involved - the search will be carried out by an officer of the same sex and in a reserved place out of sight of third parties, thus reducing the interference with the individual's privacy. In addition, body searches must be carried out, in any case, with respect for the principles of minimum interference, least harm to the privacy and dignity of the individual concerned, and suitability, necessity and proportionality, equal treatment and non-discrimination (Articles 20.3 and 4, and 16.1 OLPPS).

The appellants also criticize the fact that the provision does not require the Public Prosecutor's Office or the judicial authority to be informed of the searches carried out in "partial strip search", but merely provides that the search should be recorded in writing, indicating the reasons for it and the identity of the officer. This claim of lack of constitutionality, although irrelevant in view of the above considerations, cannot, in any case, be accepted in accordance with our well-established doctrine. With regard to the practice of proceedings that constrain the constitutionally protected scope of the right to privacy "in STC 37/1989, of 15 February, we said that it was 'only possible by court decision' (Seventh Legal Basis), although we did not rule out the possibility that, in certain cases, and with the appropriate legislative authorization (which did not exist in that case), such actions may be ordered by the judicial police (Eight Legal Basis)', and must in any event be reasoned in order to “determine the balance between the fundamental right concerned and the constitutionally protected and pursued interest, which makes it clear that the measure must be adopted (SSTC 37/1989 of 15 February 1989 and 7/1994 of 17 January 1994, among others)” [STC 207/1996 of 16 December 1996, LG 4 (C) and (D)].

Finally, we believe that Article 20.2(b) does not violate the right to bodily privacy under Article 18.1 SC, and we therefore reject its unconstitutionality.

5. *Review of the penalty regime under the Organic Law on the Protection of Public Security: general approach.*

(a) The appellants then set out the claims of unconstitutionality raised in the complaint regarding some of the provisions defining the penalty regime in Section Two, Chapter V of the Organic Law on the Protection of Public Security. In some cases because they represent an unjustified restriction of the right of assembly enshrined in Article 21 SC which affects its essential content and produces chilling effects in its exercise. Such is the ground of the main claim or *causa petendi* in relation to Articles 36.2 and 37.1, and Articles 30.3 and 37.3 and 7. However, an examination of the issue thus raised cannot be separated, because of its obvious connection, from the requirements that, from the principle of legality in matters of administrative sanctions (Article 25.1 SC) and legal certainty (Article 9.3 SC), follow for the legal definition of the offences. And this, taking into account that the appellants themselves invoke - in response to the specific provision at issue - the lack of specific prejudice of the principle of taxativity, either expressly (Article 37.7 OLPPS) or indirectly (Article 37.1, in conjunction with Article 30.3 OLPPS); and meanwhile, the State Attorney bases the constitutionality of the provisions at issue on strict compliance with the principle of legality of penalties and legal certainty

Under Article 36.23 - in conjunction with Article 19.2 - the claim is based on the fact that the right to information protected by Article 20.1 (d) SC is affected by a prior and disproportionate restriction, as prior censorship - detrimental to Article 20.2 SC - is imposed and the non-judicial seizure of information is allowed, thereby breaching Article 20.5 SC. To this must be added the violation of the principles of certainty of the law (Article 25.1 SC) and legal certainty (Article 9.3 SC), as it is impossible for the average citizen to know whether or not his conduct fits into the type of sanction described (jeopardizing the success of a police operation or the safety of the officers or their family

Once the main complaints raised by the appellants have been outlined, and before dealing with their specific examination, we will recall, for methodological reasons, the most relevant aspects of our doctrine on the sanctioning power of the Administration and, in particular, on the principles of legality in sanctioning matters (Article 25.1 SC) and legal certainty (Article 9.3 SC), given their mutual connection; this doctrine will be applicable to the prosecution of the provisions being challenged. All the above without prejudice to the subsequent inclusion of our doctrine on the fundamental rights of assembly and information whose violation is attributed to the contested provisions.

(b) According to the well-established doctrine of this court - from the early SSTC 18/1981, of 8 June, LG 2; 77/1983, of 3 October, LG 3, and 42/1987, of 7 April, LG 2 - the public administration in the exercise of its sanctioning power is subject to both the fundamental principles derived from Article 25.1 SC - "whereas the principles underlying the criminal law system are applicable, with certain nuances, to administrative law involving penalties, given that both are an expression of the State's *ius puniendi*"- (SSTC 243/2007, of 10 December, LG 3, and 70/2008, of 23 June, LG 4), as well as to the procedural guarantees under Article 24.2 SC, "albeit with the modulations required to the extent necessary to preserve the essential values underlying Article 24.2 SC and the legal certainty guaranteed by Article 9.3 SC, insofar as they are compatible with its very nature" (SSTC 197/2004, of 15 November, LG 2, and 145/2011, of 26 September, LLGG 3 and 4, and those cited therein).

(c) The principle of criminal legality (Article 25.1 SC), which includes the principle of legality of administrative offences, is organized through a double guarantee: substantive and formal. In the substantive order and with absolute scope, the guarantee corresponds to "the requirement of regulatory pre-establishment of the offending conduct and the corresponding penalties with the greatest possible precision, so that citizens can know in advance the scope of what is prohibited and thus foresee the consequences of their actions" (STC 145/2013, of 11 July, LG 4, and the judgments cited therein). As we have stated, the substantive guarantee articulates a double mandate, relating to the principles of taxativity and typicality.

On the one hand, the principle of taxativity or *lex certa* is addressed to both the legislator and the regulatory authority, requiring them, in accordance with the principle of legal certainty (Article 9. 3 SC), the "maximum possible effort" in the definition of criminal offences, enacting specific, precise, clear and intelligible rules (STC 185/2014, of 6 November, LG 8), "which means that it is not constitutionally possible to admit such broad, vague or undefined wording that its effectiveness depends on a practically free and arbitrary decision by the interpreter and judge" (STC 104/2009, of 4 May, LG 2). However, this does not preclude "the use of undefined legal concepts, although their compatibility with Article 25.1 SC is subject to the possibility that their implementation is reasonably feasible under logical, technical or experiential criteria, so that the nature and essential characteristics of the conduct comprising the offence in question can be foreseen with sufficient certainty" (STC 151/1997, of 29 September, LG 3). In any case, the requirement of a sufficient degree of certainty and security in light of Article 25.1 SC is reinforced in the case of administrative sanctioning powers exercised in the context of a relationship of overall supremacy (STC 305/1993, of 25 October, LG 5).

On the other hand, the principle of typicality is addressed to those who apply the law, "obliging them to abide, not by the rule of prohibition against arbitrary actions on the part of public authorities, manifest error or manifest unreasonableness derived from Article 24 SC, but by a stricter rule of reasonableness, which is decisive in cases where the boundary delimited by the sanctioning norm is blurred by its abstract nature or by the very vagueness and versatility of the language" (STC 145/2013, of 11 July, LG 4). And from this perspective, the principle of typicality, indissolubly linked to the principle of legal certainty (Article 9.3 SC), results in "the need for the administration in the exercise of its sanctioning powers to identify the legal basis of the penalty imposed in each sanctioning decision. In other words, the principle of typicality requires not only that the type of offence, the penalties and the relationship between infringements and penalties be sufficiently predetermined, but also imposes the obligation to state in each specific sanctioning act the basis on which that predetermination has been made. And, in the event that this rule has regulatory status, what is its legal coverage, except for those cases in which, despite not expressly identifying the legal basis of the penalty, it is implicitly and undisputedly identified" (STC 104/2009, of 4 May, LG 2)

d) The formal guarantee “refers to the necessary status of the rules defining that behaviour and regulating those penalties, inasmuch as, as this court has repeatedly pointed out, the term 'current legislation' contained in said Article 25.1 is expressive of a reservation of law in sanctioning matters" (STC 166/2012, of 1st October, LG 5, citing STC 77/2006, of March 13, LG alone, and judgments cited therein). But as we have also pointed out, with regard to administrative violations and penalties "the scope of the legal reserve cannot be as rigorous as it is with regard to criminal types and penalties in the strict sense, both for reasons related to the constitutional model of distribution of public powers and for the somewhat unescapable nature of regulatory power in certain matters, or, finally, for reasons of caution or opportunity" (STC 26/2005 of 14 February, LJ 3; followed by STC 34/2013, of 14 February, LJ 19).

Therefore, the formal guarantee "has a relative or limited effectiveness in the area of administrative penalties, since it is not possible to exclude regulatory collaboration in the actual task of classifying the infringements and assigning the corresponding sanctions, although it must be excluded that such referrals make independent regulation possible and not clearly subordinated to the law. Thus, the formal guarantee implies that the law must contain the establishment of the essential elements of the unlawful behaviour and the regulation can only correspond, if necessary, to the development and accuracy of the types of infringements previously established by law (for all, SSTC 161/2003, of 15 September, LG 2, or 26/2005, of 14 February, LG 3)". (STC 242/2005 of 10 October 2005, LG 2).

6. *Infringements related to events, meetings and demonstrations in public places.*

(A) The appellants challenge some of the provisions where a set of public actions, assemblies or demonstrations have been considered an offence, either because the offending

behaviour is actually the holding of the assembly or the demonstration in a particular place –outside the Congress, the Senate or the Legislative Houses of the Self-Governing Communities- Article 36.2 OLPPS, harming public security; either because those legal requirements of decisions taken by the authorities concerned have been breached -Articles 37.1, 3 and 7 OLPPS. At the same time, Article 30.3 OLPPS is invoked to extend the scope of responsibility of individuals, defining who shall be considered as organizers or promoters of meetings in public places or demonstrations. The appellants claim that this set of provisions restricts the essential content of the fundamental right of assembly (Article 21 SC) to a minimum, while at the same time producing chilling effects in its exercise.

(B) Taking into account the core of the appellant's and prior to the examination of the specific claims of unconstitutionality, it is necessary to recall our doctrine on the essential content and limits of the fundamental right of assembly (Article 21 SC) –of which the right of demonstration is one part; a doctrine that relates to that of the European Court of Human Rights.

(a) The right of assembly is (i) a collective form of freedom of expression exercised through a temporary association of people, which works as an instrumental technique at the service of the exchange or exhibition of ideas, the defense of interests or the disclosure of problems and claims, thus providing a channel for the principle of democratic involvement in a social and democratic State subject to the rule of Law as proclaimed in the Constitution; (ii) an individual right as regards its holders and a collective right in exercising it; and (iii) whose defining elements are the subjective –a group of people-, the temporal –temporary period-, the target –the lawfulness of the purpose- and the real or objective –the place to be held [for all STC 85/1988, 28 April, LG 2; and then followed, among others, by SSTC 66/1995 of 8 May, LG 3; 196/2002 of 28 October, LG 4; 284/2005 of 7 November, LG 3; 90/2006 of 27 March, LG 2(a); 170/2008 of 15 December, LG 3; 38/2009 of 9 February, LG 2, and 193/2011 of 12 December, LG 3]

The definition of this right as an expression of the principle of democratic involvement becomes even more relevant since, in practice, for many social groups, such a right is "one of the few means available to publicly express their ideas and claims" (SSTC 66/1995, 8 May, LG 3; 196/2002, 28 October, LG 4; 195/2003, 27 October, LG 3; 110/2006, 3 April, LG 3; 301/2006, 23 October, LG 2, and 170/2008, 15 December, LG 3). Moreover, freedom of assembly, as a collective form of freedom of expression, is closely linked to political pluralism insofar as it contributes to the formation and existence of public opinion "so that it becomes a necessary prerequisite for the exercise of other rights inherent to the functioning of a democratic regime, such as precisely the rights of political involvement of citizens" (STC 170/2008, 15 December, LG 4). Al already stated in the judgment of the Constitutional Court 101/2003, of 2 June, LG 3 "without free public communication, other rights protected by the Constitution would be deprived of any real content, and the representative institutions would be confined to mere forms and the principle of democratic legitimacy set out in Article 1.2 SC, which is the basis of all our legal and political order, would be completely distorted."

Such an approach to the right of assembly highlights its close link with the right of expression [Article 20.1 a) SC], and both of them with direct and representative democracy (Article 23.1 SC). This link has also been emphasized by the European Court of Human Rights, which describes Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), freedom of expression, as *lex generalis* in relation to Article 11 (freedom of assembly), which is a *lex specialis*, without denying the latter its autonomous role and particular sphere of application (ECtHR's judgment of 15 October 2015, case *Kudrevićius and others v. Lithuania*, § 85 and 86, and the case-law cited therein)

(b) Article 21.1 SC defines the essential content of the right of assembly in a twofold sense: firstly, by providing that its exercise "shall not require prior authorization", because "the exercise of such fundamental right is required for its immediate and direct effect, and cannot be considered as a right which requires statutory form (STC 66/1995, of 8 May, LG 2) and secondly, by excluding from the content of the fundamental right public meetings or demonstrations which

are not "peaceful and unarmed", namely violent or armed [SSTC 56/1990, of 29 March, LG 5; 66/1995 of 8 May 1995, LG 3, or 196/2002 of 28 October 2002, LG 4(b)].

This has been considered by the European Court of Human Rights in restricting the scope of application of Article 11 ECHR to "peaceful assemblies", excluding those where the organizers and participants have violent intentions, incite violence or otherwise reject the foundations of a democratic society (ECtHR's judgments of 2 October 2001, case *Stankov and United Macedonian Organisation Ilinden v. Bulgaria*, § 77; of 23 October 2008, case *Sergey Kuznetsov v. Russia*, § 45; of 21 October 2010, case Alekseyev *v. Russia*, § 80; of 18 June 2013, case *Gün et al. v. Turkey*, § 49; or of 15 October 2015, case *Kudrevićius et al. v. Lithuania*, § 92). Such peaeful nature is not altered by the fact that in the meeting or demonstration some ideas are expressed or purposes are pursued that may annoy or cause offence to other people or groups (ECtHR's judgments of 2 February 2010, case *Christian Democratic People's Party v. Moldova*, § 27, or of 15 October 2015, case *Kudrevićius and others v. Lithuania*, § 145), because "the content of the ideas or claims that are intended to be expressed and defended through the exercise of the right of demonstration and public gatherings cannot be subject to controls of political timeliness or to assessments in which the system of values that underpin and give cohesion to the social order at a given historical moment serves as a standard", unless, of course, the content of the messages is illegal (STC 66/1995, of 8 May, LG 3).

c) However, Article 21.2 SC does not define the content of the right of assembly but instead it defines the limits for its exercise (STC 66/1995, of 8 May, LG 3). We are not, therefor, dealing with an absolute or unlimited right, but its exercise may be subject to certain adjustments or limits, both those specifically provided for in the constitutional text itself, "and those imposed by the need to prevent an excessive exercise of the right from colliding with other constitutional values" (SSTC 42/2000, of 14 February, LG 2, and 193/2011, of 12 December, LG 3). Limits which must be reasoned and necessary to achieve the aim pursued, taking into account the proportionality between the sacrifice of the right and the situation in which the individual on whom it is imposed is found and, in any event, respecting its essential content (STC 195/2003, of 27 October, LG 7, and those cited therein; doctrine more recently followed by STC 24/2015, of 16 February, LG 4).

d) The exercise of the right of assembly is subject to the fulfilment of a prerequisite: the duty to prior notification to the relevant authorities (Article 21.2 SC and Articles 8 and 9 of Organic Law 9/1983, of 15 July, on the Right of Assembly, OLRA). This Constitutional Court has declared that the duty of prior notification does not constitute a request for authorization, "but merely a declaration of knowledge so that the administrative authority may adopt the appropriate measures to enable both the free exercise of the demonstrators' right and the protection of rights and assets owned by third parties, being entitled, in order to achieve such objectives, to modify the conditions of the exercise of the right of assembly and even to prohibit it, provided that the reasons required by the Constitution concur, and after making the appropriate assessment of proportionality" (STC 66/1995, LG 2).

Hence, we have already argued from the outset that failure to comply with this constitutional requirement could result in "a breach of the power to prohibit under Article 21.2, thereby making it possible to act against the law, abusively and even in the absence of good faith", so that "the sole right of assembly in a public place recognized in Article 21.2 necessarily has to be exercised with prior notice to the authority" (STC 36/1982, 16 June, LG 6; followed also by STC 42/2000, 14 February, LG 2).

Similarly, in the European Court of Human Rights' view, such requirements –as prior notification- do not run counter to the right of assembly protected by Article 11 of the Convention, by reconciling its exercise with the rights and lawful interests of others -including the freedom of movement-, but also the aim of prevention of disorder or crime (ECtHR's judgments of 7 October 2008, case *Eva Molnár v. Hungary*, § 37; of 27 January 2009, case *Samüt Karabulut v. Turkey*,

§ 35; 10 July 2012, case *Berladir and others v. Russia*, § 39 and 42; 15 October 2015, case *Kudrevićius and others v. Lithuania*, § 147 and 148).

Moreover, with regard to the belatedness of an administrative decision imposing conditions on the exercise of the right of assembly, we have pointed out that in addition to implying a breach of ordinary lawfulness –in any case- , it may also entail a violation of the fundamental right of assembly and therefore have constitutional significance; this is the case, for instance, when such delay "is due to a delaying tactic in order to prevent or hinder the exercise of the right or when it prevents the courts from ruling before the date of the meeting scheduled by the organizers [STC 66/1995, LG 2; followed by SSTC 90/2006 of 27 March, LG 2 e), and 24/2015 of 16 February, LG 3].

e) The second requirement provided for in Article 21.2 SC in order to limit, adjust or even ban the exercise of the right of assembly is that "there are well founded grounds to expect a breach of public order, involving danger to persons or property". Regarding the content of the limit set forth, in accordance with the doctrine stated in the aforementioned STC 66/1995, LG 3, the concept of public order with danger to persons or property "must be assessed in the framework of the constitutional provision to which it belongs, namely as a limit to the fundamental right of assembly in places of public circulation"; and, from this perspective, "it refers to a *de facto* situation, the maintenance of order in the substantive/material aspect in places of public circulation, not to order as synonymous of respect for the legal and meta-legal principles and values that are at the heart of social cohabitation and are the foundation of the social, financial and political order". Furthermore, we have explained that disturbance of public order "is not synonymous with the use of violence against persons or property by those attending the meetings… If the clause "with danger to persons or property" were synonymous of non-peaceful assembly, there would be no alternative but to ban it, since it would be an action unrelated to or not included in the aforementioned right" (STC 66/1995, of 8 May, LG 3).

Having regard to the foregoing, the possibility to ban the holding of meetings in places of public circulation or demonstrations requires the existence of "well-founded grounds" to conclude that a "situation of substantial disorder' may arise in the place of public circulation concerned (inter alia, SSTC 42/2000 of 14 February 2000, LG 2; 284/2005 of 7 November 2005, LG 3; and 90/2006 of 27 March 2006, LG 2(b)). In order to ban a concentration for "well founded grounds" it must be understood that "the mere suspicion or the possibility that it will produce such a disturbance" is not sufficient, "but the person who takes this decision must possess sufficient objective data, derived from the factual circumstances of each case, from which any person in a common situation could reasonably conclude, through a logical process based on criteria of experience, that the concentration will certainly produce the referred public disorder - obviously, with all the certainty or security that can be demanded from a prospective reasoning applied to the field of human behaviour" (STC 66/1995, of 8 May, LG 3). And "material disorder" is to be understood as "that which prevents the normal development of citizen coexistence in aspects that affect the physical or moral integrity of individuals or the integrity of public or private property" (STC 66/1995, of 8 May, LG 3.

Accordingly, it can be concluded that difficulties in circulation or public transit arising from the instrumental occupation of the roads by the exercise of this right of assembly only in very specific cases - such as those which cause circulatory collapse which makes it impossible to provide essential services affecting the safety of persons or goods – involve a disturbance of public order with danger to persons or goods, and this because in a democratic society the urban space is not only an area of circulation, but also an area of participation [SSTC 59/1990, of 29 March, LG 8; 66/1995, 8 May, LG 3; 90/2006, 27 March, LG 2(c); and 193/2011, 12 December, LG 4]. We have even ruled out that the repeated exercise of the right of assembly would in itself constitute a breach of public order because it would alter the balance of all the rights concerned (STC 24/2015, 16 February, LG 4, and the judgments cited therein); notwithstanding that, in certain cases - such as when the intention is to occupy a space indefinitely or for an excessively

long period - the exercise of such rights may be conditioned in a reasoned manner or prohibited if necessary (STC 193/2011, 12 December, LG 5, and the judgments cited therein)

The European Court of Human Rights has expressed the same view, considering that any demonstration in a public place may cause a certain level of disruption to ordinary life - including disruption of traffic - which in principle must be tolerated so that the right of assembly is not devoid of substance, but which is not justified in any case, nor for any inconvenience - such as the complete blocking of essential traffic routes [ECtHR's judgment of 5 March 2009, *Barraco v. France* case, § 43 and 48, and of 15 October 2015, *Kudrevićius and others v. Lithuania* case, § 155, 170 and 173, and those cited therein].

Where the competent authority, after weighing all the specific circumstances surrounding the intended meeting, concludes that there are indeed reasonable grounds for prohibiting the meeting, the following shall be done: "(a) the relevant decision must be reasoned (STC 36/1982); (b) the decision must be substantiated, i.e., to provide the reasons which have led it to conclude that, in case the meeting takes place, the proscribed disturbance of public order will occur; and (c) justify the impossibility of taking the necessary preventive measures to overcome those dangers and to allow the effective exercise of the fundamental right" (SSTC 66/1995 of 8 May 1995, LG 3, and 42/2000 of 14 February 2000, LG 2). In any event, before prohibiting the exercise of the fundamental right, the relevant authority must "propose, applying criteria of proportionality, those amendments to the date, place or duration so that the meeting can take place, since the concentration can only be prohibited if, due to the circumstances of the case, these powers to make amendments cannot be exercised" (STC 42/2000, of 14 February, LG 2). Yet if doubts remain about the existence of undesirable effects on public order, "a systematic interpretation of the constitutional provision entails the necessary application of the principle of *favor libertatis* and the consequent failure to prohibit the meeting from taking place" (STC 66/1995, 8 May, LG 3).

The possibility also exists of prohibiting meetings or demonstrations when the limits are violated while they are taking place. In such cases, exceeding the limits places the participant in the rally outside the fundamental right of assembly. This is why "the authority may adopt, within the scope of the principle of proportionality, the measures it considers necessary for the maintenance of that order, avoiding the aforementioned danger to persons, goods or constitutional values. Hence, the constitutional legitimacy of these measures depends on the existence of the *de facto* assumption enabling their adoption: that the participants in the demonstration have exceeded the limits of the right of assembly or have not fulfilled the duty of prior notification. Therefore, if necessary, proof of the existence of these circumstances will be provided for the authority that requires compliance with the aforementioned limits (STC 56/1990, of 29 March, LLGG 6 and 9)" (STC 42/2000, LG 2).

In that same vein, the European Court of Human Rights has interpreted the term "restrictions" –interferences- of the right of assembly ex Article 11 ECHR as including measures taken before or during an assembly and those, such as punitive measures, taken afterwards [ECtHR's judgment of 26 April 1991, *Ezelin v. France*, § 39; 3 October 2013, *Kasparov and others v. Russia*, § 84; 12 June 2014, *Primov and others v. Russia*, § 93; 31 July 2014, *Nemtsov v. Russia*, § 73). Whenever the right of assembly is restricted, it carries out a threefold test regarding its compliance: the restrictive measure is prescribed by law; the restriction pursues one or more legitimate aims (protection of rights or interests); the measure is necessary in a democratic society, as an overriding social necessity for the achievement of the aim or aims in question [ECtHR's judgment of 11 April 2013, *Vyerentsov v. Ukraine*, § 51, and of 15 October 2015, *Kudrevićius and others v. Lithuania*, § 102].

C) Following the presentation, in its essential features, of our doctrine on the right of assembly, (Article 21 SC), we will begin with the exam of the complaints raised with regard to Article 36.2 OLPPS, that qualify a serious infringement as:

> "The serious disturbance of citizen security that occurs on the occasion of meetings or demonstrations outside the Congress of Deputies, the Senate and the Assemblies of the

Autonomous Communities, even if they are not sitting, when it does not constitute a criminal offence".

The appellants believe that this provision involves an unjustified restriction of the fundamental right of assembly and demonstration (Article 21 SC) for two main reasons: on the one hand, the legal asset to be protected is unjustified, since the aim of guaranteeing the independence and inviolability of parliamentary activity, *ex* Article 77 SC, only becomes meaningful when the Legislative Chambers are sitting. And, on the other hand, its application does not require compliance with the limits specifically provided for in Article 21.2 SC, since the simple absence of prior notification provokes "a serious disturbance of public security."

The State Attorney's Office rejects that the type of infringement is undefined and maintains that the protected legal asset protected is both parliamentary buildings or headquarters, given their special institutional significance, and the parliamentary activity itself. Thus, its application is appropriate when certain public disorders occur outside parliamentary houses which could hinder or disturb the legitimate exercise of their functions, without preventing it or representing an attempt to invade them.

According to those arguments, the present appeal falls within the scope of what are constitutionally permissible restrictions on the right of assembly. The decision on this controversial question requires (a) examining what constitutional values the exercise of the right of assembly and demonstration in front of parliamentary seats serves, (b) defining the meaning of the legal provision of restriction of this fundamental right under Article 36.2 OLPPS; (c) verifying what legitimate constitutional purposes this restriction is addressed to and whether it is suitable to achieve it; and, finally, (d) verifying whether Article 36.2 OLPPS pursues these purposes in a proportionate manner.

(a) On the first question, it should be reiterated that urban areas are not only areas of circulation but also areas of participation (SSTC 66/1995 of 8 May 1995, LG 3, and 193/2011 of 12 December 2001, LG 4). Furthermore, from the point of view of democratic participation relevant to the right of assembly, the different divisions of urban space need not be indifferent to the organizers of a meeting, who may prefer some locations to others because they are more suited to the effectiveness of the message they intend to convey

.

As the court has stated, the "place of concentration" is of central importance in shaping the right of assembly, "since it is closely linked to the objective of promoting the views and claims pursued by the promoters, so such location therefore affects the effective exercise of the right. In fact, in certain types of meetings, the venue is the necessary condition for the organizers to be able to exercise their right of assembly in places of public circulation, since it depends on the physical space in which the meeting takes place that the message to be conveyed reaches its main recipients directly" (for all, STC 66/1995, 8 May, LG 3).

The areas outside the houses of Parliament are places that the organizers of a meeting or demonstration may consider particularly suitable to exercise the right of assembly in places of public circulation and demonstration for two distinct reasons.

The first reason is related to the function of the legislative body and becomes relevant when it is sitting in one of its formations. Those who convene the meeting may consider it necessary to hold it at the headquarters of the legislative body and during the time that it is sitting in one of its formations, as they believe that expressing their concerns in such a place and at that time is the most appropriate way for "the message to be conveyed reaches its main recipients directly " (for all of them, STC 66/1995, of 8 May, LG 3). Should this be the only argument that could motivate the organizers to choose to hold the meeting outside the parliamentary houses, they could only assert this locational preference as long as the *Cortes Generales* [the Congress of Deputies and the Senate] were operational in one or other of their forms of action

However, this is not the only explanation that, in accordance with the communication of ideas and demands under Article 21 SC, may lead the organizers to locate the meeting before parliamentary houses. There is a second reason for taking this decision, which is separate from the activity of the *Cortes* and relates more to its special institutional value. The legislative body, even if it is not hosting parliamentary events, retains its high institutional relevance intact and this fact may constitute sufficient justification for the organizers to prefer this venue over any other to carry out a specific exercise of the right of assembly or demonstration.

From the foregoing, the court concludes that the proper meaning of the law allows organizers of meetings or demonstration to choose to hold them outside parliamentary houses, whether some of their bodies are sitting at the time or are inactive. Article 21 SC precludes, in principle, the authority from prohibiting such meetings merely because they are intended to take place outside parliamentary houses. It may prohibit them only if it is justified by the fact that a particular meeting of that kind presents specific circumstances which reasonably and proportionately justify the restriction of the fundamental right under Article 21 SC

Such criterion is also stated in the ECtHR's judgment of 27 November 2012, in the *Sáska v. Hungary* case, § 21 to 23, which examined the prohibition to hold a meeting outside the Parliament on a day when none of its organic formations had any activity scheduled. The European Court of Human Rights holds (i) the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of Article 11 ECHR; and (ii) that the sole reason proposed by the police to ban the meeting (namely, that it would affect the work of MPs) was not a restriction on the right of assembly necessary in the specific case, since on the date of the event planned for this purpose no parliamentary activity was underway.

Such ruling by the European Court of Human Rights acknowledges the symbolic value of the parliamentary houses by considering it justified for organizers to choose this location for their public meetings even when Parliament is not sitting. However, the restriction of the right of assembly which is the subject of this judgment did not consist in the provision of a type of infringement linked to the serious disturbance of public security on the occasion of meetings outside the Parliament. Therefore, the weighting made there does not prejudge the assessment now requested on whether the limit to the right of assembly in Article 36.2 OLPPS is constitutional, a question that we will examine hereafter.

(b) The right of assembly includes the right to choose the place of its exercise and in particular the right to decide to exercise it before parliamentary houses (ECtHR's judgment, *Sáska v. Hungary* case, § 21). But this right is not unlimited. It requires that it be communicated to the authority, that it be carried out according to the reasonably necessary alterations that the authority indicates and that in the course of its exercise citizen security is not disturbed. A meeting in front of parliamentary houses that does not respect these limits will mean that the exercise of the right is irregular (with the authorities being able to act proportionately to restore legality), but not necessarily that it constitutes an administrative infringement. Such meetings before parliamentary houses will only be punishable when, on the occasion of such meetings, conduct is carried out in a manner expressly classified as an infringement by the law

Article 36 OLPPS defines as a serious offence, generally speaking, the production of disorder on public areas (paragraph 3) and the obstruction of public authorities and employees in the legitimate exercise of their duties (paragraph 4). The provision contained in Article 36.2 OLPPS differs from this generic nature of Articles 36.3 and 36.4 OLPPS, since the latter specifically typifies the serious disturbance of citizen security that occurs on the occasion of meetings or demonstrations in front of parliamentary houses.

By resorting to the principle of specialty, the legislator is taking special account of the particular importance in a democratic State of the right to call meetings or demonstrations outside parliamentary houses, the exercise of which could be unduly discouraged if it were established that any disturbance that might occur on the occasion of such meetings or demonstrations was

a serious offence. Article 36.2 OLPPS avoids this chilling effect by classifying as such an infringement only those conducts that, on the occasion of the aforementioned meetings or demonstrations, lead to a serious disturbance of public security, a provision that includes actions or conducts that damage people or goods heavily (or entail an aggravated risk of such a harmful result), as well as those that significantly obstruct the functioning of the legislative bodies.

Furthermore, Article 36.2 OLPPS excludes from their scope of application any serious disturbance of public security that constitutes a criminal offence. In order to guarantee the inviolability of the *Cortes Generales* and its members, as enshrined in Article 66.3 SC [for all, STC 123/2017, of 2 November, LG 2 B) c)], Article 494 CC sanctions the conduct of those who promote or lead demonstrations or meetings before legislative seats, when in session, "altering their normal functioning"; direct submission by citizens' demonstrations to the Houses is prohibited by Article 77.1 SC; and Articles 495 and 498 CC criminalize, respectively, the attempt to enter legislative seats "to lodge personal or collective petitions ", or the use of violence or intimidation to prevent their members "from attending their meetings", to restrict "the free expression of their opinions or casting their vote.".

c) Article 36.2 OLPPS, insofar as it provides for a type of infringement that takes place on the occasion of a meeting or demonstration, constitutes a legal restriction on the exercise of this right [ECtHR's judgment of 26 April 1991, *Ezelin v. France*, § 39, and of 31 July 2014, *Nemtsov v. Russia*, § 73]. It shall be a constitutional restriction if it is directed to the fulfilment of a legitimate aim and the measure it contains is suitable to achieve that pupose.

Parliamentary seats, as already mentioned in section (a), have a double significance that makes them worthy of legal protection. On the one hand, they shelter the effective performance of representative functions through the functioning of the legislative body in its various forms and formations. On the other hand, inherent in them even when no parliamentary activity is underway, is their character as institutional representation of the popular will, so that they constitute a symbol of the highest constitutional value.

In view of the dual significance of parliamentary seats, this court considers that Article 36.2 OLPPS is aimed at preventing that serious disturbance of citizen security on the occasion of meetings or demonstrations before parliamentary institutions could (i) hinder the normal functioning of the parliamentary body in its different forms and formations or (ii) result in the disregard of the symbol embodied in the parliamentary seats that may reasonably contribute, by itself or by inciting other behaviour, to endangering the peace and harmony of citizens [Article 3 c) OLPPS] or, more generally, to condition other citizens to freely exercise their rights and freedoms granted by the legal system [Article 3 a) OLPPS].

Determining as punishable conduct the serious disturbance of citizen security in the circumstances set forth by Article 36.2 OLPPS is an appropriate measure for the effective achievement of the two legitimate aims of this legal provision. The fact that Article 36.2 OLPPS provides that this infringement shall also be committed when the aforementioned conduct takes place without the parliamentary bodies being in session does not alter this test of suitability, since it is an efficient measure for the effective achievement of the second of the purposes pursued by this legal provision, given that the legislative bodies un which the parliamentary seats are placed have a special institutional significance and incorporate a symbolic value that is fully in force even when none of their formations are in session.

(d) In order to effectively achieve the two legitimate aims pursued - the normal functioning of the *Cortes* and the preservation of their special institutional significance - Article 36.2 OLPPS defines the serious disturbance of citizen security as an offence when it occurs in the circumstances already described. This measure, therefore, only makes punishable this type of conduct that, on the occasion of the aforementioned meetings, intensely harms people or property (or entails an aggravated risk of such a harmful result), as well as conduct that significantly obstructs the functioning of the legislative bodies.

In view of these considerations, this Court concludes that the provision contained in Article 36.2 OLPPS is constitutional, since the qualified value whose guarantee is sought by the Organic Law on the Protection of Public Security is not vague, if we consider that the provision also contains two legal assets aimed at protecting, on the one hand, the special institutional significance of the legislative chambers, which are of fundamental importance under the rule of Law, and, on the other, the normal functioning of these parliamentary bodies.

This also entails the full constitutionality of the second paragraph, in its entirety, including the words "even if they are not in session".

In short, in this case, the exercise of the right of assembly (Article 21 SC) is not discouraged and the normal functioning of the legislative bodies is safeguarded.

D) Article 37.1 OLPPS, which typifies a minor offence, has been challenged in connection with Article 30.3, which defines who is to be considered an organizer or promoter for the purposes of this law. The text of the contested provisions is as follows:

"Article 37. Minor offences

1. Holding meetings in places of public circulation or demonstrations in breach of the provisions of Articles 4.2, 8, 9, 10 and 11 of Organic Law 9/1983, of 15 July, for which the organizers or promoters shall be responsible".

"Article 30. Parties responsible

[…]

3. For the purposes of the present, the organizers or promoters of the meetings in places of public circulation or demonstrations shall be considered to be the individuals or legal entities that have signed the mandatory communication. Likewise, shall also be considered organizers or promoters, even if they have not signed or submitted the communication, those who in fact lead, direct or carry out similar acts, or who due to publications or declarations calling the meeting, to oral or written statements disseminated at them, to slogans, flags or other signs they display, or to any other facts, can reasonably be determined to be their leaders".

The criticisms made of Article 37.1 OLPPS cannot be assessed in isolation, but rather in accordance with the provisions of Article 30.3 OLPPS. The appellants infer from both provisions a disproportionate restriction of the right of assembly in a democratic society. This is because citizens who have simply taken part in a spontaneous peaceful gathering or who have not been previously notified are liable to be punished. This approach would be in conflict with the case-law of the European Court of Human Rights on the treatment of unreported peaceful demonstrations.

The State Attorney states that the purpose of this provision, in accordance with the principle of legality of penalties [*nulla poena sine lege]* (Article 25(1) SC), is precisely to sanction the holding of meetings in places of public circulation or demonstrations, without prior notification to the relevant authority, a constitutional requirement (Article 21(2) SC), which places the organizer or promoter outside the fundamental right of assembly. It also rejects the complaints against Article 30.3 OLPPS, defending the greater precision that the provision provides to this type of infringement, by replacing the term "inspirers" with that of "leaders" of the meetings or demonstrations.

a) Article 37.1 OLPPS typifies non-compliance by meetings and demonstrations with the legal requirements provided for in the Organic Law regulating the right of assembly, which is thus further reinforced by the imposition of sanctions. In particular, it punishes the failure to adopt measures to guarantee good order, for which the organizers or promoters are responsible (Article

4.2); the omission of the duty of prior notification (Article 8), or the failure to adjust the written prior notification to the content determined by the Law (Article 9); carrying out the meeting or public demonstration in contradiction to the provisions of the government authority in its decision, positively - when it does not comply with the communication - or negatively, if it has been prohibited or some of its elements have been modified (Article 10) or to what has been agreed by the judicial authority (Article 11). Therefore, non-communicated demonstrations or meetings, and those communicated that do not comply with the content communicated or the modifications introduced by the competent authority as well as those prohibited by the government authority, shall be sanctioned.

The provision is based on objective and easily ascertainable facts that provide citizens with certainty to know in advance the prohibited area, moving away from open, vague or imprecise expressions, thus satisfying the standard of foreseeability (STC 169/2001 of 16 July, LG 6, and ECtHR's judgment of 15 October 2015, *Kudrevićius and others v. Lithuani*a case, § 108 and 109). Therefore, from the point of view of the principle of taxativity (Article 25.1 SC) and legal certainty (Article 9.3 EC), no reproach of unconstitutionality can be made against the type of infringement of Article 37.1 OLPPS.

Similarly, the provision *per se* does not entail an unjustified or disproportionate limitation of the right of assembly, nor does it have a chilling effect on its exercise. As we have stated, this is a fundamental right whose exercise "is imposed due to its immediate and direct effectiveness" and, in this sense, the controversial provision of the Organic Law for the Protection of Public Security is linked to the possibility that the relevant authorities adopt the necessary and proportionate measures to achieve a balance between the protection of the rights and property of third parties and the free exercise of the right to demonstrate (STC 66/1995, of 8 May, LG 2). However, the appellants focus their complaints on a specific breach of the Organic Law regulating the right of assembly and for a specific case: namely, sanctioning non-communicated peaceful demonstrations, which implies questioning or qualifying the requirement of the "duty of prior notification" in these cases; furthermore, they invoke a possible collision with the case-law of the European Court of Human Rights.

Our doctrine on the duty of prior notification has already been set out in paragraph (B)(d) of this same legal basis, to which we refer in order to avoid unnecessary repetition. Also there we echoed the case-law of the European Court of Human Rights, which does not see the requirement of "prior notification" as an obstacle to the right of assembly *ex* Article 11 ECHR. But in view of the appellants' allegations, it is necessary to examine the position of the European Court regarding the demand for this requirement in relation to non-communicated or spontaneous peaceful demonstrations.

The European Court of Human Rights has held, in line with our doctrine, that the requirement of "prior notification" does not normally encroach upon the essence of the right of assembly as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering (ECtHR's judgment of 23 October 2008, *Sergey Kuznetsov v. Russia* case, § 42, and of 12 June 2014, *Primov and others v. Russia* case, § 117). Since States have the right to require a prior notification, they must be able to impose sanctions on those who participate in demonstrations that do not comply with such a requirement, provided that the sanction is prescribed by law and proportionate (ECtHR's judgment *Kudrevićius and others v. Lithuania*, § 148 and 149, and those cited therein). However, the absence of prior notification and the ensuing unlawfulness of the action do not give *carte blanche* to the authorities; they are still restricted by the proportionality requirement of Article 11 ECHR (ECtHR's judgment in *Primov and others v. Russia*, § 119). In other words, because of the need to make a proportionality test in each case, taking into account, among other things, the public interest at stake and the risk involved in holding the meeting or demonstration (ECtHR's judgment in *Kudrevićius and others* v. Lithuania, § 151).

In prosecuting non-communicated demonstrations - "unlawful" versus "prohibited" demonstrations (ECtHR's judgment in *Kudrevićius and others v. Lithuania*, § 149), the European Court of Human Rights has been asking the domestic authorities for a certain degree of tolerance towards such demonstrations, depending on the special circumstances of each case. Circumstances such as the absence of any demonstrated risk of insecurity or disturbance (ECHR, 24 July 2012, *Fáber v. Hungary*, § 47), the minimum levels of noise or disturbance caused (ECHR, 15 November 2018, *Navalnyy v. Russia*, § 129 and 130), or the duration and extent of public disturbance (ECHR, 5 January 2016, *Frumkin v. Russia*, § 97). In the specific case of spontaneous or unreported peaceful demonstrations, the European Court has gradually clarified its case-law, which can be summarized as follows: (i) the absence of prior notice may not be sufficient to justify a restriction of the right of assembly, provided that there are special circumstances and the participants have not engaged in any unlawful conduct (ECtHR's judgment of 17 July 2007, *Bukta and others v. Hungary* case, § 36, and of 14 October 2014, *Yilmaz Yildiz and others v. Turkey* case, § 42 and 45); (ii) the particular circumstances have been specified in the existence of a current political event or occurrence, and the demonstration was necessary to provide an immediate response to such event (ECtHR's judgment *Kudrevićius and others v. Lithuania*, § 155).

In view of the stated case-law of the European Court of Human Rights and in line with our doctrine, the claims of unconstitutionality reported by the appellants must be rejected. The requirement of prior notification to the relevant authority does not entail a disproportionate interference or restriction of the right of assembly; nor does it mean that their absence is likely to be sanctioned by an offence prescribed by law and proportionate, as is clear from their minor character. This does not preclude the authorities from carrying out the appropriate proportionality test when applying the sanctioning type, in order to safeguard and not discourage the exercise of the right of assembly (STC 66/1995, LG 2), and even more so in some cases, such as those of spontaneous demonstrations, in view of the prevailing circumstances, as an immediate response to a current political event, to the absence of illegal conduct or to an effective risk to public security.

With regard to that approach, it should now be recalled that the possibility of deviating from the standard cannot serve as a basis for its annulment. As pointed out by the STC 238/2012 of 13 December, LG 7, '"the mere possibility of a tortious use of the rules can never in itself be sufficient reason to declare them unconstitutional, because although the rule of Law tends to replace the government by men with the government of laws, there is no legislature, however wise he may be, capable of producing laws that a ruler cannot misuse" (STC 58/1982, 27 July, LG 2, in the same sense SSTC 132/1989, 18 July, LG 14; 204/1994 of 11 July 1994, LG 6; 235/2000 of 5 October 2000, LG 5; and 134/2006 of 27 April 2006, LG 4)' [similarly STC 42/2018 of 26 April 2001, LG 5b)].

b) However, the reproach made against the administrative infringement examined derives from its reading together with Article 30.3 OLPPS, since responsibility for this infringement is attributed to those who are the organizers or promoters of the public act concerned (the same occurs in the case provided for in Article 35.1, second paragraph, OLPPS, although it has not been challenged), which in the appellants' view allows the sanction to be extended to any person who participates in the non-communicated peaceful assembly. Prior to examining such provision, we must emphasize that the figure of the promoter or organizer is not alien to our legal system. In addition to the previous rules on public security, it was already provided for in the Law regulating the right of assembly, Article 4 of which regulates the subsidiary liability of organizers or promoters for damages that the participants in such meetings may cause to third parties, for civil purposes only. Likewise, in the criminal field, in relation to the crimes of illegal meetings and demonstrations, the responsibility of those who "promote, direct or lead" is determined (Articles 494 and 495.2 CC), the "promoters or directors" or those who "have not attempted to prevent by all means available to them" the presence of persons with weapons (Article 514.1 and 5 CC), considering, for these purposes, those who "call for or lead them" (Article 514.1 *in fine* CC).

Article 30.3 identifies those persons responsible for the meetings or demonstrations in their capacity as "organizers" or "promoters", based on the general rule set out in paragraph 1: the responsibility for the offences committed "shall fall directly on the perpetrator of the act"; that is, only the person who carries out the action classified as an offence may be punished. The definition of the figure of the promoter or organizer is made through a double criterion: (i) an objective and express criterion, which includes natural or legal persons who have signed the prior communication; (ii) a functional criterion, which presumes this condition in those who preside, direct or carry out similar acts, or those who by a set of facts can reasonably be determined to be their directors; and accordingly, in a purely illustrative manner, the publications or declarations of calls, oral or written statements that are disseminated, the slogans, flags or other signs are cited.

The contested provision, far from entailing an extension of the sanctioning liability, as the appellants maintain, implies a limitation or restriction of such liability. The infringement provided for in Article 37(1) OLPPS may only be committed, not by those who simply participate in such non-communicated meetings or demonstrations, but by those who are considered to be the promoters and organizers. However, it is not sufficient to have this condition objectively or that it can be reasonably deduced from any of the facts contained in the rule or others of a similar nature, since those requirements derived from the principle of guilt must of course be met.

As we have reiterated, in the field of administrative Law relating to penalties, the principle of guilt applies “which precludes the imposition of penalties solely on the basis of the result and without regard to the diligent conduct” of the alleged offender [STC 76/1990 of 26 April 1990, LG 4 A)]. The principle of guilt is also linked to the prohibition of liability without fault or objective liability, which, in addition to requiring the presence of wilful misconduct or fault, also entails the need to establish the authorship of the punishable act or omission; and the principle of the individual character of penalties or sanctions, which means personal liability for one's own acts and not those of others (STC 185/2014, of 6 November, LG 3, and those cited therein).

In view of the above, the promoters or organizers of meetings or demonstrations that fall within the scope of Article 37.1 OLPPS may only be sanctioned in case they have incurred in wilful misconduct or fault in the particular case (Article 28.1 of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector). Furthermore, their liability shall be limited solely and exclusively to the fact that they are held in breach of the requirements of the Law regulating the Right of Assembly, and shall not include everything that happens at such meetings or demonstrations, nor everything that is done by each of the participants in them. The organizers or promoters will be exonerated from liability for the actions of others provided that it is proved that they could not prevent the commission of certain acts despite the efforts that were required; in these cases, such efforts must be interpreted in such a way that it does not excessively hinder the exercise of the right of assembly.

Following the above reasoning, it can be concluded that Articles 37.1 and 30.3 OLPPS do not deserve to be accused of a lack of constitutionality.

(E) Similarly, for incurring an unjustified and disproportionate restriction of the fundamental right of assembly, the minor infringement defined in Article 37.3 OLPPS has been appealed, which reads as follows: "Failure to comply with restrictions on pedestrian movement or itinerary on the occasion of a public event, meeting or demonstration, when they cause minor disruption to the normal course of events”.

Mere "minor disruption" in the course of a public act, meeting or demonstration can hardly justify, according to the appellant parliamentary groups, the hindrance of the free exercise of the right of assembly. The public authorities must always favour a minimum of interference, limited to the extent necessary, in order to protect rights in the event of a conflict.

The State Attorney links the type of offence with the duty of prior notification (Article 21 SC), and the failure to comply with the arrangements set by the relevant authority; a failure which, once established, empowers the administration to impose a penalty which, in his view, is proportionate and reasonable. The application of the offending type is also extended to those who, by not taking part in the demonstration or meeting, cause such disturbances, thus operating as a protection of the fundamental right.

The purpose of the contested provision is to protect the “normal course” of public events, meetings or demonstrations which are lawful or not prohibited, in two aspects which are relevant to their proper conduct - and also to the free exercise of the rights of non-participating third-parties - namely: the restrictions on pedestrian movement and/or the route which derive from the prior notification or have been fixed, as the case may be, by the relevant authority. Once the conditions for holding the event, meeting or demonstration have been agreed, the corresponding security arrangements are determined by both the organisers and the security forces. The provision sanctions the failure to comply with certain minor incidents in the aforementioned aspects: affecting traffic or pedestrian mobility. Thus, the type of offence will be applicable to the participants of the act, meeting or demonstration who incur in such conduct, excluding, where appropriate, the organizers or promoters for whom the already examined Article 37.1 OLPPS is applicable. Likewise, it shall also apply to non-participating third-parties who interfere with their conduct in the normal course of public acts or meetings; provided that it does not reach the degree of disruption defined as a serious penalty in Article 36.8 OLPPS.

Article 37.3 OLPPS defines as a minor infringement certain breaches of the conditions established to make the exercise of the right of assembly compatible with the effectiveness of the rights and freedoms of third parties. Therefore, cases of exceeding the enjoyment of the right are punished, and not its regular exercise. However, given that the literal nature of the unlawful conduct includes any minor alterations in the development of the meetings or demonstrations, this court finds that Article 37.3 OLPPS, on this basis, would mean that individuals who take part in them could reasonably withdraw from the normal exercise of their right, fearing that for any unexpected circumstance they would end up committing the breaches laid down in the sanctioning rule. This interpretation, by implying a relevant chilling effect on the enjoyment of the right, would render Article 37.3 OLPPS unconstitutional

Nonetheless, the principle of the preservation of Law makes it necessary to strive to interpret the provisions in accordance with the Constitution, provided that the meaning of the law is respectful of both the letter and the content of the rule concerned [for all of them, STC 65/2020, of 18 June, LG 2 b)].

In view of this principle, it must be emphasized that the systematic interpretation of Article 37.3 SC must take account of the fact that it imposes a restriction on a fundamental right and that such provision is of a punitive nature, both of which force the interpreter to prefer, from among the possible interpretations, those which are more in line with the principles of restrictive interpretation and *favor libertatis*. In accordance with these hermeneutic principles, this court finds that the term "when they cause minor disruption" refers to those that are truly relevant, in the sense of providing a certain entity and seriousness insofar as, being a provision of administrative law that imposes sanctions, its application must be the result of a restrictive interpretation.

As for the persons who may be involved in this type of infringement, without prejudice to the responsibility that may be required of the promoters or organizers, this might be those persons attending the meeting or demonstration on an individual basis directly responsible for causing such substantial alterations.

(F) Finally, Article 37.7 OLPPS has been appealed, which defines as minor offence the following:

> “Occupying or remaining in any property, dwelling or building belonging to others, in both cases against the will of its owner, tenant or holder of any other right over it, when they

do not constitute a criminal offence. Likewise, the occupation of public roads in breach of applicable rules, or against the decision taken by the relevant authorities in application of such rules. The occupation of public roads for unauthorized street selling shall also be included".

In addition to the infringement of the right of assembly (Article 21 SC), the appellant parliamentary groups also claim the violation of the principle of taxativity (Article 25(1) SC). In the case of occupation of property or similar, for failing to specify the very term "occupation" or to specify whether or not violence or intimidation is to be used. In the case of occupation of public roads, for failing to specify which law or lower-ranking regulation must be infringed for the conduct to be punishable.

The State Attorney rejects the indeterminate nature of the term "occupation", considering that the type of offence defines physical occupation against the will of the owner or holder of the property right, being its unlawfulness aggravated, as the case may be, if violence is involved. The protection of the right of assembly - he argues - does not require the infringement of the right to property (Article 33 SC), and the condition that these do not constitute criminal conduct is merely a manifestation of the *non bis in idem* principle. Nor does it share the lack of clarity or indetermination attributed to the sanction for occupation of public roads, since, in this case, the State representative insists, we are dealing with occupation, without physical resistance, by a meeting or demonstration not communicated or exceeded in the terms previously communicated.

Prior to examining the claims of unconstitutionality, it is necessary to point out that the State Attorney is right when he states that the appellants do not argue anything in their complaint with regard to the final clause of the second paragraph of Article 37.7 OLPPS, which states: "Occupation of public roads for unauthorized street selling shall be included". As we have stated, "when the refinement of the legal system is at stake, it is the appellants' onus not only to open the way for the court to make a decision, but also to collaborate with the court's justice in a detailed assessment of the serious issues involved. It is therefore fair to speak [...] of a burden on the appellant and, in cases where that burden is not observed, of a lack of due diligence enforceable in court, which is the diligence to provide the grounds which may reasonably be expected (STC 11/1981 of 8 April 1981, LG 3, reiterated in SSTC 43/1996 of 15 April 1996, LG 3); 36/1994 of 10 February, LG 1, and 61/1997 of 20 March, LG 13)", as stressed in STC 86/2017 of 4 July, LG 2. In accordance with this well-established doctrine, this court cannot evaluate the complaint made by the appellants to the aforementioned final clause of the second paragraph of Article 37.7 based on the violation of Articles 21 and 25.1 SC, since the appeal thus expressed is simply stated and is not supported by the necessary evidence enabling the court to rule on it.

(a) In the first paragraph of Article 37.7 OLPPS, that an individual or group of persons "occupy" any property, dwelling or building belonging to others, or "remain" in them, in both cases against the will of the owner or holder of any other property right, "when they do not constitute a criminal offence". Thus, the definition of the administrative offence is given by three elements: (i) the will against the owner or holder of the right *in rem* affected, which is the decisive factor; (ii) that it does not constitute a criminal offence, that is, a conduct constituting the offence of forcible entry of a dwelling (Article 202.1 CP) or the domicile of a public legal person or an establishment open to the public (Article 203.1 and 2 CP), the crime of usurpation (Article 245.2 CP), or the crime of public disorder with occupation of domicile of a public or private legal person (Article 557 ter.1 CP) and (iii) the absence of violence, since if it were to occur, it would give rise to the aggravated forms of the aforementioned criminal offences. The legal asset protected in these cases would be public security, which is expressed in the protection of the exercise of rights recognised by the legal system [Article 3 (a) OLPPS] and, in the case of legal-public persons, in the protection of public assets [Article 3 (f) OLPPS].

The fundamental right of assembly, as far as we are concerned here, has been defined as a right of peaceful and unarmed assembly recognized in Article 21.1 SC; a right of collective exercise, as a reflection of the freedom of expression exercised through an association of

persons (for all, STC 85/1988, of 28 April, LG 2, later followed by many others, including SSTC 66/1995, of 8 May, LG 3, or 193/2011, of 12 December, LG 3). The right of assembly or demonstration is thus not necessarily affected by the type of offence being challenged. And in those cases where the peaceful occupation is either the final result of the original legitimate exercise of the right of assembly or demonstration, or the manner in which the concentration or demonstration is organized in itself - as may be the case, for instance, in labour relations - given that the occupation takes place against the will of the owner or holder of another right *in rem*, its sanction as a minor infringement seems, a priori and weighing the circumstances of each case to be able to be considered, unlikely to be considered as a disproportionate limit that discourages the exercise of the right of assembly. Similarly, nothing can be objected to the type of offence from the point of view of the principle of taxativity (Article 25(1) SC).

(b) In contrast, the second paragraph of Article 37.7 OLPPS sanctions the "occupation of public roads" by a person or group of persons in two cases: (i) for infringement of applicable law and (ii) against the decision taken in application of the law by the relevant authority. From the perspective of public security, there is nothing to prevent the characterization of offences aimed at ensuring the peaceful use of roads and spaces intended for public use and enjoyment. Also, it is clear that the right of assembly or demonstration can lead to temporary occupations, more or less intense, of the streets or squares of our cities, without this meaning that we are faced with an unlimited right of exercise that cannot be subject to reasoned adjustment, and even prohibition, in order to safeguard the rights and legal interests of third parties (SSTC 42/2000, of 14 February, LG 2, and 193/2011, of 12 December, LG 3), as may occur in the case of indefinite or excessively long occupation of a space (STC 193/2011, of 12 December, LG 3, and those cited therein).

However, the use of public roads, as a space for participation, includes a number of activities that are a peaceful expression of citizen coexistence, which, although they are not related to the exercise of the right of assembly, may be linked to the exercise of other rights and freedoms recognized in our Constitution and in law. For this reason, any limitations must be interpreted with restrictive criteria and in the most favourable sense - the principle of *favor libertatis* - to the effectiveness and essence of such rights (SSTC 159/1986, of 16 December, LG 6; 254/1988 of 21 December, LG 3; 3/1997 of 13 January, LG 6; 88/2003 of 19 May, LG 9; 195/2003 of 4 October, LG 4; 281/2005 of 7 November, LG 8; 110/2006 of 3 April, LG 3; and 193/2006 of 19 June, LG 5).

Furthermore, it is necessary to examine the alleged failure of this contested provision to observe the principle of legality (Article 25 SC) and the principle of legal certainty (Article 9(3) EC). This court has emphasized, as we have already pointed out, that the principle of legality protected by Article 25 SC contains a formal guarantee - which protects freedom by providing that the core of the punishable conduct must be provided for in legislation with the status of a law - and a material guarantee - which requires that the infringements be defined in such a way that the prohibited field is foreseeable for the sake of the principle of legal certainty - (for all, SSTC 166/2012, of 1 October, LG 5, and 34/2013, of 14 February, LG 19).

The second paragraph of Article 37.7 OLPPS meets the formal guarantee of the principle of legality of penalties because it establishes the essential elements of unlawful conduct (for all, STC 160/2019, of 12 December, LG 2). First, it defines the offending conduct as (a) the occupation of public roads whenever (b) it alters the public security in any of the ways set forth in Article 4 OLPPS. All the types of offences provided for in the Organic Law on the Protection of Public security, for reasons of systematic occurrence, are aimed at protecting the purposes pursued by public security and set out in Article 4 OLPPS.

Furthermore, in order for occupation of public road to constitute punishable conduct, it must be carried out "in breach of the provisions of the law". This reference to "the provisions of the law" is clearly referred to by its wording to legally binding rules, so that the provisions contained in each sectoral law referred to should supplement, also with the status of a law, the essential elements of the unlawful conduct.

The material guarantee of the principle of legality sets different requirements. It is not enough to specify in a legal standard the core of what is prohibited by the type of offence. It is also necessary that the offending behaviour be defined with sufficient precision to make the scope of what is prohibited foreseeable. The constitutional doctrine has established that the regulatory norm can contribute extensively to the definition of the type of offence in a sufficiently precise manner to make legal certainty possible, which in this case would refer, in principle, to the sub-legal implementing provisions of the Organic Law on the Protection of Public Security or of each sectorial law submitted.

However, as recalled in STC 162/2008, of 15 December, LG 2, entrusting in a general manner an adequate regulatory precision to the regulations "makes it so difficult to know what is prohibited - by requiring the search for applicable regulations and rules laying down obligations in them - that already from the rule of reference it is possible to state that the value of legal certainty provided by the enactment of Article 25.1 EC, among others, is not sufficiently safeguarded".

The court observes that the case being prosecuted is clearly different. The second paragraph of Article 37.7 OLPPS provides that only the occupation of public roads "in violation of the law" will be punishable, a term which refers to the fact that the rule referred to must have the status of law. This is a blank sanctioning rule, the essential core of which is contained in the prohibition and which is enhanced by reference to other legally binding rules, since the regulatory contribution with adequate precision of the type of offence that guarantees the principle of legal certainty must necessarily be found in a legal provision, excluding the implementing regulations, which results in the ruling.

7. *Infringements linked to the use of personal or professional images or data.*

(A) The parliamentary groups object to Article 36.23 OLPPS which punishes the unauthorized use of images or data of authorities or members of the security forces and corps, in connection with Article 19.2 OLPPS which, in their view, allows non-judicial seizure. The provisions in question have the following content:

"Article 36. Serious offences

[…]

23. The unauthorized use of personal or professional images or data of authorities or members of the security forces and corps that may endanger the personal or family safety of the agents, of the protected facilities or jeopardize the success of an operation, while observing the fundamental right to information".

"Article 19. Provisions common to identification, registration and verification procedures
[…]

2. Apprehension during the identification, registration and verification of weapons, toxic drugs, narcotics, psychotropic substances or other effects resulting from a crime or administrative offence shall be recorded in the corresponding report, which must be signed by the person concerned; failure to sign shall be expressly recorded. The record shall be presumed to be accurate as per the facts set out therein in the absence of proof to the contrary."

The appellants claim that Article 36.23 OLPPS provides for a disproportionate restriction on the fundamental right to information [Article 20(1)(d) SC], by making its exercise subject to an authorization procedure which infringes the prohibition of prior censorship *ex* Article 20(2) SC. Hence, it emphasizes the informative coverage of any event with the intervention of authorities

or members of the security forces and corps, while at the same time failing to mention that the use, dissemination and knowledge of certain data or images relating to them may, in some cases, be of general interest and public relevance. On the other hand, the link between Article 36.23 and Article 19.2 OLPPS, allows - they argue - the non-judicial seizure of information material, which violates Article 20.5 SC. Finally, the administrative offence is accused of not satisfying the requirements of the principles of taxativity and legal certainty (Articles 25.1 and 9.3 SC), by leaving it to the administration - in many cases, to the agent or head of the police operation - to determine whether the situation of danger or risk that the prohibition and, if applicable, the sanction may entail, is present.

The State Attorney argues that the contested provision safeguards the right to information since its proper interpretation leaves intact its prevalence in the event of a collision with an unauthorized use of data or images; authorization which exempts from any administrative liability and which will never apply to mere "capturing". It precludes the existence of a prior censorship, since the accreditation of the type of offence requires the processing of sanctioning proceedings in all cases *a posteriori* of the facts. And he accuses the appellants of making an excessive interpretation of the police powers derived from Article 19.2 OLPPS, so that it is not possible to speak of "administrative seizure" either; a provision which, moreover, has a framework and *raison d'être* - that of the general powers of the security police - different from Article 36.23 OLPPS, included in the sanctioning regime.

Having defined the positions of the parties involved in the present process in the terms set out above, the question raised herein concerns a conflict between the exercise of the fundamental right to freely communicate information and the protection of another constitutional value, namely the public security, in particular the security of the individual concerned or his family, of the protected facilities or the success of a police operation. In other words, we must examine the collision between the need to ensure the normal development and effectiveness of police action, as a means of guaranteeing public security, and the right of citizens to disseminate images or data which, affecting the authorities or members of the security forces and corps, they deem relevant to the general interest; a question which acquires greater importance, if possible, in a society in which the possibilities of capturing - via mobile telephones - and disseminating - social networks - of information - images and data - of all kinds have increased.. The object of this process does not include any possible injury or conflict with the personal rights of the authorities or members of the security forces and corps, such as the right to honour, to personal and family privacy, and to one's own image (Article 18 SC), without this implying, under any circumstances, their lack of constitutional protection, insofar as what is disclosed refers directly to the exercise of public functions.

(B) In order to specify the object of our pronouncement, some considerations on the canon of freedom of information, well-established in our constitutional doctrine – clearly in line, once again, with the case-law of the European Court of Human Rights - must be made beforehand, recalling those aspects of greater relevance for the present case.

(a) The free exercise of the fundamental rights to freedom of expression and to freely communicate or receive accurate information, enshrined in Article 20 SC, guarantees the formation and existence of free public opinion, "a guarantee which is of particular importance since, being a prior and necessary condition for the exercise of other rights inherent in the functioning of a democratic system, it becomes, in turn, one of the pillars of a free and democratic society For citizens to be able to freely form their opinions and contribute to public affairs in a responsible manner, they must also be widely informed so that they can weigh up diverse and even conflicting views" (STC 159/1986 of 16 December 1986, LG 6; and SSTC 21/2000 of 31 January 2000, LG 4, and 52/2002 of 25 February 2002, LG 4; in the same vein, ECtHR's judgment of 7 December 1976, *Handyside v. United Kingdom*, § 49, and of 6 May 2003, *Appleby and Others v United Kingdom*, § 39). The essential role played by the freedom to communicate or receive information in the operation of democracy requires that the object of protection of Article 10(1) ECHR, as the European Court of Human Rights points out, protects not only the substance of the ideas and information expressed but also the form in which they are conveyed

(ECHR, 24 February 1997, *De Haes and Gijsels v. Belgium*, § 48); protection extending to the Internet, given its accessibility and its capacity to store and communicate vast amounts of information, thus enhancing the public's access to news and facilitating the dissemination of information in general [ECHR, 10 March 2009, *Times Newspapers LTD (Nos. 1 and 2) v. United Kingdom*, § 27].

(b) We have been identifying freedom of information, as opposed to the broader concept of freedom of expression - of thoughts, ideas and views - as "the free communication and reception of information on facts or, more narrowly, on facts which can be considered newsworthy; warning, however, that the distinction between the two freedoms is not always clear, "since the expression of one's opinion often needs to be supported by the account of facts and, conversely, the communication of facts or news almost always includes some element of assessment, a commitment to the formation of an opinion" (SSTC 6/1988, 107/1988, 143/1991, 190/1992 and 336/1993). Therefore, in cases where elements of both meanings are mixed, the one that appears as preponderant or predominant must be taken into account in order to include them in the relevant section of Article 20.1 SC (SSTC 6/1988, 105/1990, 172/1990, 123/1993, 76/1995 and 78/1995)" (STC 4/1996, of 16 January, LG 3).

c) The subjects of this right, as we stated at an early stage, "are not only the owners of the media that disseminates information or the professionals of journalism or those who, even though they are not journalists, impart information through such media, but, primarily, "the community and each of its members"" (STC 168/1986, of 22 December, LG 2; and reiterated, among many others, in SSTC 165/1987 of 27 October, LG 10; 6/1988 of 21 January, LG 5; or 176/1995 of 11 December, LG 2); although, "the constitutional protection of the right 'reaches its highest level when freedom is exercised by the professionals of information through the official means of formation of public opinion which is the press in its broadest sense' (STC 165/1987, reiterated in SSTC 105/1990 and 176/1995, among others)" [STC 225/2002, of 9 December, LG 2 d; and in the same vein, ECtHR's judgment of 26 November 1991, *The Observer and The Guardian v. United Kingdom*, § 59; applying it also to non-governmental groups or associations participating in the public forum, as well as ECtHR's judgment of 27 May 2004, *Vides case Aizsardzības Klubs v. Latvia*, § 42, and of 15 February 2005, *Steel and Morris v. United Kingdom*, § 89]; specific protection which in no way means that the professionals of information had a fundamental right reinforced in relation to other citizens.

d) The exercise of the right to information is by no means an absolute right, as it is subject to internal limits, relating to its own content: accuracy and public relevance; and to external limits, which refer to its relationship with other rights or constitutional values with which it may conflict: the rights of others and, in particular and without being exhaustive, the right to honour, privacy, personal reputation and the protection of youth and childhood, Article 20.4 SC [SSTC 170/1994 of 7 June 1994, LG 2; 6/1995 of 10 January 1995, LG 2(b); 187/1999 of 25 October 1999, LG 5; and 52/2002 of 25 February 2002, LG 4].

Also the European Court of Human Rights recognizes that the right to information - Article 10.1 ECHR - is not an absolute right, allowing for restrictions which, in order to be considered legitimate, must meet certain minimum requirements: (i) they should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects [ECtHR's judgment of 26 April 1979, *Sunday Times (No. 1) v. United Kingdom*, § 49, and most recently, 15 October 2015, *Kudrevićius and others v. Lithuania*, § 108, and those cited therein]; ii) should be "necessary in a democratic society" in order to reach the legitimate aim pursued —Article 10.2 CEDH: national security, territorial integrity, public safety, prevention of disorder or crime, etc.— ECtHR's judgment of 16 June 2015, *Delfi AS v. Estonia* case, § 131, or of 2 February 2016, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* case, § 54, and those cited therein); (iii) should be proportionate, so that the measures adopted are the less restrictive in order to achieve the aim pursued (ECtHR's judgment of 18 Cedember 2012, *Ahmet Yildirim v. Turkey* case, § 59 to 70).

(i) With regard to the basic requirement of accuracy, the well-established doctrine, summarized in STC 52/2002, 25 February, LG 5, states that "it does not imply the requirement of rigorous and total accuracy in the content of the information, so that erroneous or unproven information can be exempted from any constitutional protection or guarantee, but that protection or guarantee must be deprived to those who, violating the right of all to receive accurate information, act with disregard for the truth or falsity of what has been communicated, behaving in a negligent and irresponsible manner, by conveying as true facts simple rumors devoid of any contrast or mere inventions or insinuations"; therefore, "the informant, if he wishes to place himself under the protection of Article 20.1 (d) SC, has a special duty to verify the accuracy of the facts he exposes through the appropriate investigations and using the diligence required of a professional" (with regard to the standards of professional information, we refer to the doctrine set forth in Legal Basis 6 of the aforementioned STC 52/2002, and the many judgments contained therein). Similarly, the standard of professional diligence under Article 10 ECHR lies in the subjective conduct of informants: how the information has been obtained, whether it has been checked, whether it was based on official reports, whether they have acted in good faith… (ECtHR's judgment of 21 January 1999, *Fressoz and Roire v. France*, § 54; of 20 May 1999, *Bladet Tromsø and Stensaas v. Norway*, § 68; of 10 December 2007, *Stoll v. Switzerland*, § 141; of 8 January 2008, *Saygili and others v. Turkey*, § 38; or of 29 July 2008, *Flux v. Moldova*, § 29)

(ii) With regard to the requirement of public relevance of the information, a matter of major interest in the present case, this court has held that information meets this condition "provided that it serves the general interest in information, and does so by referring to a public matter, that is to say, to facts or an event affecting all citizens" (STC 134/1999, 15 July, LG 8). Thus, we have held that "information on the positive or negative results achieved by the State security forces and corps in their investigations is relevant or of public interest, in particular if the crimes committed involve a certain seriousness or have caused a considerable impact on public opinion, extending that relevance or interest to any new data or facts that may be discovered, in the most diverse ways, in the course of the investigations aimed at clarifying their authorship, causes and circumstances of the criminal act" (SSTC 219/1992, of 3 December, LG 4; 232/1993, of 12 July, LG 4, and 185/2002, of 14 October, LG 4; in the same vein, ECtHR's judgment of 7 June 2007, *Dupuis and others v. France*, § 41 and 42, and of 1 July 2014, case *A.B. v. Switzerland*, § 47 and 48. However, "it has also specified, in line with those statements, that in no case can this exempt the informant from a careful examination of the public relevance and accuracy of the content of each of the news items that this general information contains and that refer to specific persons, since honour is a value assigned to individuals (STC 219/1992, of 3 December, LG 4)" (STC 52/2002, of 25 February, LG 8).

e) Finally, Article 20. 2 SC prohibits the exercise of freedom of information from being restricted by any form of prior censorship and, as this court has already stated on several occasions, this means that "any measure restricting the production or dissemination of a work whose essence consists in the prior examination by a public authority of the content of that work, the purpose of which is to judge the work in question on the basis of abstract values restrictive of freedom, in such a way as to approve the publication of the work which conforms to those values at the discretion of the censor and to refuse it otherwise"; and their prohibition must be extended "to any measures that may be adopted by the public authorities that not only prevent or openly prohibit the dissemination of certain opinions or information, but also any other measure that simply restricts or may have a chilling effect on the exercise of such freedoms (SSTC 52/1983, Legal Basis 5, and 190/1996, Legal Basis 3), even if the law, the only rule that may establish them, attempted to justify their existence in the protection of those rights, goods and values that, also under Article 20.4 SC, are constitutionally set as limits to the freedoms of expression and information in our constitutional order, thus confining the legislator who might feel such a temptation or fickleness to do so by invoking the legal reservations provided for in Articles 53.1 and 81.1 SC" (STC 187/1999, of 25 October, LG 5).

Since the ultimate aim behind the prohibition of all prior censorship is to prevent the public authority from losing its due neutrality with regard to the process of free public communication (SSTC 6/1981 of 16 March, LG 3, and 187/1999 of 25 October, LG 5), the rigour of the prohibition

reaches its maximum intensity in relation to the so-called "government" censorship, but does not prevent a judge or court, duly authorized by law, from taking certain reasoned measures restricting the exercise of freedom of information. In this regard, we have pointed out that "the Constitution itself justifies the seizure of publications, recordings and other information media, although it can only be agreed upon by means of a court order (Article 20.5 SC), thus implicitly prohibiting the existence of the so-called administrative seizure" (STC 187/1999, LG 6). In other words, the Constitution prohibits such emergency measures from being taken by a public power other than the judiciary.

(C) In examining this provision, Article 36.23 OLPPS envisages as a serious infringement (i) the unauthorized use of images or data of the authorities or members of the security forces and corps; (ii) when it may jeopardize the personal or family safety of the agents, the protected facilities or the success of a police operation; and (iii) provided that this use is not covered by "due respect for the fundamental right to information".

(a) "Unauthorized" use of data or images of authorities or police officers, regardless of how or where they were obtained, is punishable; and such use is sanctioned for its ability to endanger or risk personal or family safety, the integrity of protected facilities or the success of a police operation. A number of purposes protected by the Organic Law for the Protection of Public Security are thus safeguarded. It covers the free exercise of rights and freedoms recognized by the legal system [Article 3 a)], as well as "respect for peace and public security in the exercise of rights and freedoms" [Article 3 (d)], as it prohibits "endangering the personal or family safety of agents". It also protects "the normal provision of basic public services for the community" [Article 3(g)] and "the prevention of crime and offences" [Article 3(h)] insofar as it punishes such use by jeopardizing "protected facilities" or "the success of a police operation".

(b) The appellants claim that Article 36.23 OLPPS restricts the right to information by means of prior censorship, which is constitutionally prohibited by Article 20.2 SC. We have already recalled that, according to the STC 187/1999 of 25 October, LG 5, prior censorship would be prohibited by Article 20.2 SC when the dissemination of the images or data in question is subject to prior examination of their content by the public authority, so that such dissemination can only take place if the public authority "grants it". It should also be noted, as it helps to clarify the meaning of the prohibition in Article 20.2 SC, that Article 20.5 SC allows for the seizure of publications by means of a court order and that STC 34/2010, of 19 July, LG 5, has found constitutional the adoption by judicial bodies of precautionary measures which, whether or not they constitute judicial seizure in the strict sense, involve restrictions prior to the dissemination of messages with the aim of reducing the risk of injury to other constitutional assets or rights.

The application of this constitutional doctrine to the present appeal requires the assumption that the appealed provision typifies the "unauthorized" use of images or data as an infringement. Therefore, it uses a concept of profiles that is very defined in public Law, such as authorization, which refers to the need to obtain from the public authority, from the public administration in this case, because we are dealing with a law that regulates an administrative activity, a permission to start or continue a specific activity, thus giving the authorizing public administration the opportunity to verify that the conditions exist to prevent the remaining legal assets at stake from being damaged by the authorized activity.

Finally, Article 36.23 OLPPS, given that the activity consisting of using images or data from authorities or members of the security forces and corps is subject to obtaining prior administrative authorization, it is contrary to the prohibition of prior censorship under Article 20.2 SC. Accordingly, the "not authorized" clause of such provision should be declared unconstitutional.

(c) It remains to be judged whether the characterization as an infringement of the use - no longer subject to permission or prior administrative authorization - of images or data of the authorities or members of the security forces and corps falls under any of the unconstitutionalities alleged by the appellants.

According to its wording, Article 36.23 PLO could be interpreted in some ways that would be contrary with the very content of the right to freedom of information (Article 20(1)(d) SC) or the principle of legality (Article 25 SC). However, in accordance with the rule that the law must be preserved when it can be construed as complying with the Constitution [by all, STC 65/2020, of 18 June, FJ 2 (b)], this court finds that the provision in question does not fall under any of the grounds of unconstitutionality alleged, provided that the terms (i) "use", (ii) "endanger" or "risk" and (iii) "with respect to the fundamental right to information" are interpreted as follows.

(i) The "use" as a traditional behaviour, given that it must "endanger [...] or put at risk" any of the legal assets mentioned in the provision, is not carried out with the mere capture or possession of "personal and professional images or data". Therefore, only the act of publishing or disseminating in any way, whether by traditional means or through the channels offered by information and communication technologies, such as social networks or other similar platforms, will be punishable, so that the mere capture not followed by publication or dissemination of such images or data will not be sufficient. Furthermore, connecting the type of offence to legal assets of significant constitutional importance such as the protection of private and family life (Articles 10.1, 18.1 and 39 SC), it can be concluded that the "use" referred to in Article 36.23 SC is that without the consent of the owners of the images or data disseminated.

(ii) The element of the type consisting in "endangering [...] or putting at risk" any of the legal assets indicated in the provision cannot be understood in isolation. Its proper meaning derives from its integration into the system consisting of the regulations for the protection of public security, bearing in mind that one of its guiding principles is that administrative intervention is only "justified by the existence of a specific threat [...] that is reasonably likely to cause real harm to public security" (Article 4.3 OLPPS). If the intervention activity only affects these cases, a fortiori the "risk" or "danger" that makes up the type of offence ex Article 36.23 OLPPS is the one described as close or specific, ruling out the possibility that the infringing conduct may be deemed to have taken place when the "risk" or "danger" is merely abstract or remote.

(iii) The expression "regarding the fundamental right to information" is intended to require that the principle of proportionality be taken into account at the time of application, in particular when ascertaining whether the factual premise provided for in Article 36.23 OLPPS has been carried out. The enforcer will have to face a weighting judgment in such a way that only those who carry out the type of behaviour that endangers the protected legal assets, such as the personal or family safety of the agents, of the protected facilities or that endangers the success of an operation, as indicated in the provision, will be liable to sanction, as well as expressly weighing the elements of each individual case, both those that aggravate and those that reduce the need for protection of the right to information. This weighting shall address, at least, (a) the verification of whether the images or data disseminated belong to the private life or are related to the official activity of the authorities or agents; (b) the evaluation of the public relevance of the dissemination of such images or data, taking into account the factual circumstances and in particular whether or not there is sufficient general interest in knowing these images or data.

In accordance with the reasoning in this section (C), this court declares the unconstitutionality and nullity of the "not authorized" clause of Article 36.23 OLPPS and agrees that the remaining provision does not incur in any of the alleged lack of constitutionality as long as it is interpreted in the aforementioned sense, an interpretation that in turn will result in the ruling.

This precludes the application of Article 19.2 of the PLO, which the appellants linked to the understanding that it could enable the apprehension of the equipment or devices used to take or capture the images or data. It is therefore not necessary to decide on its constitutionality.

8. *Challenge of the particular regime for Ceuta and Melilla with regard to the rejection at the frontier of foreigners who attempt to enter illegally*

A) Finally, the appellants challenge the First Final Provision of the Organic Law on the Protection of Public Security, which introduces a Tenth Additional Provision into Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, with the following wording:

> "1. Foreigners who are detected at the border line of the territorial demarcation of Ceuta or Melilla while trying to overcome the border control elements to cross the border irregularly may be refused in order to prevent their illegal entry into Spain.
>
> 2. In any event, rejection shall be carried out in compliance with international human rights and international protection law, to which Spain is a party.
>
> 3. Applications for international protection shall be submitted in the places provided for that purpose at border crossings and shall be processed in accordance with the provisions of the regulations on international protection".

The parliamentary groups complain, firstly, that the contested rule has no connection whatsoever with the Organic Law on the Rights and Freedoms of Foreigners in Spain, which infringes Article 23(2) SC by committing fraud in parliamentary procedure. Secondly, they argue that a regime of massive and undifferentiated return of foreigners is being introduced, by a mere *ultra vires* action, which does not comply with current legislation on foreigners, thereby violating Articles 9.3, 24.1 and 106 SC, for the reasons set out in greater detail in the background to this judgment. Furthermore, they claim that the regulation does not respect the case-law of the European Court of Human Rights regarding the application of the principle of *non-refoulement*, and prevents access to the right of asylum provided for in Article 13.4 SC.

The counsel for the Congress, for her part, confines her allegations to rejecting the violation of Article 23.2 SC by the First Final Provision. After explaining the case-law of this court and recalling the parliamentary process, she concludes that it cannot be accepted that the rules of legislative procedure have been violated and with it the *ius in officium* of MPs. And she ends her argument by pointing out that the implementation of measures relating to illegal immigration has an undeniable relationship with public security. The State Attorney has expressed in similar terms, as in his opinion the parliamentary processing of the amendment has satisfied the principle of minimum harmonization-because of the connection between the spread of mass assaults on external borders and public security problems, among others-, and the legislative procedure has been observed.

As regards the violations of Articles 9(3), 24(1) and 106 SC, the State Attorney rejects the appellants' arguments, on the basis that the contested provision fills a legislative gap in respect of the material conduct of border surveillance entrusted to the State, which takes place at a stage prior to removal and expulsion aimed at guaranteeing legality. This action is not exempt from limits and passes the test of proportionality required by this court and the European Court of Human Rights. And insofar as it affects foreigners who are attempting to enter Spain illegally, the guarantees derived from Article 24.1 SC are not applicable to them; without prejudice, of course, to the fact that police action may be subject to judicial review *ex* Article 106 SC.

(B) We will first consider the possible violation of the legislative procedure which led to the adoption of the contested provision. In order to settle this claim of unconstitutionality, it is appropriate to recall our case-law on the exercise of the right of amending Articles, which is essentially contained in the judgments cited by the parties; SSTC 119/2011, of 5 July, LG 6; 136/2011 of 13 September LG 7 and 59/2015 of 18 March FFJJ 5 and 6 (also followed by SSTC 176/2011 of 8 November LG 4, 209/2012 of 14 November LG 4, 132/2013 of 5 June LG 3, 120/2014 of 17 July LG 6 and 155/2017 of 21 December LG 3). From the above case-law and for the purposes of the present constitutional process, the following main ideas can be drawn:

a) From the point of view of Parliament' legality, the exercise of the right to amending Articles must respect a minimum connection of homogeneity with the amended text, otherwise it will affect both the right of the author of the proposal (Article 87 SC) and the instrumental nature of the legislative procedure (Article 66(2) SC) and, consequently, the function and purposes assigned to the exercise of legislative power by the Houses [STC 59/2015, 18 March, LG 5 a)]. The need for a certain substantive connection between the amendment and the amended text "derives, firstly, from the subsidiary nature of any amendment to the amended text. Furthermore, the very logic of the legislative process also leads to this conclusion, since, once a legislative proposal is accepted by the Chamber or the Legislative Assembly for consideration, its object cannot be altered by amendments to the articles, since this function is fulfilled precisely by the already overdue procedure for amendments in its entirety, which cannot be reopened. In fact, amending, both conceptually and linguistically, implies the modification of something pre-existing, the object and nature of which has been determined beforehand; only that which has already been defined is amended. The amendment cannot be used as a mechanism to give life to a new reality, which must also be born of a new proposal" (STC 119/2011, 5 July, LG 6.).

In order to establish whether there is such a substantive connection or minimum harmonization between the legislative proposal and the proposed amendment, the governing bodies of the Houses must have a wide margin of appreciation to establish the existence of a substantive link between the amendment and the governmental or non-governmental bills under discussion. They must give a reasoned opinion on such link, so that "only when it is clear and unequivocal that there is no such link should the amendment be rejected, since in that case the true nature of the right of amendment would be perverted, as it would have become a new legislative proposal" (STC 119/2011 of 5 July, LG 7).

In the present case, the object of the amendment, introduced in the parliamentary process through the rapporteur's report (the "*Cortes Generales* Official Gazette" A series, no. 105-3, of 24 November 2014), cannot be found to comply with the principle of minimum link of harmonization. The contested provision deals with the regulation of a special regime for foreigners in order to deal with the situation of risk arising in the border areas of Ceuta and Melilla - the external border of the European Union - as a result of migratory pressure. Thus, this issue cannot be described as totally foreign to public security, which is part of the broadest area of public safety; nor is it necessarily intended to associate the phenomenon of immigration of foreigners with an increase in public insecurity

(b) The appellants' alleged infringement of Article 23(2) SC would also require that the breach of parliamentary legality had affected the core of their representative function. We have stated that "the right of participation, the *ius in officium*, affects a whole series of situations of MPs in which the governing bodies of the Chambers must observe the representative function, not because these are merely subjective faculties of those who carry out this function, but as faculties that allow the people's representatives to correctly exercise this representation by exercising the legislative function. This requires the possibility of submitting legislative proposals, discussion in the public parliamentary debate on the subjects covered by that debate by contributing to it, improvement of the texts by introducing amendments, and observance of their right to express their position through the right to vote. A debate should not be structured in such a way that the introduction of more amendments makes it impossible to submit proposals and their defence" (STC 119/2011, LG 9). In this case, there is no evidence that this right of participation was actually

infringed during the processing of the amendment, either in Congress or in the Senate, which, moreover, has not been objected by the appellants.

It cannot therefore be held that there is a lack of harmony or disconnection, in the terms alleged by the complaint and, having not thus been found a substantial alteration of the process of formation of the will of the Chambers in accordance with our well-established case-law, the present ground of unconstitutionality must be dismissed.

(C) The evaluation of the new tenth additional provision of the Organic Law on the rights and freedoms of foreigners in Spain, introduced by the first final provision of the Organic Law on the protection of public security, requires taking into account, first of all, the unique situation of the autonomous cities of Ceuta and Melilla. The Schengen Agreement, signed on 14 June 1985 and to which Spain acceded by the Protocol of 25 June 1991 (Official State Gazette of 30 July), promoted the creation of an area of free movement of persons, by gradually abolishing internal border controls and transferring them to the external borders of the signatory States; the external borders of the European States are therefore also the external borders of the other States party to that agreement. Subsequently, following the entry into force of the Treaty of Amsterdam (Official State Gazette of 7 May 1999), the agreement is incorporated into the institutional and legal framework of the European Union, one of whose objectives is to maintain and develop "an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". For this reason, the autonomous cities, both located on the African continent, are currently the external land border between the European Union and third states, making them one of the main access routes for migratory flows towards Europe. All this means that on many occasions the Spanish state is overwhelmed in its efforts to contain the attempts of groups of people to illegally cross the fence or arrive in boats on the coasts under Spanish sovereignty; this proves that we are facing a humanitarian crisis of such magnitude that its importance is European, to say the least, and would require the adoption of measures of a supra-state nature

Since the situation described above is undeniable, we cannot ignore the fact that the measure provided for in the contested regulation - "rejection at the frontier" - affects foreign nationals who intend to enter Spanish territory illegally, and whose place in the constitutional framework has been objected to by the appellants on account of its legal configuration. The assessment of the provision, in view of the allegations expressed by the parties in this constitutional process, will be carried out in the following order: firstly, insofar as the measure affects foreigners, we will recall some aspects of the constitutional status of foreigners in Spain that are relevant for the purposes of the present process. Next, we will consider the regime provided for in the legislation on aliens regarding forced departures from Spanish territory, a necessary preliminary step to establish the nature of the "rejection at the frontier" and thus be able to assess it from the perspective of Articles 9.3, 24.1 and 106.1 SC. Finally, we will assess whether the contested provision infringes the case-law of the European Court of Human Rights on the principle of "*non-refoulement*", preventing the exercise of the right to asylum provided for in Article 13(4) SC.

a) Article 13.1 SC provides as follows: “Foreigners shall enjoy the public freedoms guaranteed by the present Title, under the terms to be laid down by treaties and the law.” Our doctrine has been consistent in the interpretation of the constitutional provision, and the following criteria should be highlighted: (i) the expression "public freedoms" must not be interpreted in a restrictive sense, so that foreigners shall enjoy the rights and freedoms recognized in Title I of the Constitution, and refers to all foreigners, even though they may find themselves in Spain in various legal situations; (ii) the reference to the law "does not therefore imply a deconstitutionalisation of the legal position of foreigners since the legislature, while having a wide margin of freedom to specify the 'terms' under which they shall enjoy the rights and freedoms in Spain, is subject to restrictions deriving from Title I of the Constitution as a whole, and in particular

those contained in the first and second paragraphs of Article 10 SC" (SSTC 107/1984, of 23 November, LG 4, and 236/2007, of 7 November, LG 3).

We have insisted that foreigners enjoy certain rights "under their own constitutional mandate, and unequal treatment with respect to Spaniards is not possible" (STC 107/1984, of 23 November, LG 4; and also STC 95/2000, of 10 April, LG 3). These are rights inherent to the dignity of the individual (STC 91/2000, 30 March, LG 7); such as the right to life, physical and moral integrity, privacy, and ideological freedom (STC 107/1984, LG 3); the right to liberty and security (STC 144/1990, 26 September, LG 5); and the right not to be discriminated against on the basis of birth, race, sex, religion or any other personal or social condition or circumstance (STC 137/2000, 29 May, LG 1). Although "this does not imply closing the way to the various political options or alternatives that fit within the Constitution, conceived as a 'framework of coincidences' [...] that allows for different legislation on foreigners" (STC 236/2007, of 7 November, LG 3).

In relation to these rights recognized directly by the Constitution to foreigners, among which is the right to effective judicial protection, whose violation has been claimed by the appellants in the present process (STC 99/1985, of 30 September, LG 2), as well as the instrumental right to free legal aid (STC 95/2003, of 22 May, LG 4), the legislature finds itself limited both in the configuration of its content, and in the treatment given to foreigners according to their different legal situations. Article 13(1) SC "recognizes the possibility for the legislature to introduce additional conditions for the exercise of fundamental rights by foreigners, but to do so, in any case, the constitutional requirements must be observed, since this provision cannot be allowed to freely configure the very content of the right, when it has already been directly recognized by the Constitution for foreigners [...].Indeed, it is one thing to authorize differences of treatment between Spaniards and foreigners, but another to consider this authorization as a possibility to legislate on the matter without taking into account the constitutional mandates" (STC 115/1987, of 7 July, LG 3).

Therefore, "the failure of foreigners to comply with the requirements for stay or residence in Spain does not allow the legislator to deprive them of the rights to which they are constitutionally entitled as individuals, regardless of their administrative situation. Non-compliance with those legal requirements prevents foreigners from exercising certain rights or contents thereof which, by their very nature, are incompatible with their irregular situation, but this does not mean that foreigners who do not have the required authorization for stay or residence in Spain are deprived of any rights while in that situation in Spain" (STC 236/2007, of 7 November, LG 4).

In the process of establishing the rights of foreigners, this court has declared that "the Universal Declaration of Human Rights and the other international treaties and agreements on the same matters ratified by Spain, to which Article 10.2 SC refers as an interpretative criterion of fundamental rights" are of special relevance (STC 91/2000, of 30 March, LG 7). We have already pointed out that Article 10.2 SC "does not make such international treaties and agreements into an autonomous canon of validity of the rules and acts of public authorities from the perspective of fundamental rights" (STC 236/2007, of 7 November, LG 5), but on the contrary, "it merely sets out a connection between our own system of fundamental rights and freedoms, on the one hand, and the international conventions and treaties on the same matters to which Spain is a party, on the other. It does not confer constitutional status on internationally proclaimed rights and freedoms insofar as they are not also enshrined in our own Constitution, but it does require the relevant provisions of the Constitution to be interpreted in accordance with the content of such treaties or conventions, so that in practice this content becomes to some extent the constitutionally declared content of the rights and freedoms set out in the second chapter of Title I of our Constitution" (STC 36/1991, of 14 February, LG 5).

Finally, Article 13(4) SC recognizes the right to asylum - whose violation by the contested provision is also invoked by the appellants - and states that the terms on which citizens of other countries and stateless persons may enjoy that right shall be determined by law. In this case, we

are not dealing with a fundamental right of those set out in the second chapter of Title I, but "with a constitutional mandate for the legislature to determine the status of those who claim to be persecuted and who seek asylum in Spain. The rights of the asylum seeker -or the one holding asylum status - will be, then, those set forth by law. Obviously, the law regulating the regime of foreigners holding asylum status - or asylum seekers - must fully respect the other provisions of the Constitution and, in particular, the fundamental rights that foreigners enjoy"; this is because "the fundamental rights derived from the dignity of the person granted by the Constitution to all persons subject to the acts of the Spanish public authorities" are in force during the time that the asylum seeker remains in "suitable premises" at the border post, the specific territorial placement of these premises being therefore irrelevant (STC 53/2002, of 27 February, LG 4).

b) Moving on, now, to the examination of the legislation on foreigners, we must start from the premise that "the right to enter Spain is not a fundamental right of which foreigners are holders pursuant to Article 19 SC" (STC 236/2007, of 7 November, LG 12), as entry is conditional on compliance with the requirements set forth in Article 25 of Organic Law 4/2000, of 11th of June, on the Rights and Liberties of Foreigners in Spain and their Social Integration (hereinafter, “LOEx”) and Article 4 of its Regulation, passed by Royal Decree 557/2011, of 20 April (hereinafter, “LOEx Regulation”). Thus, several procedures are regulated regarding the forced departure of foreign persons from Spanish territory, which are relevant within the context of the present constitutional process. These are the following: (i) return to the place of origin (Article 60 LOEx), as an effect derived from the prohibition of entry into Spain by authorized border posts of foreigners who are not in compliance with the legally established requirements (Article 26.2 LOEx and Article 15 of the LOEx Regulation); (ii) expulsion of the foreigner who is illegally in Spanish territory, for not having obtained an extension of stay or for not having obtained or having expired the residence permit (Article 57 LOEx and Articles 242 to 248 of the LOEX Regulation); and (iii) the return of those who, having been expelled, contravene the prohibition on entry into Spain [Article 58.3 (a) LOEx], or who attempt to enter the country illegally [Article 58.3 (b) LOEx], including "aliens intercepted at the border or in the vicinity" [Article 23.1 (b) LOEx Regulation]. Foreigners have the right to effective legal protection, for which reason these procedures shall, in any case, respect the guarantees provided for in the general legislation on administrative procedure and, in particular, with regard to publicity of the rules, contradiction, hearing of the interested party and reasoning of the decisions (Article 20 LOEx); they also have the right to free legal assistance and an interpreter, which guarantees the right of defense (Article 22 LOEx), in particular for making submissions and filling appeals, this being expressly provided for in Article 21 LOEx

This legal framework includes the contested Tenth Additional Provision of the Organic Law on the Rights and Freedoms of Foreigners in Spain, introduced by the Organic Law on the Protection of Public Security, which provides in paragraph 1 the "rejection at the frontier" of foreigners who are detected at the border of the territorial demarcation lines of Ceuta or Melilla. The other two sections of the additional provision are of an instrumental nature: they clarify how the rejection is to be made (section 2) and where, if applicable, applications for international protection are to be lodged (section 3). The first question to be addressed is the nature of the "rejection at the frontier" and then whether or not it conforms to the constitutional framework.

(i) The appellants argue that "rejection at the frontier" is a new regime for the removal of aliens who enter Spain illegally, which exempts the provisions of Article 58.3 LOEx. On the contrary, the State Attorney maintains that the rejection operates in a phase prior to the eventual removal or expulsion of foreigners, since they have not yet entered Spanish territory: the illegal entry has not been completed, but is taking place.

It is clear that access to or entry into Spanish territory takes place when the internationally established border limits have been crossed, and likewise, that the border posts and containment structures (fences, walls or barriers) are located and built on Spanish territory. There is no legal coverage for operating with a border concept that can be determined in a discretionary manner by the Spanish administration, even if only for the purposes of establishing the application of the

legislation on foreigners; among other reasons, because the principle of legal certainty would be put at risk (Article 9.3 SC).

In any event, regardless of whether the "rejection at the frontier" occurs before, during or after crossing the border, it is undeniable that these actions are carried out by members of the Spanish security forces and corps; and are, in principle, actions carried out from Spanish territory, since foreigners will be repelled or apprehended in the space between fences or on the fence itself. However, what is relevant from the perspective of subjecting the actions of the public authorities to the Constitution and all other legal provisions (Article 9.1 E.C.) is that, as we have stated, we are dealing with an activity undertaken by Spanish authorities and civil servants, even if it takes place in an area beyond Spanish territory (STC 21/1997, of February 10, LG 2; and similarly, in the field of the right to asylum we speak of "legal situation of submission of asylum seekers to a Spanish public authority", STC 53/2002, of February 27, LG 4). This means that the foreigners apprehended, when trying to overcome the containment structures, come under the control and jurisdiction of the members of the security forces and corps and, therefore, of the Spanish State, making it irrelevant whether or not these structures - the fence - are located in territory under Spanish sovereignty, so the legislation on aliens should apply to them

In the same vein and from the perspective of the application of the European Convention on Human Rights, the European Court of Human Rights believes that “whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual”; and this is because an area “outside the law” where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention cannot be justified (ECtHR’s judgment of 23 February 2012, *Hirsi Jamaa and others v. Italy* case, § 74 and 178 to 180, and judgments cited therein).

The “rejection at the frontier”, to the extent that it is carried out by Spanish authorities and civil servants, is subject to strict compliance with the Constitution and the remaining legal system, together with the need to observe, as expressly stated in the second paragraph of the contested provision, the Law on international human rights and international protection. The guarantees provided for in our legal system are applicable to the aliens who are being rejected entry while in the containment structures located in Spanish territory, which are part of the border security system.

(ii) The “rejection at the frontier” set out at the tenth additional provision of the Organic Law on the Rights and Freedoms of Foreigners in Spain is somewhat similar to the *refoulement* provided for in Article 58.3 LOEx, in the terms set out in STC 17/2013, of 31 January, LG 12, to differentiate it from expulsion and that can be transferred to the present case. *Refoulement* - and also rejection at the frontier - is "intended to prevent the contravention of the legal system for foreigners, and therefore does not in itself entail a sanction but rather a government measure of immediate reaction to a disturbance of the legal order, organized through a flexible and rapid mechanism [...]. In short [...] it consists of a measure agreed upon by the Spanish State within the framework of its policy on foreigners, which includes both the necessary control of migratory flows to our country and the implementation of requirements and conditions required of foreigners for their entry and residence in Spain”.

“Rejection at the frontier" is, therefore, a new system which, in the face of a particular situation - the detection of foreigners within the territorial demarcation lines of Ceuta or Melilla while attempting to penetrate the border controls in order to cross the border in an unauthorized manner - allows the administration and its agents to carry out a substantive surveillance action aimed at immediately restoring the legality contravened by the attempt to cross the border illegally.

The adoption of a specific system for Ceuta and Melilla, insofar as their border posts are unique in terms of their geographical location - the only external border of the Schengen area on

African soil - cannot be considered unreasonable or unjustified. Such particular situation has also been taken into consideration by the Grand Chamber of the European Court of Human Rights in its judgment of 13 February 2020, with regard to *N.D. and N.T. v. Spain* case, when stating that "in this context, however, in assessing a complaint under Article 4 of Protocol No. 4, the Court will, importantly, take account of whether in the circumstances of the particular case the respondent State provided genuine and effective access to means of legal entry, in particular border procedures. Where the respondent State provided such access but an applicant did not make use of it, the Court will consider, […], whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible" (§ 201). And it also holds that "where such arrangements [of legal entry] exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation [Schengen] to control borders, from requiring applications for such protection to be submitted at the existing border crossing points […]. Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons (as described in paragraph 201 above), to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers and using force" (§ 210).

The reference in the said judgment to the specific situation in which irregular border crossings occur - attempted by foreigners taking advantage of their large numbers and using force – in its ratio constitutes the assessment of the circumstances of the specific case, which it resolves as a condition that aggravates the power of rejection at the frontier, which is generally found not to be in conflict with the requirements under Article 4 of Protocol No. 4. Generally speaking, however, it is not necessary to appreciate the circumstances of acting in a large number and with violence in order to apply the provision, but rather the attempt by individuals to enter Spain and be caught at the boundary fences of Ceuta and Melilla is sufficient.

(iii) Having specified the nature of the "rejection at the frontier" regime and the circumstances in which it operates, we must now ascertain whether it collides, as claimed by the appellants, with the constitutional framework provided by Articles 9.3 and 106.1 SC in conjunction with Article 24.1 SC.

The appellants claim that this is an *ultra vires* action, since it involves an administrative act carried out without any procedure. However, it is appropriate to recall our doctrine according to which "a right to the full conduct of administrative proceedings in matters relating to aliens which concludes, in any event, with a decision on the merits of the case" does not form part of "the guarantee granted by Article 106 SC. In contrast, the guarantees contained in this constitutional provision are satisfied if the interested parties have the right to submit to the examination by the courts the legality of what they consider to be a failure by the administration to comply with the obligations arising from the law" (STC 17/2013, of 31 January, LG 11). Furthermore, it is true that the "rejection at the frontier" envisaged in particular for the autonomous cities of Ceuta and Melilla is a substantive action of a coercive nature, the purpose of which is to immediately restore the legality transgressed by the attempt by foreigners to cross that particular land border in an unauthorized manner. A substantive action which will be so without prejudice to the court supervision which may be carried out by virtue of the actions and appeals which the foreign person may lodge in each specific case.

The regime of "rejection at the frontier" specifically provided for Ceuta and Melilla in the tenth additional provision of the Organic Law on the rights and freedoms of foreigners in Spain, as set out in the first paragraph, is not unconstitutional. As required by an appeal on the ground of unconstitutionality, that assessment stems from considering the provision in an abstract manner, without prejudice, therefore, to the fact that the concurrent circumstances in each of its applications must be appropriately weighed in the constitutional proceedings in which they arise.

Moreover, in second section it is stated that such rejection “shall be carried out in compliance with international human rights and international protection law, to which Spain is a party”. This means that the action must be carried out with the guarantees granted to foreigners by the international rules, agreements and treaties entered into by Spain, which connects, through Article 10.2 SC, with our own regime of fundamental rights and freedoms (STC 36/1991, of 14 February, LG 5). The provisions established to comply in a genuine and effective manner with international human rights standards must ensure full respect for the guarantees inherent in the dignity of individuals, as recognized in our Constitution for all persons subject to the actions of the Spanish public authorities (STC 53/2002, of 27 February, LG 4).

Anyhow, it is clear from the aforementioned international human rights commitments that, on the occasion of such "rejection at the frontier" action, the security forces and corps must pay special attention to particularly vulnerable categories of people, including, with varying intensity and scope, those who appear to be minors (especially when they are not accompanied by their relatives), taking into account the particular safeguard of the rights under Article 3. 1 of the United Nations Convention on the Rights of the Child; pregnant women; or those affected by serious forms of disability, notably caused by old age; and persons in a particularly vulnerable category.

(c) Finally, we must decide whether, as the appellants maintain, the tenth additional provision of the Organic Law on the rights and freedoms of foreigners in Spain does not observe the case-law of the European Court of Human Rights, with regard to the application of the principle of *non-refoulement*, discouraging the exercise of the right to asylum provided for in Article 13.4 SC.

It is worth remembering that in the case of foreign nationals who do not meet the necessary requirements to enter Spain and submit an application for asylum, the provisions of Articles 21 and 22 of Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection, must be complied with, which provide for the duration of the processing of the file and the stay in the premises authorized for this purpose. And that the third section of the tenth additional provision of the Organic Law on the Rights and Freedoms of Foreigners in Spain states that the filing of applications for international protection shall be carried out in the places provided at the border posts, and shall be processed in accordance with the applicable regulations on the matter.

The right to asylum, as is widely known, is particularly linked to the principle of "*non-refoulement*" which currently operates as a guarantee applicable to all legislation on aliens, and whose purpose is to prevent the return of a person to a territory where his or her life, integrity or freedom would be threatened (Article 33 of the 1951 Geneva Convention on the Status of Refugees; and at the European Union level, it is embodied in Article 19.2 of the Charter of Fundamental Rights, and Article 5 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on the return of illegally staying third-country nationals).

This principle has been further elaborated by the European Court of Human Rights on the occasion of expulsions or deportations, and results in the obligation of States to ensure the treatment to which foreigners who are returned to their country of origin or provenance are exposed so as not to incur a breach of Article 3 ECHR: prohibition of torture and inhuman or degrading treatment [ECtHR’s judgment of 28 February 2008, case *Saadi v. Italy*, § 124-133, 137-141 and 147 *in fine*; 5 May 2009, *Sellem v. Italy*, § 28-37; 3 December 2009, *Daoudi v. France*, § 64; 23 February 2012, *Hirsi Jamaa and others v. Italy*, § 113-114; 19 December 2013, *N.K. v. France*, § 37-41, among others). Moreover the Court recalls –at the abovementioned judgment of 13 February 2020, *N.D. and N.T. v. Spain* case—, that States like Spain, with external borders of the European Union, shall make available genuine and effective access to means of legal entry, which should allow all persons who face persecution with risk to their life or integrity to submit an application for protection, based on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms, including the European Convention on Human Rights (§ 209). And concludes that where such means exist and are effective, States “may refuse entry to their

territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons […], to comply with these arrangements by seeking to cross the border at a different location […]" (§ 210).

Bearing in mind that the tenth additional provision of the Organic Law on the rights and freedoms of foreigners in Spain does not in any way exclude the legal regime provided for in Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection of asylum, by merely establishing where applications must be submitted - border posts in Ceuta and Melilla, and that the means, which allow access to a legal procedure for entry into Spanish territory, must exist and be effective, in compliance with Spain's international obligations, the complaints of unconstitutionality made by the appellants cannot be accepted.

To conclude, the Tenth Additional Provision of the Organic Law on the Rights and Freedoms of Foreigners in Spain, in the terms in which it has been interpreted in this legal basis, conforms to the constitutional framework, and therefore its lack of constitutionality must be rejected.

R U L I N G

In view of the foregoing, the Constitutional Court, by the authority conferred by the Constitution of the Spanish Nation, has held:

First. To declare the "not authorized" clause of Article 36.23 of Organic Law 4/2015, of 30 March, on the Protection of Public Security (OLPPS) to be unconstitutional and null and void.

Second. To declare that Articles 36.23, 37.3 and 37.7 are not unconstitutional provided that they are interpreted in the terms set out, respectively, in LG 7 (C) Article 36.23; in LG 6 (E) Article 37.3 and in LG 6 (F) Article 37.7.

Third. That the first final provision incorporating the tenth additional provision in Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, is in accordance with the Constitution, provided that it is interpreted as indicated in legal basis 8 (C), specified in the following points:

(a) Application to individual entries.

(b) Full supervision by the courts.

(c) Compliance with international obligations.

Four. To dismiss the appeal of unconstitutionality for the remainder

The present judgment shall be published at the State Official Gazette.

Delivered in Madrid, on 19 November 2020 -Juan José González Rivas.-Encarnación Roca Trías.-Andrés Ollero Tassara.-Santiago Martínez-Vares García.-Juan Antonio Xiol Ríos.-Pedro José González-Trevijano Sánchez.-Antonio Narváez Rodríguez.-Alfredo Montoya Melgar.-Ricardo Enríquez Sancho.-Cándido Conde-Pumpido Tourón.-María Luisa Balaguer Callejón.-Signed and sealed.

Separate opinion given by the Magistrate Ms. María Luisa Balaguer Callejón to the judgment issued regarding the unconstitutionality appeal no. 2896-2015

By virtue of the power conferred on me by Article 90.2 of the Organic Law of the Constitutional Court, and with full respect for the views of the majority as reflected in the

judgment, I hereby cast this vote, leaving a record of the grounds for my position disagreeing with the ruling and the reasoning behind it.

These differences cover the system of sanctions applied to the exercise of the right to demonstrate, the power of the security forces to carry out strip searches, the possibility of demonstrating outside the legislative chambers, and the rejection at the frontier and without prior procedure of migrants who did not enter Spain through the posts authorized for this purpose.

1. Public security and its constitutional regulation.

The underlying notion of security in the Organic Law 4/2015, of 30 March (OLPPS), is based on the need to maintain the public order necessary for the maintenance of public peace. The preamble to the law expressly refers to this purpose as "the preservation not only of security, but also of the calmness and peaceful coexistence of citizens", which may be altered by "indefinite dangers", in a relationship of opposition between freedom and security that is not inherent to constitutional states, in which the demand to the state powers, by means of street pressure, is recognised as a legitimate form of expression of political participation, for the awareness of citizens and in the use of the constitutional value of political pluralism set forth in Article 1 SC.

But both the law and the judgement I disagree with, despite all the formal declarations contained in their respective texts, ignore the fact that the regulations on public security should be based on a premise of guarantee and minimum intervention in the scope of fundamental rights. Because its essential purpose is not to ensure the comfort or peace of the citizens, or even public calmness by avoiding the inconveniences that the exercise of certain fundamental rights generates in coexistence, but to ensure that public administrations in general, and the bodies and State security forces and corps in particular, do not interfere in the exercise of the fundamental rights of the citizens by acting in an arbitrary, unreasonable manner and with abuse of rights. Freedom must be the rule and restriction the exception. The Organic Law for the Protection of Public Security should not be a law for the control of citizens, but a rule for the control of the power exercised over citizens. And if the judgment had been drawn up from this perspective, the findings would necessarily have been different.

If a protective conception of the rule is maintained, the test of constitutionality requires a test of proportionality - in the broad sense -, less reductionist, more rigorous and significantly less apodictic. Therefore, it can be concluded that the judgment shares the defensive assumption upon which the legislature relied when drafting the 2015 Law for the Protection of Public Security. It is not enough to formulate clarifying and distinctive definitions of what constitutes citizen security or public safety, as is done in legal basis 3 based on what the law itself provides. Despite the insistence that the standard for the prosecution of measures restricting rights involves examining the legal provision, the existence of a constitutionally legitimate purpose, and the formulation of the test of proportionality (suitability, necessity, and proportionality in the strict sense), the conclusion is based on an evident difference between the conception of political pluralism and freedom of demonstration, which are subject to public peace and security as the absence of conflict. Similarly, as we shall see, previous constitutional case-law, or that of the European Court of Human Rights, is reiterated until exhaustion, without drawing the consequences that could be affirmed from this invocation because the sum of all these arguments, which I accept and share, loses all meaning if when examining each of the contested provisions, the context and reasons behind the passage of the law and the real consequences of its enforcement are ignored or, as is the case with several of the contested provisions, the full assessment of the proportionality of the measures restricting the fundamental rights at stake is not implemented.

The abstract test of constitutionality can be neither blind nor ignorant of the social reality on which it must be projected. Because the Law for the Protection of Public Security of 2015 broadens, with respect to the previous one of 1992 (Organic Law 1/1992, of 21 February,

on the Protection of Public Security), the supervisory abilities of executive powers over the free exercise of certain fundamental rights that make up "the right to protest", namely: the right of association (Article 22 EC), the right of assembly (Article 21(1) EC), the right to demonstrate (Article 21(2) EC), freedom of expression (Article 20(1)(a) EC) and freedom of information (Article 20(1)(d) EC), when their free exercise is a form of the right of political participation.

This is because over the last few decades, civil society has progressively transformed its forms of political participation. Citizen protest, which in previous decades had a more institutionally structured form of expression, has turned since the beginning of this century to the occupation of public space - physical and virtual - in connection with the successive crises experienced since 11 September 2001. In the search for new ways to make their voices heard in the defence of individual and collective rights and, in particular, of benefit rights after the economic crisis of 2008, social movements, civil society organisations, platforms, groups and associations have increased their recourse to the right to demonstrate in spaces of all kinds. In Spain this led to an unusual increase in demonstrations, meetings and occupation of common spaces, even public buildings, during the years immediately prior to the law coming into force, and are an important, if not the only, reason for shielding the state apparatus from protests over what all these groups considered an unfair distribution of the effects of the economic crisis. Since May 2011, the 15-M movement and all those who accompanied it as predecessors or derivatives (the tides [*las mareas*], the anti-eviction movement through the actions of the Platform of People Affected by Mortgages [*Plataforma de Afectados por la Hipoteca*], the Platform Surrounding Congress [*Plataforma Rodea el Congreso*] and a long etcetera) changed the way of doing politics and exercising the right to participate in public affairs directly, outside other traditional channels constitutionally provided. They reshaped the way in which political pluralism was perceived and changed the public scene and the rules of citizen coexistence by occupying public spaces. It is enough to bring here the data from the Ministry for Home Affairs - which does not include what happened in the Basque Country or in Catalonia -: in 2012 and 2013 the highest number of demonstrations was reached since the 1978 Constitution was approved, with 44,223 demonstrations reported in 2012.

It was in response to this implementation of the right to protest and to this extra-parliamentary and extra-judicial request to deal with the conflict that Organic Law 4/2015 was drafted, subject since its approval to much broader suspicions of lack of constitutionality than those that the appellants ended up including in their lawsuit. A number of the new behaviours considered as infringements (very serious, serious or minor) reflect the new forms of protest that have emerged in previous years. But the law did not respond to any social demand, as evidenced, for example, by the surveys of the Centre for Sociological Research of those years. Nor did it find an echo or adequate response in the General Council of the Judiciary (report on the draft Organic Law on the Protection of Public Security, 30 December 2013), nor in the United Nations bodies responsible for monitoring compliance with the major human rights treaties, nor from the Council of Europe Commissioner for Human Rights.

The General Council of the Judiciary expressly stated that the draft Organic Law for the Protection of Public Security was situated in what has come to be known as the "Criminal Law of dangerousness". And in its report it was highlighted how "from the axioms of this Law, security becomes a priority category in criminal policy, as an asset that the State and public authorities must defend with all available means and instruments. As a result, the proposed Law, on the one hand, intensifies preventive action not only against crime but also against administrative offences, and on the other, it increases significantly the number of offences against public security".

Moreover, the *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, signed by Maina Kiai on 10 June 2013 [A/HRC/26/29/Add.1], responds to doubts about the conformity of the then draft of Organic Law on the protection of citizen security with international human rights standards, expressing concern that "an extensive concept of security of institutions and authorities is made to prevail over the

protection of the exercise of citizens' civil rights and freedoms, including the right to freedom of peaceful assembly". The rapporteur is "seriously concerned about the disproportionate and excessive restrictions on the right of peaceful assembly that the DOLPPS entails, as I fear that they undermine the very existence of the attributes of pluralism, tolerance and open-mindedness that are necessary to any democratic society". The same concern is expressed both in the United Nations Universal Periodic Review (UPR) of 2015 [one of its recommendations (131,111) calls for the amendment of the law on citizen security so that freedom of expression and the right to peaceful assembly are not restricted, and another (131,180) refers to the need to modify the regulation of returns in Ceuta and Melilla], as in the UPR 2020 which, in the absence of final conclusions, has also addressed the issue of summary returns on the border lines of Ceuta and Melilla and the effects that the application of the Organic Law on the Protection of Public Security has had on the enjoyment of fundamental freedoms and the right to participate in public and political life [document A/HRC/WG.6 /35/ESP/3, which summarizes the communications of the interested parties on Spain].

The rationale for the adoption of the law responds to the logic of maintaining security in the management of political and social problems, without the legislature's awareness that a new generalized situation has emerged in the form of protest, which is common to many countries in our democratic environment. And so it is a reaction, because those who exercise the right to protest are considered to be elements that disturb public order and coexistence, and not active subjects in the construction of political pluralism. And this logic, which undermines the legitimacy of the critical individual and the communities of which he or she is a part, assumes and conveys a disproportionate restriction of the fundamental rights through which the right to protest is exercised, because it favours the maintenance of social peace, tantamount to public security, over the constitutional value of pluralism. And so it forgets that, in a social and democratic State governed by the rule of law (Article 1.1 SC), the fight to overcome inequalities and remove the obstacles that prevent the effective equality of individuals and the groups they belong to (Article 9.2 EC) is the prerequisite for social cohesion, which must be the basis for guaranteeing the social peace and harmony to which the Organic Law for the Protection of Citizen Security aspires. Enjoyment of public security also means equal enjoyment of the rights enshrined in the Constitution (Article 9.2 SC), a decent standard of living (Article 10.1 SC) and the exercise of rights such as freedom of assembly (Article 21.1 SC) and freedom of expression (Article 20.1 (a) SC) without institutional harassment and without risking disproportionate sanctions. The disturbance of public peace and order, within the constitutionally established limits, outside the use of violence and as long as it cannot be described as serious, can be supported by the exercise of fundamental rights, and can be essential to the formation of the political pluralism that is at the basis of democratic societies.

Unless all the above is taken into account, the law cannot be comprehended, nor can it be interpreted in a way that is coherent with the Constitution. The decoupling of the legislature from the social reality of 2015, results today in the disconnection of the interpreter of the Constitution from the social reality of 2020, once again in crisis and in full reflection on the scope of individual freedoms and the exercise of the rights of protest in a situation of serious health crisis that forces us to think, no longer about public security, but about public health.

Many of the provisions at issue in this constitutional appeal do not comply with the constitutional requirement of restricting rights based in accordance with the principles of legal certainty, legality and proportionality. Yet the judgment does not make this clear. Either because it does not fully and completely apply the proportionality test [in relation to Articles 20.2 -legal basis 4-; 36.2 -legal basis 6 (C) (c)-; 37. 1 -legal basis 6 (D)-]; or because it develops a conforming interpretation within the framework of administrative law on penalties that circumvents the principle of taxativity, and provokes much more legal uncertainty than the one it seeks to combat, as well as causing a clear chilling effect with regard to the exercise of

the fundamental right (Articles 37.3 -legal basis 6 (E)-; 37.7 -legal basis 6 (F)-; and first final provision -legal basis 8-).

In the judgment, freedom and security appear as a binomial, and indeed they are so defined in Article 17 EC. But freedom, justice, equality and political pluralism are the superior values of the legal system of our social and democratic rule of law (Article 1.1. EC), and this varied and privileged character must be taken into account when examining the constitutionality of restrictions on the rights that embody these values, in particular when the restrictions come in the form of administrative sanctioning law. Yet the judgment has failed to do it.

a) *Demonstrating outside the place where the parliamentary mandate is exercised cannot be an illegitimate exercise of the right to political participation (Article 36.2 OLPPS and Article 21 CE).*

Demonstrations have a fundamental relevance as a political factor, and are an essential form of collective action in Western democracies. Knowing how the form, scope and development of demonstrations have evolved, it is no longer possible to think of demonstrations only as an expression of conflict -which provokes them or can produce them-, but also as a form of democratic expression, because they are part of the political process and because they give a new interpretation to the right to political participation in Article 23.1 CE. The mere evocation of the alter-globalization movement, the *Arab Spring*, the demonstrations against the measures linked to the proclamation of the state of emergency in various European countries, or the very recent *All-Poland Women's Strike* movement, is clear proof of this political-participatory dimension.

In this context, the place where demonstrations are held also participates in the construction of the immanent political discourse, and the occupation of the space is a way of giving it symbolic value and placing it in the political debate. Demonstrating in the *Cortes*, Parliaments or governmental headquarters is also part of the political discussion which, if it is peaceful and without recourse to violence, would be within the content of Article 21 EC. Demonstrations held before parliaments or assemblies, where representatives of the citizens meet and exercise their representative mandate, are not only intended, as the judgment points out, to send a message to the representatives of popular sovereignty, but also to express the disconnection felt between those who hold that sovereignty and those who make decisions in their name and on their behalf. The symbolic space, in this case, is clearly part of the political discourse, in particular if we bear in mind that, given the existence of specific criminal offences to safeguard the collective inviolability of the Chambers (Articles 494, 495 and 498 CC), the introduction of Article 36.2 OLPPS is not justified.

However, the judgement does not assume that demonstrating in front of the legislative chambers is a legitimate exercise of the right to demonstrate and political participation. On this assumption, a stricter analysis of a sanctioning provision that classifies the conduct as serious should have been made. And despite not ignoring the reality to which I have just referred, insofar as it recognises that the urban space is a space for participation and that the place where the meeting is held is not unrelated to the effectiveness of the demonstration, it does not draw the appropriate substantive consequences from this formal recognition. The majority of the court takes the view that the mere fact of demonstrating in front of the seats of these representative chambers implies a risk or threat to the normal development of parliamentary activities, whether those who carry out these activities are in session or not.

Article 36.2 OLPPS specifically characterizes disorder or threats to public security as a serious offence when this is breached in front of the legislative chambers. The characterisation of the offence is then associated with the place where the demonstration is held, which requires the test of constitutionality to assess the suitability, necessity and

proportionality, not of the classification of the unlawful act but of its specific characterisation. And it is on this aspect of the argument of the judgment that I disagree with the judgment.

The conflict between the constitutional protection of the parliamentary representative function (which is linked to articles 66.3 and 77 EC) and the guarantee of the expressive, democratic and symbolic value of the right of assembly before the parliamentary chambers is settled in the judgment in favour of the first element of the binomial. Although previous case-law recognising this is invoked, no account is really taken of the fact that the right to demonstrate also collaborates in the establishment and development of democracy and political pluralism, as it is also a formula for direct participation - not institutionalised - in public affairs within the framework of our social and democratic rule of law [SSTC 85/1988, LG 2; 66/1995, LG 3; 284/2005, LG 3, and 90/2006, LG 2a)].

The reasons for deciding the conflict in this way are clearly expressed in legal ground 6, paragraph (C) (c). For the Court, the provision pursues two legitimate constitutional aims, to ensure “the normal functioning of the parliamentary body in its different forms and formations” and to prevent “disregard of the symbol embodied in the parliamentary seats that may reasonably contribute, by itself or by inciting other behaviour, to endangering the peace and harmony of citizens [Article 3 c) OLPPS] or, more generally, to condition other citizens to freely exercise their rights and freedoms granted by the legal system [Article 3 (a) OLPPS]”.

A systematic and teleological interpretation of the various constitutional provisions, both those enshrining fundamental rights and those determining institutional privileges, could justify a restriction of the right of assembly in order to ensure the normal functioning of parliamentary bodies, provided that such restriction is reasoned, proportionate and necessary to achieve the aim pursued (SSTC 195/2003, LG 7, and 24/2015, LG 4, among others). That purpose, then, could be legitimate, but it does not occur when no activity is underway inside the Chambers. The symbol of the institution and the symbol of the exercise of the right, both essential for the establishment of the democratic regime, have equal constitutional value and one should not be privileged over the other. Thus, the lack of constitutionality of the challenged provision is obvious when it characterises the punishable behaviour by the mere fact that it takes place outside closed Chambers. Because in this case there is no parliamentary function to preserve. And the protection of the symbol is not enough to justify the restriction of the right, because dignity is predicated of human beings, holders of fundamental rights (Article 10.1 SC) and not of the institutions or the buildings in which they are housed

With regard to the punishment of the behaviour when the chambers are in session or parliamentary activities are under way, the provision does not conform to the canon of constitutionality set out in general terms in the judgment either. It is not easy to distinguish what type of disturbances, which alter the normal functioning of the Legislative Chambers, are likely to fall within the type of offence in Article 36.2 OLPPS, if we bear in mind that Article 494 CC punishes conduct arising from meetings or demonstrations which, when the Chambers are in session, have the effect of "altering their normal functioning”. What is the difference, then, between the criminal conduct and that which amounts to the administrative offence? The formula used to define the legal asset protected by the administrative offence - "serious disturbance of public security" in connection with "guaranteeing the normal functioning of institutions" - and by the criminal offence - "disruption of the normal functioning" - does not provide a clear definition of their respective scope of application. Moreover, the conducts subject to administrative sanction could also be included in other types of offences provided for in the Organic Law for the Protection of Public Security, such as Article 36.3, without it being clear, in accordance with the concurring rules of Article 31 OLPPS, which is the particular provision. All this narrows the scope of application of the administrative offence to the punishment of actions which, although they may affect the functioning of parliamentary institutions, are not sufficiently significant to seriously disrupt public safety, or go beyond the level of mere nuisance or discomfort in the conduct of parliamentary activity.

Therefore, due to its legal structure, the offence introduces a restriction of the right of assembly that does not satisfy the proportionality test, at the same time as it discourages its exercise under the threat of a serious administrative sanction (SSTC 66/1995, FFJJ 3 and 5, and 42/2000, LG 2). In other words, its form does not satisfy the need to define in a concrete, precise, clear and intelligible manner the infringing conducts and their corresponding sanctions (SSTC 145/2013, LG 4, and 185/2014, LG 8). And, therefore, it not only violates Article 21 EC, but also Article 25.1 EC, due to its excessively open and indeterminate nature.,

b) Spontaneous demonstrations are not prohibited demonstrations. The penalties associated with their holding generate a chilling effect on the exercise of the right that is constitutionally unacceptable (Article 37.1 OLPPS and Article 21 CE).

A combined reading of Articles 30.3 and 37.1 OLPPS leads to the sanctioning of the organisers or promoters of prohibited demonstrations, which have not been communicated or which, having been communicated, do not observe the terms of the communication or the governmental modifications to the terms of the communication. Therefore, spontaneous demonstrations, even when they are peaceful, are considered to constitute a minor administrative offence, making those who organise or promote them liable.

The judgement upholds the constitutionality of the provision from the point of view of taxativity and legal certainty (Articles 25.1 and 9.3 SC), denying that it entails an unjustified or disproportionate restriction of the right of assembly, or that it has the effect of discouraging the exercise of this right. However, I believe that the rule inverts the constitutional logic of the recognition of the right to demonstrate, by modifying the nature of the formal act of communication. This change in the right is a clear alteration of its essential content which, therefore, becomes unconstitutional as opposed to Article 21 SC.

Article 21 EC expressly prohibits, in its first paragraph, the possibility, both in law and in administrative practice, of subjecting the exercise of the right of assembly to authorization. Any provision, or administrative act, with such an objective would therefore violate the aforementioned article. For this reason, the second paragraph of the provision, which provides for the need to give prior notice to the competent authority of the calling and holding of any meeting or demonstration, is only consistent with the first part of Article 21 SC provided that the act of giving notice is denied any conditioning effect on the exercise of the right. The purpose of the notification of the demonstration is to guarantee its proper exercise by the organisers and to avoid, as far as possible, that the exercise of the right may adversely affect persons and property, or may entail the infringement of other constitutionally recognised rights, in which case modifications may be made to the exercise of the notified right, including suspensive conditions. However, these modifications must always be considered restrictively. Thus, prior notification should not be regarded as submission of the exercise of the right to government authorization, but rather as an instrument at the service of those exercising the right to demonstrate. Sanctioning the lack of communication subverts this way of understanding prior communication and transforms it into a *de facto* subjection to administrative authorization. Where the administration impose sanctions for failure to communicate or comply with the terms of the prior notice, then the communication becomes an act with a binding substantive content that binds the organisers and enables the administration to claim responsibilities

As in other provisions of the judgment, the court misinterprets, in my view, the case-law of the European Court of Human Rights, decontextualizing the pronouncements it uses as reinforcing arguments, and forgetting two fundamental aspects. The first is that Article 10.2 SC imposes an obligation - not always followed by this court - of adjustment or interpretative confluence of minimum standards, so that nothing prevents the Constitutional Court from applying standards that are more protective than those derived from the Strasbourg doctrine. Indeed, the only interpretative autonomy of the constitutional jurisdiction should lie in the improvement of these standards. Secondly, the judgments of the European Court of Human

Rights decide on individual and specific claims, not abstract judgments of conventionality, so that the grounds of the judgments cannot be uncritically transferred, without taking into account the factual and normative assumptions that condition them, ignoring the existence of a degree of discretion granted to the States.

Therefore, when resorting to the case-law of the European Court of Human Rights to assert that States may require prior notification before holding a demonstration, it should be remembered that Spain cannot require prior notification in the form of a request for authorization, because this would be incompatible with the Constitution itself.

The Strasbourg court always carries out the full analysis of the limitation of measures restricting fundamental rights by examining whether such measures are provided for by law, have a legitimate aim and are necessary in a democratic society. And this last step in the application of the canon is fundamental, because this is where one can examine whether the interference with the exercise of the right is in line with the specific circumstances of the case. It is true that when an abstract assessment of constitutionality is carried out, as is the case here, setting out the proportionality test is not so simple because the context is general and fundamentally theoretical. But such difficulty does not preclude the need to address the argument comprehensively. As declared by the European Court of Human Rights itself “The proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 (Article 11-2) and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places” (ECtHR’s judgment of 26 April1991, *Ezelin v. France* case).

In this case, the imperative is to guarantee public security, but it is not justified that, in the case of a peaceful and unarmed assembly, the fact that the demonstration has not been timely and orderly communicated, or the fact that it takes a different route to that previously announced, or different to that marked in the communication from the Government Representation Office [*Subdelegación del Gobierno*], can be considered an infringement. In order to ensure public safety, it could be and is indeed punishable to disturb public security (Article 36.1 OLPPS); to provoke disorder (Article 36.3 OLPPS); to disturb a lawful demonstration (Article 36.8 OLPPS). However, if the holding of a peaceful assembly is sanctioned, in which there is no disturbance of public order or any nuisance other than that derived from the mere fact that a demonstration is taking place, then what is being sanctioned is the lack of communication, and then the aim cannot be to preserve public safety, so that there is a clear disconnection between the stated purpose and the measure adopted, from which the lack of proportionality of the measure restricting rights is derived.

c) Failure to know what type of action is administratively reprehensible means that the principle of taxativity is not being complied with (Articles 37.3 and 37.7 OLPPS and Article 25 CE).

The attempt to formulate declarations in conformity with the law in provisions that are either clearly restrictive of rights or belong to the sphere of administrative sanctioning law entails a greater damage to the legal system than would result from the expulsion of those same rules from the system of sources.

Interpretative judgments, "reject a claim of unconstitutionality or, in other words, declare the constitutionality of a contested provision insofar as it is interpreted in the sense that the Constitutional Court considers adequate to the Constitution, or not interpreted in the meaning (or meanings) that it considers inadequate" (STC 5/1981). The problem, in in this case, is that the first enforcer of the rule declared compliant under certain conditions will be precisely the party called upon to restrict the exercise of the fundamental right at issue, according to the logic and purpose of the Organic Law for the Protection of Public Safety, to which we have referred in the first paragraphs of this opinion. And that party will be aware of the rule, but not necessarily of the judgment describing how it is to be interpreted. And until

the matter is decided by a judge who is capable of applying the appropriate interpretation, the right to privacy, or the guarantee of *non-refoulement*, or the right to demonstrate will already have been undermined, and reparation will be very difficult. This would have the effect of discouraging the legitimate exercise of rights, which the Strasbourg Court has so often rejected (the chilling effect).

Constitutional interpretative judgments on the guarantee of fundamental rights against the sanctioning power of the State and, in particular, against the sanctioning power of the administration, do not ensure a restrictive interpretation of the limits to the exercise of fundamental rights, but rather, in contrast, they conform to the broadest possible interpretation of these limits within the margins of constitutionality. Which is not desirable neither for the guarantee of rights nor for the guarantee of the principle of legal certainty (Article 9.3 SC).

In short, although interpretative judgments are the result of the application of the principles of preservation of the law and interpretation in accordance with the Constitution, they may not always be compatible with the guarantee of legal certainty (Article 9.3 SC) and, in the case of sanctioning law, with the guarantees of typicality and taxativity (legality of penalties, Article 25.1 SC). It is my understanding that the court should have applied in this case the principle that if the interpretation introduces a greater degree of complexity in the application of the rule than that derived from the rule itself, that is because, obviously, the conforming interpretation is rather a reconstruction of the rule and, therefore, the contested rule was surely incompatible with the control parameter.

Legal Ground 8 of STC 341/1993, with regard to the review of the previous law on public security, expressed it in this way: "The interpretation and legislative application of the constitutional concepts that define the areas of freedom or immunity is an exceedingly delicate task, in which the legislature cannot diminish or relativize the rigour of the constitutional statements that provide guarantees of rights or create margins of uncertainty as to how they are affected. This is not only irreconcilable with the very idea of constitutional guarantee, but even contradictory with the only raison d'être - quite feasible in itself - of these legal provisions, which is none other than to ensure greater certainty and precision as regards the limits framing the actions of the public authorities, also when these authorities clearly fulfil the 'State's duty to effectively prosecute the crime' (STC 41/1982, legal ground 2). Efficiency in the prosecution of crime, which is unquestionably legitimate, cannot, however, be imposed at the expense of fundamental rights and freedoms".

The judgment from which I disagree, it seems clear to me that the effectiveness of maintaining public order and public safety is imposed at the expense of fundamental rights and freedoms, and leaves margins of uncertainty as to how these rights are affected and guaranteed. The consistent declarations of constitutionality of Articles 37.3 OLPPS [legal basis 6(E)] and 37.7 [legal basis 6(F)] are proof of this.

Article 37.3 OLPPS states that "non-compliance with pedestrian traffic or route restrictions during a public event, meeting or demonstration, when they cause minor alterations during their normal progress". The judgment recognises that this wording can have a chilling effect on the exercise of the right by covering any minor alteration in the development of meetings or demonstrations, so this expression is interpreted by saying that the alterations must be "truly relevant, in the sense of being of a certain entity and seriousness insofar as, being a provision of administrative sanctioning law, its application must be the result of a restrictive interpretation". The court, therefore, by way of interpretation, has modified the content of the provision and the minor alterations have become relevant alterations due to their entity or seriousness. In my view, to stretch the meaning of a word to make it say the opposite is to recognise that the expression in the provision does not conform to the limits that the judgment claims to apply.

Article 37.7 OLPPS defines as a minor offence the occupation of real estate or remaining in it - against the owner's will - when it is not a crime and the occupation of public roads in violation of the law or against the decision of relevant authorities to the contrary. Thus, occupation is punishable, when it is not a crime, and along with it an indefinite and certainly very broad range of conducts.

This provision is clearly vitiated by a lack of taxativity, and the compliant interpretation provided by the judgment does not overcome it, but rather deepens it. The provision suffers from a lack of specificity that clearly violates the principle of typicality under Article 25.1 SC. It does not specify what is to be understood by "occupation", whether violence or intimidation should be involved, or whether the simple simultaneous presence of persons in such a common place, even in a totally peaceful manner, would be sufficient. This provision could be applied to a protest camp, to the installation of petition circulators in a public square without legal protection or in contravention of a command from the authorities in application of the law, or to the setting of a homeless in the street to spend the night, not to mention an unlimited number of other situations that are not specified.

Public roads, as spaces for participation, are home to a multitude of activities which are a peaceful expression of civic coexistence, unrelated to the exercise of the right of assembly, but which may be linked to the exercise of other rights and freedoms. For this reason, any restrictions must be interpreted with restrictive criteria and in the sense most favourable to the effectiveness and essence of these rights. It is not worth recalling the constitutional case-law that reiterates this ad nauseam. The judgement does so quite appropriately. However, despite this, I cannot reach the same conclusion as the judgment, because the offence does not satisfy either the requirements of the principle of taxativity (Article 25.1 SC) or the principle of legal certainty (Article 9.3 SC). We have argued the need for the legislature to make the greatest possible effort in defining the types of penalties, which does not prevent the use of indeterminate legal concepts (STC 151/1997, LG 3), yet does prevent the use of such open expressions "that the effectiveness depends on a practically free and arbitrary decision of the interpreter and judge" (SSTC 100/2003, LG 2; 26/2005, LG 3; 242/2005, LG 2, and 104/2009, LG 2). In compliance with the aforementioned doctrine, in the case of the contested provision we are faced with a blank sanctioning rule, given that the law whose infringement or application establishes the sanction for occupation of public roads is unrelated to the Organic Law for the Protection of Public Security itself, without at any point specifying which law is involved or the type of decision against which the prohibited behaviour arises. Furthermore, the introduction of an administrative offence in a State provision for acts that are already sanctioned by Municipal by-laws only intensifies the punitive effort against those who occupy public spaces in defence of their own or, in most cases, collective interests, and on excluded sectors of the population who continue to be placed under the threat of breaking the law for the mere fact of being in a place where other members of society does not want to see them, and who are subjected to sanctions that they are unlikely to be able to cope with. The result is to discredit these people and the way in which they address their complaints, thus diminishing the importance of being taken into account by the public authorities.

2. The right to personal privacy and dignity of individuals are impassable limits to external body searches [Article 20.2 b) OLPPS and Article 18 SC].

Article 20.2 (b) OLPPS empowers members of the State security forces and corps, without the intervention of any judicial authority, to carry out external body searches, i.e. pat-down searches, in which the possibility of partial or even full nudity is allowed Certainly, the judgment rules out the possibility of full nudity, but it is also true that it does not explain the reasons that lead it to understand the provision in this way. The judgment limits to stating that Article 20 OLPPS does not cover cases of full nudity, without taking this consideration into account in the ruling, and without this conclusion being able to be deduced from the literal wording of the provision.

In legal ground 4 (c), the judgment considers that "the 'existence of rational grounds' that make it possible to discover or obtain 'instruments, effects or other items' relevant to the exercise of the functions of investigation and prevention legally entrusted to the security forces and corps (Article 20.1 OLPPS), in order to preserve public security", is the constitutionally legitimate purpose that justifies the limitation of the right to personal privacy (Article 18.1 EC). In other words, it is the prevention of crime and the investigation of the commission of possible offences that justifies the restriction of the right without any judicial intervention whatsoever (the judgment expressly states this in section (d) of legal ground 4).].

The wording of the provision leaves such a wide margin for the discretion of law enforcement officers that it cannot be understood that the measure envisaged is proportional to the violation of the affected right, especially bearing in mind that the court has acknowledged that strip-searches are a serious interference with the right to personal privacy (STC 218/2002). The judgment states that taking into account the legitimate aim pursued (investigation and prevention of crime) the measure is suitable and necessary, offering guarantees for its implementation with a minimum impact on the right. But I do not agree either that the purpose of the measure justifies it or that it is appropriate or necessary, because the margin of uncertainty is so wide that it is impossible to make an unequivocal assessment on the matter.

In the first place, the enabling assumption for adopting the measure is that there are "rational grounds" that could lead to the discovery of effects or items relevant to the fulfilment of the police functions of investigation or prevention (Article 20.1 OLPPS). Thus defined, the direct purpose of this provision is not to guarantee public security, but to ensure the fulfilment of the functions of the State security forces and corps provided for in Article 11.1 g) of Organic Law 2/1986, of 13 March (the function of securing the instruments, effects and evidence of crime). Therefore, a right intimately linked to human dignity is sacrificed so that the police authority can complete its investigative function, without necessarily compromising public safety at the time of the external bodily intervention. The rule does not satisfy the canon of foreseeability, because it does not specify the precise grounds for adopting such a measure. Nor does it specify which are the instruments or objects that, due to their relevance - potential for generating a serious risk to public security - could justify it; nor the facts or circumstances that could trigger police intervention (criminal or dangerous behaviour susceptible to administrative offence, their commission or the simple threat or intention to commit them, etc.).

Authorizing the practice of an external body search that may entail a possible nudity in order to prevent or investigate, if necessary, any administrative offence is clearly disproportionate, and also ignores the gender perspective and the different impact that nudity has on personal privacy depending of the sex of the person who undergoes it. The principle of proportionality can neither be understood to be satisfied by the requirement that the search be carried out with respect for the principles of minimum interference, of least harm to the privacy and dignity of the person concerned, and of suitability, necessity and proportionality (paragraphs 3 and 4), because the guarantees provided for leave open the option that, in cases of urgency, they may not be complied with, once again opening a wide margin for the discretion of the police officer concerned. The provision authorises a particular police behaviour, but it does not provides a guarantee against police action at all, and by formulating the guarantees of intervention it clearly shows its shortcomings, as it has limited itself to raising the Instruction 12/2007 issued by the State Secretariat for Security on the behaviour requested to law enforcement officials to guarantee the rights of people arrested or under police custody to legal status.

The provision is not sufficient, and cannot be saved by interpreting it as excluding full body searches, which are the most invasive, because nothing is said in the law in this regard. As stated in the separate opinion to STC 17/2013, of 31 January, concerning searches in detention centres for aliens, "the lack of quality of the law is so overwhelming in this case that it should have led to a statement of unconstitutionality of the provision for violation of Article

18.1 SC. The guarantee of legal provision is only one of the conditions for the constitutionality of the restriction of this fundamental right. However, this guarantee is not limited to the fact that the measure is authorized by the law, but, in accordance with minimum requirements of the quality of the law and observance of the essential content of the right - as a mandate addressed to the legislature of fundamental rights - (Article 53.1 SC), it is imperative that in such regulation the legislature predefines, as the first obliged to weigh up conflicting rights or interests, those cases, conditions and guarantees in which it seems appropriate to adopt measures restricting fundamental rights".

In the present case the regulatory predefinition is not sufficient. And therefore, letter (b) of Article 20.2 OLPPS violates the right to bodily privacy under Article 18.1 SC, reason why it should have been declared unconstitutional and null and void.

3. *Refoulement* at the frontier criminalizes the irregular migrants and the judgment *de facto* prevents them from defending any of human rights belonging to them (First Final Provision of the Organic Law on the Protection of Public Security).

As with the examination of the law's penalty regime, to which I have already referred, the interpretation of its first final provision, which legalizes a common practice at the Spanish land borders with Morocco - of Europe with Africa - known as "immediate removals" [*devoluciones en caliente*], ignores the context in which the contested provision was passed.

The analysis of this - well known - context leads to the conclusion that the purpose of the first final provision of the Organic Law for the Protection of Public Security was not to set up a procedure different from those already legally provided for in the regulations on aliens for the removal of persons intercepted at the fences of Ceuta and Melilla, but to disregard every kind of procedure, giving legal coverage to an action of the State security forces and corps which consists of the persons intercepted at the fence being handed over to Moroccan agents with no procedure whatsoever. This conclusion is reinforced by the absence in the wording of the provision of any reference to the need to develop a procedure; the evidence that, despite the time that has elapsed, no regulatory development of any procedure has been laid down; and the fact that, in the administrative practice of the enforcement of rejections at the frontier, no procedure of any kind has been followed..

This reading of the provision corresponds to that by the appellants, who consider that it is a regulation that establishes a *de facto* administrative action contrary to the Constitution. Therefore, the constitutionality challenged by the appellants, although it is formally directed, as could not be otherwise, against a legal provision, claiming the violation of Articles 9.3, 24.1 and 106 SC (and subsequently invoking Articles 13.4 and 15 SC), it does so against the backdrop of a specific administrative practice, which is ultimately what the appellants consider to be contrary to the Spanish constitutional system.

The majority opinion has taken the view that this provision is constitutional provided that it is interpreted in accordance with a number of considerations made in legal ground 8(C), in particular in the following points: (i) application to individual entries; (ii) full supervision by the courts and (iii) compliance with international obligations; thus leading to the ruling.

In the aforementioned context of the aim pursued by the contested provision, this ruling implies two things. On the one hand, the introduction of a specific legal regulation for the removal of persons intercepted at the fences of Ceuta and Melilla is declared constitutional, provided that the aforementioned conditions are met, since the provision is not declared unconstitutional and null and void but is conditional on a conforming interpretation. On the other hand, the rejection at the frontier is disallowed, as it has been applied until now, without the possibility of supervision by the courts and observance of international obligations, notably the individualization of the action to identify situations of particular vulnerability.

While agreeing that rejection at the frontier, in order to be constitutionally valid, must be subject to judicial control and must comply with international obligations [as stated in paragraphs (b) and (c) of the third section of the judgment], I cannot but point out the paradoxical nature of the judgment on this point. Indeed, the contested provision, if anything, makes impossible both judicial control of the removals and the possibility of compliance with international human rights treaties signed and ratified by Spain, which are part of our own system of sources of law (Article 96.1 SC).

I share some of the assumptions expressed by the majority opinion underpinning the interpretative declaration of constitutionality:

(i) All the guarantees provided for in our legal system are applicable to the regime of rejection at the frontier set forth in the contested provision, both because it is an action carried out by Spanish authorities and public officials, and because it takes place in Spanish territory, since the fences of the autonomous cities are located and built within that territory, and there is no constitutional coverage to deal with a concept of border that can be established in a discretionary manner by the Spanish administration, even if it is for the mere purpose of deciding the application of the legislation on aliens, as this would violate Article 9.3 SC.

(ii) The implementation of a control system for situations of access to national territory through the crossing of the fences of Ceuta and Melilla cannot be considered, from a constitutional point of view, unreasonable or unjustified, in view of their uniqueness.

(iii) The action consisting of "rejection at the frontier" must be subject to the appropriate judicial control in accordance with the actions and appeals lodged, in each particular case, by the person concerned; it must be carried out in genuine and effective compliance with the guarantees recognised by international human rights standards for the persons concerned; and the security forces and corps must pay special attention in these actions to particularly vulnerable persons.

In contrast, I do not agree with some of the assumptions used in the reasoning of the majority opinion and with the omission of others, which in my view were relevant to the assessment of constitutionality from the perspective of Articles 9.3, 24.1 and 106.1 SC.

(i) The majority opinion in its reasoning refers to the fact that the ECtHR's judgment of 13 February 2020, in *N.D. and N.T. v. Spain* case, regarding the circumstances of the specific case at issue, sets out as a condition for considering that the removals comply with the requirements of Article 4 of Protocol No. 4 of the European Convention - prohibition of collective expulsion of aliens - that the attempt to enter Spanish territory must be made by taking advantage of their large numbers and using force. In spite of this, the judgment argues that, generally speaking, it is not necessary for these circumstances to be observed in order to apply the contested provision, but that it is sufficient to discover at the border fences of Ceuta and Melilla any attempt to enter Spain by any person, individually considered. In fact, this consideration is taken to the ruling when it is specified that one of the conditions for the constitutionality of this provision is: "(a) Application to individual entries."

It is absolutely contradictory to state that rejection at the frontier must comply with international human rights law, including Article 4 of Protocol No. 4 ECHR, and at the same time to establish that it is not necessary for one of the conditions imposed by the European Court of Human Rights to be met in order to validate rejection at the frontier as subject to the prohibition of collective expulsion, which is to carry out a reasonable and objective analysis of the specific case of each of the individuals to be expelled. If the European Court of Human Rights, as the highest and true interpreter of the guarantees of the European Convention on Human Rights and its Protocols, has ruled in the aforementioned ECHR of 13 February 2020, that the immediate and forcible return of aliens from a land border is only acceptable in the context of an attempt by a large number of migrants to cross that border in an unauthorised

manner and *en masse*, then, the position of the majority opinion to extend the applicability of this provision to cases not authorised by the case-law of the European Court of Human Rights, which is what is done in paragraph 3(a) of the judgment - "application to individual entries" - contradicts what is stated in paragraph 3(c) of the judgment - "in compliance with international obligations".—.

(ii) The majority opinion also finds that the “rejection at the frontier” is a substantive action of a coercitive nature, whose purpose is to immediately reinstate the legality contravened by aliens who attempted the irregular crossing of that particular land border.

However, I understand that this categorisation would cover, where appropriate, the act of intercepting the person trying to cross the fence, but not, in any case, the subsequent act of physically handing him over to the Moroccan authorities. This second act constitutes *refoulement* in the legal sense. The use of the term *refoulement* in the contested provision does not make it possible to avoid the fact that the person intercepted is already on Spanish territory and under the custody of Spanish officials. Therefore, the contested provision, according to its own wording, does not provide for a regulation consisting of preventing access to national territory - the intercepted persons are already in national territory - but of preventing them from remaining in national territory by returning them to their place of origin. Hence, this regulation and the actions it aims to cover must be qualified as expulsion in the legal sense, which indeed is how they have also been defined by the ECHR of 13 February 2020, § 191.

An act of these characteristics - the physical surrender of a person under Spanish jurisdiction to another jurisdiction - with all the far-reaching implications that this entails in terms of the ownership of rights, including fundamental rights, of the individual concerned, is of such relevance and legal magnitude that, from a constitutional perspective, it cannot be considered a mere substantive act that does not require some kind of procedure in which minimum guarantees are complied with.

The uniqueness of the location of Ceuta and Melilla could be a justifying element, from a constitutional point of view, to determine a particular return procedure in the legislation on aliens. However, there is no constitutional justification whatsoever, from the perspective of Articles 9.3, 24.1 and 106.1 SC, for the "restoration of the violated migratory legality" to be carried out completely disregarding a minimum procedure and respect for essential guarantees. The greatness of the system of freedoms and human rights, a necessary substantive element for the identification of a regime as democratic, consists, among other things, in responding to an alleged irregularity with respect for minimum procedural guarantees in the imposition of the legal consequences derived from that conduct.

Moreover, it is hard for me to understand how it is possible to reconcile the idea that rejection at the frontier should be qualified as a mere coercive substantive action which, constitutionally, does not require a procedure or respect for minimum guarantees, with (i) the categorical affirmation that "rejection at the frontier", as an action carried out by Spanish public officials, is subject to strict compliance with the Constitution and all other legal provisions, as well as having to observe international human rights and international protection standards; and (ii) the conditions of constitutionality of the provision imposed in the ruling that it must allow for both judicial control and compliance with international obligations in terms of individualizing and identifying possible situations of particular vulnerability.

Without a minimum procedure and the possibility of individualizing each act of rejection at the frontier, there is no possibility of making the fundamental right to obtain effective judicial protection (Article 24.1 SC) genuine and effective, through a subsequent judicial control of that specific action. Nor is it possible to guarantee either the principles of responsibility and prohibition against arbitrary actions on the part of public authorities (Article 9.3 SC) or the judicial control of the legality of administrative action, as well as its subordination to the purposes justifying it (Article 106.1 SC). Therefore, the provision should have been declared fully unconstitutional and null and void.

Likewise, without this minimum procedure, it is impossible to make genuine and effective the essential constitutional guarantees, inherent to any procedure for the restoration of migratory legality through *refoulement*, set out in constitutional case-law, which have been specified, generally speaking, in the publicity of rules, contradiction, hearing of the interested party and reasoning of decisions; and, in connection with Article 22 LOEx, in the rights to free legal assistance and the assistance of an interpreter in all administrative proceedings that may lead to their return, aimed at guaranteeing the right of defence (STC 17/2013, of 31 January, LG 12).

(iii) I also believe that the first final provision of the Organic Law on the Protection of Public Security is unconstitutional because it conflicts with Articles 13.4 and 15 SC in relation to the right to international protection and the principle of *non-refoulement*.

The judgment, relying on the content of the second and third paragraphs of the contested provision, states that neither the application of international human rights law nor the legal regime of international protection has been excluded, despite which, in the ruling, the constitutionality of the provision is conditional on the fact that rejection at the frontier is carried out with respect for these international obligations. The problem of the argumentative process developed by the majority opinion on this issue is, once again, to reconcile the interpretation of the first section of the contested provision, according to which rejection at the frontier is considered a mere coercive substantive action which, by its very character, would be excluded from any type of administrative procedure, with the requirements imposed in the other two sections concerning the need to observe international human rights law and the right to international protection.

The assertion that it follows from international human rights obligations that, when executing a "rejection at the frontier", security forces and corps should pay special attention to particularly vulnerable categories of persons is clearly insufficient since it is not explained how such obligations can be enforced in the absence of a procedure developed with minimum essential safeguards. Precisely, if anything guarantees the existence of a procedure, it is the singularized identification of the situations that surround people and that may make them particularly vulnerable because they are minors, asylum seekers or international protection seekers, victims of trafficking or sick people. The majority opinion exemplifies this necessary attention with the description of situations of particular vulnerability that can be seen externally - people who manifestly appear to be minors or affected by serious reasons of incapacity, and pregnant women. But it is clear that this assessment reveals ignorance of the situations experienced at the southern border. The age of people is never obvious when they are at the top of the fence - as the opinion of the Committee on the Rights of the Child of 12 February 2019 (CRC/C/80/DR/4/2016) states -, and it is even less obvious that women in an evident state of pregnancy, or people with apparent and "serious" disabilities, are going to attempt an assault. The safeguards provided for in the judgment are so remote from the reality of things that the safeguard is no longer a safeguard.

Beyond this, it should be remembered that there are situations of particular vulnerability that are not necessarily easy to apprehend, and for whose identification it would be necessary to develop a procedure with sufficient guarantees to meet these identification needs. The Constitution does not enable a victim of human trafficking or other forms of gender-based violence, a potential applicant for international protection or a minor who does not appear to be a minor, to be considered of lesser consideration for the purposes of what is now being discussed than a pregnant woman, a person with clear signs of suffering from serious incapacity or a minor whose physical appearance will not cast doubt on his or her minority. The invocation in international human rights law, as well as in the Spanish Constitution, of the need for protection of particularly vulnerable persons has nothing to do with the *prima facie* evidence of the situation. The absence of appearance or evidence of that situation of particular vulnerability does not deprive the persons of the constitutional protection that should be

afforded to them. However, rejection at the frontier, considered as a mere coercive substantial action not subject to procedure, not only prevents the required proactive attitude of the public administration in identifying these situations, but, even more seriously, makes it impossible for the persons concerned to even allege their condition of vulnerability.

Moreover, compliance with international obligations as a condition imposed by the majority opinion for the constitutionality of the regulation of rejection at the frontier has become impossible, at least as far as minors are concerned. The opinion of the Committee on the Rights of the Child of 12 February 2019 (CRC/C/80/DR/4/2016) has already stated that the practice of this type of summary returns by Spanish public officials is in breach of the international obligations under Articles 20. 1 - a child deprived of his or her family environment shall be entitled to special protection provided by the State- and 37 - no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment- of the Convention on the Rights of the Child, insofar as it does not allow the minor to undergo a process of identification and assessment of his or her personal situation and of the existence of a risk of persecution and/or irreparable harm prior to being handed over to the Moroccan authorities and is not given the opportunity to make submissions to such return (paragraphs 14.7 and 14.8).

With regard to the genuine and effective impossibility of complying with the constitutionally imposed condition of respecting international obligations, the impact of rejection at the frontier on the identification of international protection needs cannot be ignored either. The judgment issued by the CJEU of 25 June 2020, case C-36/20, recalls that Article 6.1 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, sets out the possibility not only to make an application for international protection to an authority competent under national law for registering such applications but also to other authorities which are likely to receive such applications, but not competent for the registration, expressly mentioning the police, border guards, immigration authorities and personnel of detention facilities, and imposing the obligation to States that such authorities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged. In this context of the case-law of the Court of Justice of the European Union, I also fail to discern the viability of an interpretative pronouncement such as the one upheld by the majority opinion regarding Article 13.4 SC. If, in accordance with European regulations and case-law, a border guard, like those called upon to enforce rejection at the frontier, have the legal status of "other authorities" to receive applications for international protection, the absence of a minimum procedure complying with essential guarantees also makes it impossible to comply with the international obligation imposed as a condition of constitutionality of the contested provision

Accordingly, I believe that the first final provision introducing the tenth additional provision in Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain, and their social integration, should have been declared unconstitutional and null and void, as it does not make it possible in a genuine and effective way to comply with the requirements of constitutionality set out in legal ground 8 (C) and in the third paragraph of the judgment.

In short, the approved judgment and, in particular, its ruling, are in my view irreconcilable with the very idea of the restrictive interpretation of the limits to the exercise of fundamental rights. And they are, moreover, inconsistent with the only *raison d'être* that I believe to be legitimate for a law for the protection of public security: to ensure that the guarantee of social harmony and peaceful coexistence does not undermine the exercise of the rights that are called upon to alter that peace, to ensure political pluralism and the defence of the rights of those who find it most difficult to live in peace and harmony.

And, in this respect, my separate opinion is hereby issued.

Madrid, on 19 November 2020.-María Luisa Balaguer Callejón.- Signed and sealed.