Public spaces and the exercise of fundamental rights in Spain following the approval of the organic law for the protection of public safety

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Abstract: This study is primarily an analysis of Organic Law 4/2015, 30 March, of the protection of public safety as a paradigm of the stigmatisation of public disorder and political, cultural and social life on the streets, in the face of which it aims to achieve a kind of civic ‘tranquility’. In the new public space 2.0, those who take their grievances and protests to the streets and public infrastructure, those who publish images “without prior police authorisation”, and even those who are simply trying to find a way to survive on the streets, are considered enemies of that ‘tranquility’. Despite the undoubted improvement of the law’s wording compared to the shameful draft, which came in for especially harsh criticism from the Prosecutorial Advisory Board and the General Judicial Council, this rule represents the translation of the premises of the most recent reforms of the Criminal Code to punishment under administrative law: the criminalisation of public spaces to impede the rise of ‘the dangerous classes’.

Keywords: state of law; fundamental rights; public safety; demonstrations; street protests; public order; Spain.


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1 Introduction: public order versus disorder in the streets

The recently published book The complexity of public space, democracy and regulating the exercise of fundamental rights, compiled by professor Aláez (2016) included a piece by Bastida (2016) entitled ‘The concept of public space as a place for the exercise of fundamental rights (public spaces and the exercise of fundamental rights)’ which examined, amongst other things, how public space should be conceived of in democratic terms, and which criticised the legal, political and planning tendency to impose ‘order’ on the streets. Lefebvre (1970, p.18) proclaimed the disorder of this space itself as a place that fulfils informative, symbolic, and recreational functions. This disorder, which Lefebvre defended as positive because it reveals the existence of social life, is perceived by the ruling classes as a threat. So then, Organic Law 4/2015, of 30 March, for the protection of public safety is paradigmatic of the stigmatisation of public disorder and the political, cultural, and social life of the streets, in the face of what aims to achieve a kind of civic ‘tranquility’. It is paradigmatic of that which considers enemies those who take their grievances and protests to the streets and public infrastructure, who publish images ‘without police authorisation’ in the new public space 2.0; even those who are simply trying to survive on the streets. This stigmatisation has not been in vain, having reached the extreme of considering unauthorised selling on the street a public safety offence. Despite the undoubtable improvements of the text in the Law over the shameful draft, which came in for especially harsh criticism from the Prosecutorial Advisory Board and the General Judicial Council, this rule represents the translation of the premises of the most recent reforms of the Criminal Code to punishment under administrative law: the criminalisation of public spaces to impede the ‘unstoppable rise of the dangerous classes’ (Maqueda Abreu, 2015). In the following pages we intend to justify these statements.

2 Reasons given by the legislature for passing Organic Law 4/2015, of 30 March, for the protection of public safety

According to the explanatory statement in Organic Law 4/2015, 30 March, for the protection of public safety (henceforth LOPSC, according to the initials in Spanish), said the law is justified by “…the simple passage of time, with the perspective it offers of the strengths and weaknesses of legislative provisions, the social changes in our country, the new ways that public safety and order may be put at risk, new demands from society, the compelling need to update the sanctions system, and the desirability of including constitutional court decisions in this area amply justify a legislative change”.

It is about legitimising this expansion of punishment under administrative law along the lines indicated by professor Silva Sánchez (2011, p.11) regarding criminal law; there is also the allusion to the appearance of new threats and risks to society, as well as the appearance of new legal protections. However, it does not specify what the new view is of the weaknesses of the 1992 Organic Law, nor what social changes have occurred, nor what new ways we might find in which public order or safety may be at risk. And, maybe
most importantly, the existence of these societal demands for new protections is not clear. It is, to be precise, a ‘strange unanimity’ of the public, in the words of Silva Sánchez (2011, p.11), which is present in the expansionist tendency of the criminal code, and which differentiates this orientation from that of the law and order movement, in which “some social sectors – to simplify, the well off – who support such proposals; however others, -the marginalised, but also the intellectuals and human rights movements- are opposed to them”.

What may be happening, at least in the sanctions under administrative law at stake in LOPSC, which is no doubt linked to the reform of the criminal code in Organic Laws 1 and 2/2015, 30 March, is that the expansionist line of this law is connected to the law and order movement, and is related new protections, but with the old repression of certain social movements.

Of course, up to now the opposition to this securitarian orientation has largely come from social movements in defence of civil rights. Silva Sánchez himself concludes that “neither the ideological premises nor the demands of the ‘law and order’ movement have disappeared,” but rather, for him, they “have become (comfortably) integrated into this new social consensus on the role of criminal law”. It does not seem to us that there is a public consensus on the role of sanctions under administrative law but it does seem that, as we will aim to demonstrate here, LOPSC has opted for a securitarian model.

Article 1 states the objective of the law:

“1. Public safety is an essential condition for the full exercise of fundamental rights and public liberties, and safeguarding them, as a collective legal right, is a function of the state, subject to the constitution and the law. 2. The objective of this law is the regulation of diverse plurality of actions of varying character aimed at the protection of public safety, through the protection of persons and goods and the maintenance of public calm.”

The absence of specifics is somewhat surprising when previously, the explanatory statement stated that it must eschew “generic definitions which justify extensive action against citizens by virtue of undefined dangers, and avoid administrative discretion and generic punitive powers”.

In this regard, the Report on the Draft bill from the General Judicial Council commented, in an obviously critical tone, that “following the line marked by the criminal code reform project, in Criminal law based on threat, from whose axioms security has become a priority in criminal policymaking, as an asset that the state and public powers are to defend with all of the tools at their disposal. In consequence, the proposed law on the one hand, intensifies preventive action, not only for criminal offences, but also administrative offences, and on the other hand, it significantly increases the number of offences against public safety”. A good proportion of these criticisms of the draft may also be levelled, as we shall see below, at the Organic Law which was finally approved.

Obviously, this is not saying that public order should not be protected, but rather that it’s protection must consist in the defence of fundamental rights recognised in the Constitution, which are “those basic structural components of both the objective legal system and each of its branches on the grounds that they are the legal expression of a system of values which, by constitutional determination, must inform judicial and political organisation as a whole” (Constitutional Court Judgment – henceforth STC – 53/1985 of April 11 Legal Ground -henceforth F – . 4).

The legislator of public safety whether criminal or administrative, is obliged, then, to bear in mind those rights recognised in the constitution, those which protect life, personal
Public spaces and the exercise of fundamental rights in Spain

safety, and individual freedom, as well as defence of property. One must also consider their appropriate definition when other rights come into play such as freedom of expression, or the right to protest, as these latter cannot be ignored when guaranteeing democratic public order. It is worth remembering what the Constitutional Court has already said (STC 341/1993, 18 November, F. 8) regarding prosecution of the now abrogated Organic Law 1/1992 21 February, for protection of public safety (henceforth LOSC):

“The interpretation and legislative application of the defining constitutional concepts in matters of freedom or immunity is extremely delicate work, in which the legislator cannot diminish or downplay the rigor of the constitutional statements which establish guarantees of rights, nor can they create margins of uncertainty about how they are effected. That is not only irreconcilable with the idea of constitutional guarantee itself, but contradictory, even with the sole rationale -very plausible in itself- of these legal orders, which is nothing less than achieving better certainty and precision regarding the limits on the action of public power, also when this power clearly fulfils the “state obligation to pursue crime effectively” (STC 41/1982, of July 2, F. 2). Effective persecution of crime, the legitimacy of which is unquestionable, may nevertheless not be imposed at the cost of fundamental rights and freedoms.”

It seems as though the legislator has not heeded this advice very well when revising the aforementioned Article 1, nor, for example in Article 4.3:

“Intervention is justified by the existence of a specific threat or by objectively dangerous behaviour which is reasonably liable to cause real damage to public safety and, in particular, an attack on individual and collective rights and freedoms, and other legally protected assets, or damage to the regular functioning of public institutions.”

In addition, we can also see in this precept the classification of dangerous behaviours as an instrument to produce public safety in line with what has been called neoconservative orientation in terms of security policy, which, as noted by Brandariz García (2014, p.317), aims at reinforcing the powers of the state in the fight against criminality and conforming to a type of ‘expressive justice’ based on the severity of punishment and able to deal with a supposed social sense of insecurity, as well as to respond to matters characterised by otherness and danger.

Consequently, there is a commitment to what in criminal matters, has been called ‘management style practices’: improving coordination between the different prosecuting bodies and management of public order, and the development of collaboration between public and private entities in law enforcement and the fight against crime.

These tendencies are noted, for example, in Article 7.3 which stipulates:

“Private security companies, offices of private detectives, and private security personnel have a specific obligation to help law enforcement authorities in the exercise of their duties, to give them such assistance as necessary, and to follow their instructions, under the terms of the private security regulations.”

It is one of the consequences, as stated in the explanatory statement in the recent Law 5/2014, 4 April, on Private Security, of the understanding that “in recent years there have been notable advances in civic consideration and in rethinking the role of the private sector in security, recognising ‘the importance, effectiveness, and efficiency of public-private alliances as a way to address and resolve the urgent and varied problems of security present in society’. More and more often, private security is considered an
indispensable part of the mix of measures aimed at protecting society and defending citizens’ rights and legitimate interests”.

This cooperative trait also characterises the criminal model of public safety in which, in the words of Diez Ripollés (2004) “the key point is the realisation that this whole phenomenon of involving society in the control of crime has shifted community energies from eagerness to achieve social inclusion for those outside society towards interest in ensuring that criminals are socially excluded”.

In short, the choice has been made, with little attempt at disguise, for efficient management of security, minimising the cost to the public purse of public order. Although, on balance, it is worth questioning whether public safety is in peril, at least if we look at the data that the Ministry of the Interior itself provides in its annual statistics from 2015 (the most recent at the time of writing, February 2017): the crime rate (criminal offences per thousand inhabitants) in Spain has continued to fall in the last five years.

**Figure 1** Criminal offences per thousand inhabitants in Spain (see online version for colours)

![Figure 1](image1)

What is more, this rate is one of the lowest in Europe.

**Figure 2** Criminal offences per thousand inhabitants in the European Union (see online version for colours)

![Figure 2](image2)
And the situation is comparatively even less worrying if we look at the murder rate.

**Figure 3** Murder rate in the European Union (see online version for colours)

To sum up, it does not seem that the public safety situation in Spain needs new regulation in this area; in any case, and given its approval, it will obviously have to be applied in accordance with the constitution, not forgetting of course, that there has already been an Organic Law regarding public safety which was not free from criticism either.

### 3 Offences linked to specific public spaces

In the first place, LOPSC Article 35.1 stipulates that “serious offences include assemblies or demonstrations without notice or prohibited in infrastructure or installations providing
basic services to the community or the surroundings thereof, as well as trespass onto those premises, including overflight,…”

If one of the essential elements defining a serious offence is the specific place where assemblies or demonstrations occur, then a clear definition of that is lacking, as one might be understood to have committed said offence if the assemblies or demonstrations occur in the “surroundings”. The question that raises is: where do these “surroundings” start and end? So we lack certainty and there is ample regulatory confusion, unconstitutionally undermining the principle of legal certainty (Article 9.3 Spanish Constitution) in connection with the legality of punishments (Art. 25 SC).

And as the constitutional court said in one of its first decisions (STC 27/1981, 20 de July), legal certainty:

“is the sum of certainty and legality, regulatory hierarchy and publicity, non-retroactivity of restrictive laws, prohibition of arbitrariness, but that, even if we exhaust ourselves adding together these principles, it would not have been necessary to define them individually. Legal certainty is the sum of these principles, balanced in such a way as to promote, in the legal system, justice and equality, in freedom” (F. 10); later, and more specifically, the court (STC 46/1990, 15 March) insisted that “the requirements of 9.3 relating to the principle of legal certainty means that legislators must seek regulatory clarity rather than confusion, must endeavour to be informed about the matter being legislated, understand legal practitioners and the citizens they must answer to, and must avoid causing objectively confusing situations…”

It is essential to encourage and seek certainty regarding what is Law and not,…. to cause laws to play against one another or relationships between laws which as a consequence introduce difficult-to-resolve confusion regarding the predictability of which law is applicable and the consequences of laws currently in force (F. 4). And, in relation to punitive provisions (criminal in this case) legislators are called upon to make the “maximum possible effort in the description of criminal definitions, producing laws which are specific, clear, precise and intelligible” (SSTC 142/1999, F. 3; 24/2004, F. 2; 283/2006, F. 5,…).

In the second place, Section 22 of Article 36 penalises “the failure to comply with lawfully imposed restrictions on the navigation of high speed vessels and light aircraft”.

It is particularly interesting that a provision of this type is included when the Constitutional Court has already had occasion to rule unconstitutional a similarly worded law, although with different material content, in the abrogated Organic Law 1/1992; one should not forget that one of the motives given by the legislature for passing Organic Law 4/2015 is, to be precise, “the desirability of including constitutional court decisions in this area”. According to this judgement (STC 341/1993, F. 10), “in some way the law may enable or provide the regulation for the ex novo arrangement of obligations or prohibitions the contravention of which would be a punishable offence. Such reference to sub legal rules for the unconditional arrangement of offences is not, it is worth repeating, reconcilable with the content of Article 25.1 of the Spanish Constitution”.

Such a reference may be admissible but only as long as it is justified and complies with a series of conditions; including, and especially for what matters here, that the law - in this case LOPSC-, in addition to indicating the punishment, contains the essential elements of the illegal behaviour and satisfies the demands of certainty. On balance, it does not seem as though in Section 22 of Article 36 of LOPSC the ‘essential elements of the illegal behaviour’ are sufficiently determined, and for that it would be
unconstitutional because it weakens the principles of legal certainty (Art. 9.3 CE) and the legal authority to impose penalties (Art. 25.1 CE).

Thirdly, Section 7 of Article 37 describes the minor offence of “the occupation of any property, dwelling or other building, or the residence therein, against the will of the owner, tenant or holder of other rights over the same, unless constituting a criminal offence. Similarly, the occupation of a public highway with an offence determined by law or counter to a decision in that regard by the responsible authorities. Unauthorised selling on the street is considered to be included in this premise”.

In this regard ruling nº7/2015, 7 June from The Council for Statutory Guarantees of Catalonia about LOPSC, highlighted that with that wording any occupation without the owners authorisation could be punished, independent of whether it impacts a strictly private legal relationship, and it must be remembered that not every injury to property rights is subject to criminal or administrative punishment, as civil law sets out the actions necessary to re-establish the integrity and peaceful enjoyment of the rights of the owner. Furthermore, the article does not express in sufficient detail what legal right it protects, in the sense that the wording does not necessarily lead to the establishment of a direct, clear link to the protection of public safety.

The same criticism may be levelled at the classification described in the second section, which does not identify which law it deals with nor the type of administrative decision that is not complied with; nor does it clarify how selling on the street may weaken public safety.

To sum up, we find in the new law regulating public security various articles whose constitutionality may be put in doubt because of insufficient legal certainty; that is to say, certainty with regard to what is the law and what is not, which demonstrates that not enough effort has been made to make the rules “specific, clear, precise and intelligible”.

4 Offences related to public events

First of all, Article 36.1 of LOPSC describes the serious offence of “the disturbance of public safety in public events, sporting or cultural events, religious rites and formalities, and other gatherings attended by large numbers of people, where that does not constitute a criminal offence”.

This article, as indicated in the aforementioned judgement from The Council for Statutory Guarantees of Catalonia, does not meet the requirements of certainty and clarity demanded by constitutional jurisprudence, as it does not have any specificity about the level of disturbance of the offending act or the result it must produce, acting as an open clause or a “mishmash”, which would allow almost any disturbance of public safety to be punished as a serious offence.

In the second place, Article 36.2 of LOPSC envisages, also as a serious offence, “the serious disturbance of public safety created by gatherings or demonstrations in front of the Congress of Deputies, the Senate, or the legislative assemblies in the autonomous communities, even if said bodies are not sitting, where that does not constitute a criminal offence”.

In this article it is not clear what is intended to be protected when assembly or demonstrations outside parliamentary buildings is punished so severely even when the chambers are not sitting, given that the following section sets out the same punishment if
one causes "disorder on public highways, spaces or establishments, or blockages on 
highways with street furniture, vehicles, containers, tyres or other objects, when in such 
cases it causes serious disruption to public safety".

Furthermore, one must consider the symbolic value of these public buildings and that, 
as the European Court of Human Rights (ECHR) has indicated, "political expression [an 
assembly or demonstration are collective means of exercising freedom of expression] 
demands a high level of protection due to the effects of Article 10" (rulings Thorgeir 
Thorgeirson v. Iceland, 25 June 1992; and Hertel v. Switzerland, 25 August 1998) and 
"when the object of reproach is the government [in a broad sense, that would include 
institutions such as legislative chambers] the permissible space for criticism, whether 
scathing and hurtful, even false if not in bad faith, is particularly broad" (case Castells v. 
Spain, 23 April 1992).

Along similar lines, in the recent ruling in the case of Lashmankin and others v. 
Russia, 7 February 2017, the ECtHR stressed the disproportionate nature of a prohibition 
which did not address the existence of a specific risk to public order and concluded that 
the Russian authorities did not perform a careful examination of the viability of less 
restrictive measures to avoid disorder and that in Russia, the prohibition against 
demonstrating in front of certain official buildings is unlimited in time and applicable in 
the whole country. In conclusion, the prohibition of holding demonstrations close to 
Justice Administration buildings, whether posing an obstacle to or impeding the exercise 
of legal functions or not, is unnecessary in a democratic society.

In a similar way, the UN Special Rapporteur for freedom of association and peaceful 
demonstration and the OSCE Expert Group have argued that such universal prohibitions 
are undesirable, as they do not allow the specific circumstances of each case to be 
considered.

Finally, the same lack of specificity already criticised appears in Section 8 of 
Article 36, which includes as a serious offence "the disturbance of the process of a lawful 
meeting or demonstration, where that does not constitute a criminal offence".

5 Offences linked to assembly in public spaces

According to Article 37 minor offences include “1. Assembly in spaces of public transit, 
or demonstrations failing to comply with Articles 4.2, 8, 9, 10 and 11 of Organic Law 
9/1983,…”

The non-compliance mentioned refers to the formal requirements of the exercise of 
assembly and demonstration and the question this raises is whether that justifies the 
imposition of sanctions, albeit minor. In this regard it is worth recalling the case of 
Yilmaz Yildiz and others v. Turkey, 14 October 2014, which arose from a fine of 100 
Turkish liras (about 62 euros) imposed on the petitioners for having taken part in various 
peaceful demonstrations outside various hospitals to demand a change of management in 
those health centres.

The ECtHR acknowledged various ideas:

1 the right to assembly is a fundamental right in a democratic society, and along with 
   freedom of expression forms one of the pillars of this type of society; for that reason 
   it must not be interpreted in a restrictive manner
as a general principle, all assemblies or demonstrations in public spaces cause certain disruption to daily life and it is important for the Authorities to show a certain level of tolerance in the face of these assemblies if they are peaceful, otherwise Article 11 would be deprived of its significance

3 the imposition of administrative punishments for participating in a peaceful demonstration is disproportionate and unnecessary for the maintenance of public order

4 sanctioning this behaviour may have a deterrent effect and act as a disincentive to participate in similar assemblies.

In the very recent, previously cited case of *Lashmankin and others v. Russia*, 7 February 2017, the ECtHR found against the state in question because, among other things, the actions -the breaking up of the meeting, the arrest of some of the attendees, repeated refusal of permission to hold the event on the day or at the place or in the manner notified… – were contrary to the exercise of the right to peaceful assembly, despite the events having been declared unlawful by the national courts.

6 Offences related to capturing images in public spaces

Article 36.23 of Organic Law 4/2015 describes as a serious offence “the unauthorised use of images or personal or professional data of authorities or members of law enforcement bodies that may pose a risk to their or their family’s personal safety, to protected installations or threaten the success of an operation, in accordance with fundamental rights related to freedom of information”, and, in accordance with Article 19, “apprehension while carrying out identification, registration and checks of arms, toxic drugs, narcotics, psychotropic substances and other effects arising from a crime or administrative infraction will be noted in the corresponding record, which must be signed by the party concerned; if they refuse to sign, their refusal shall be recorded. The issued record shall enjoy the presumption of truth therein, except where there is proof to the contrary”.

The combination of these articles means, firstly, the imposition of a kind of general prohibition on the use of images and personal or professional data of members of law enforcement bodies except where previously authorised; secondly, the sanctioning administration itself can seize this material if it concludes that the image or data capture infringes Article 36.23. Such tangled regulations seems not to be very compatible with our fundamental law for a number of reasons.

A It does not seem possible to impose a general prohibition on the use of images or personal or professional data about the authorities or members of law enforcement bodies, not even with the caveats about protecting their personal and family safety, or that of protected installations or risking the success of an operation, and invoke fundamental freedom of information rights.

Law enforcement personnel carry out extremely important public functions and, in carrying out those functions, they are subject to civic control and control of public powers, which must mean then, that the law goes contrary to that: the right to collect photos or data, a premise which was accepted at the time in Organic Law 1/1982, 5 May,
regarding civil protection of the right to honour, to personal and family privacy, and to one’s own image, which in Article 8.2.a states that “in particular, the right to one’s own image does not prevent: a) its capture, reproduction or publication in any media, when that regards persons who are exercising a public office, or whose work is public in nature, if the image is captured during a public event in spaces that are open to the public”.

In this regard, both the ECtHR and the CC have expressed consideration of precisely those situations outlined in O. L. 4/2015.

The first, in the case of Sürek v Turkey (number 2) 8 July 1999, concerning the conviction of a majority shareholder in a magazine-owning limited liability company for having published a report revealing the identity of various officials together with information suggesting that they had committed serious offences, concluded that, bearing in mind the seriousness of the facts in the case, there was a legitimate public interest in not only the behaviour of these officials, but also in their identity, adding that the Turkish state’s objective of protecting members of the security services from possible attacks was not enough to justify the restrictions on freedom of expression or information; in short, the ECtHR concluded that sentences like that one dissuade the media [in this case the press] from contributing to open debate on matters of public interest.

For its part, the CC (STC 72/2007, 16 April), in a case concerning the publication of a photograph which identified a local police officer who participated in an eviction, resolved that:

“examination of the photograph and accompanying text makes it clear that we are faced with a document that reproduces the image of a person in the exercise of a public office... and that the photograph in question was taken of a public act (an eviction by judicial order, to be carried out with the help of municipal police officers, in the face of determined resistance from those being evicted), in a public place (a street in a neighbourhood in Madrid), consequently it is unreasonable to conclude, as the sentence under review argues, that this coincides with the scenario envisaged in Organic Law 1/1982, 5 May, regarding civil protection of the right to honour, to personal and family privacy, and to one’s own image. In addition it also seems that the information communicated by the magazine is undoubtedly true and is evidently in the public interest. Furthermore, the photograph in question (despite the allegations in the complaint) is ancillary to the information published and does not show the complainant doing anything other than strictly carrying out their orders,...

Ultimately, although it is true that the use of any technique of distorting or hiding the complainant’s features would have made it possible for the news of the violent eviction to reach the readers in the same way and without being weakened, as the complainant claims, it is nevertheless clear that, as the contested ruling states, this is not a specific case that demands anonymity, without prejudicing other cases in which that may be so [final subparagraph of Article 8.2 c) of Organic Law 1/1982 5 May]. In fact, contrary to the complainant’s argument, it does not seem as though, in the circumstances of this case, that there are reasons of security for hiding the features of a police officer for the mere fact of being involved, through the legitimate exercise of their professional functions, in the act of assisting a judicial commission charged with executing an eviction order, in the face of determined opposition from those affected.”

Along the same lines, and in relation to the use of data, the Constitutional Court has also recognised (STC 52/2002, 25 February, FJ 8) that:
“there is relevant public interest in information about positive or negative results produced by the investigation by law enforcement bodies, especially if the offences committed are of a certain seriousness or have had a considerable impact on public opinion. That relevance and interest extends to new data and facts that may be discovered, in various ways, in the course of investigations aimed at uncovering the authors, causes and circumstances of said criminal act (SSTC 219/1992, 3 December, FJ 4; 232/1993, 12 July, FJ 4).”

Similarly, and with respect to law enforcement officers, the LOPD and the guarantee of fundamental rights to data protection refers to personal data, which no doubt must include the officer’s professional data. That said, it is not possible to resort to this fundamental right to justify preventative administrative controls about obtaining and using that data. Identification from the badge number, unit, officer’s image, etc., is personal data, but depending on the case, their knowledge may be of general public interest and relevance. In addition, this data is already public, it is on display in a public place, it was collected while the officer was carrying out their duty in a public place, as part of a public act, and is professional data in nature. Because of that, it is no longer confidential information, which is not to say that one may make whatever use of this data one wishes, but only that its acquisition in these circumstances does not constitute injury to the fundamental right to data protection. Nor is there a real and imminent threat of harm which would justify a restriction such as that envisaged in the article cited above, which in any case, would not legitimise preventative action such as outlined in that article.

Finally, and as noted in their judgement by The Council for Statutory Guarantees of Catalonia, this “prohibition on prohibiting” the use of images and data of members of law enforcement bodies protects not only professionals in the media but also the population as a whole; in the words of the Constitutional Court (STC 168/1986, 22 December, FJ 2): “the subjects of this right are not only the owners of the entity or media which disseminates the information, or journalists, or those who, even without being such, communicate such information via said media, but rather, fundamentally, «the community and each of its members ».

In the second place, Article 36.23 establishes preemptive censorship, expressly forbidden by Article 20 CE, by referring to the unauthorised use of images and data. The Constitutional Court has been categorical in this regard (STC 187/1999, 25 October, FJ 5:

“The prohibition of any type of preemptive censorship, in the framework of freedom of expression is nothing more than a guarantee aimed at limiting the legislature and sparing them, protected in the caveats of the law in Articles 53.1 and 81.1 C.E., the temptation of exercising their power over any authorisations, of whatever type or character, even when grounded in the protection of those constitutional rights, freedoms and values which, as set out in Article 20.4 C.E., function as a limit of that freedom in either sense. This Court has already stated on numerous occasions that to be preemptive censorship, there must be some kind of limiting measure of the creation or dissemination of a work the spirit of which consists of submitting the content to a preemptive examination by a public power the aim of which is to judge the work in question in accordance with some abstract values restrictive of freedom, in such a way as to grant the power to publish works which meet the criteria of the censor and to refuse publication otherwise...
Preemptive censorship,..., is an instrument, often of great subtlety, which would allow intervention in such processes, vital for a democratic state, stipulating what opinions and information may circulate, be divulged, communicated, and received by the citizenry. It is here where we must seek the reason why its interdiction must be extended to whatever measures that public powers may adopt that not only openly impede or prohibit the diffusion of certain opinions or information, but also any other measure which simply restricts or may possess an undesirable dissuasive effect on the exercise of such freedoms (SSTC 52/1983, FJ 5º, 190/1996, FJ 3º)..."

In the third place, incompatibility with the Constitution may also affect the previously mentioned Article 19.2 of Organic Law 4/2015 in relation to the aforementioned 36.23, as the Fundamental Law (Article 20.5) reserves the power of seizing "publications, recordings and other means of information" to legal bodies, not the administration, as stated in LOPSC.

The previously mentioned STC 187/1999 (FJ 6) states that:

"the Constitution itself legitimises the seizure of publications, recordings and other media, although only by virtue of a judicial order (art. 20.5 C.E.), implicitly prohibiting, therefore, the existence of so-called administrative seizure, as this court has already stated when making a judgement on the constitutionality of Articles 12 and 16 in Law 14/1966, 18 March, Press and Printed Material, which ruled on a similar measure, which was declared unconstitutional in STC 52/1983... The Constitution alone, which is no small thing, prohibits said urgent measures from being adopted by a public power other than the judiciary, when it involves the critical examination of the content of a message whose dissemination may be refused or restricted, and furthermore, that said measure may only be adopted in those cases the law allows as the result of a valid relevant judicial order in an ad hoc process."

7 Mass expulsions of foreign persons from Ceuta and Melilla

The final provision of Organic Law 4/2015 adds a tenth additional provision to Organic Law 4/2000, 11 January, about rights and freedoms of foreigners in Spain and their social integration:

1 Foreigners found on the border marking the territorial area of Ceuta or Melilla while trying to pass border protection elements in order to irregularly cross the frontier may be rejected with the aim of preventing their illegal entry into Spain.

2 In all cases, the expulsion will be carried out in accordance with international law on human rights and international protection to which Spain is party.

3 Requests for international protection will be formalised in appropriate places at the border crossings and will be done in conformance with the established law on international protection.

We will limit ourselves to briefly analysing whether this provision is compatible with the constitutional guarantees on the right to asylum and the expulsion of foreigners.

Firstly, it deals with a measure with very a specific target: "foreigners found on the border marking the territorial area of Ceuta or Melilla while trying to pass border protection elements in order to irregularly cross the frontier”. Secondly, although it states ‘rejection’, it is still a kind of expulsion, if we interpret that term in the same way as the
Public spaces and the exercise of fundamental rights in Spain

ECtHR, ‘in its generic sense, as used in everyday language (to drive away from a place)’ (the case of Hirsi Jamaa and others v. Italy, 23 February 2012). In addition, it is considering a “collective” expulsion (foreigners found…), so Article 4 of the ECHR would seem to apply, which strictly states that “collective expulsion of foreigners is prohibited”.

Collective expulsions were defined by the ECtHR (in the matter of Čonka v. Belgium, 5 July 2002) as “any measure which obliges foreigners, as a group, to leave a country, except in cases where the measure has been taken as a consequence and on the basis of a reasonable and objective examination of the particular situation of each one of foreigners making up that group”. The ECtHR has also clarified that (Hirsi Jamaa and others v. Italy) “the objective pursued by Article 4 of protocol number 4 is to prevent states from being able to expel any given foreigners without having previously examined their individual circumstances and, as such, without having given them the opportunity to present their arguments against the measure taken by the competent authority”.

On the matter of asylum, the ECtHR emphasises (the case of Hirsi Jamaa and others v. Italy) that it has already indicated on other occasions that those states making up the external border of the European Union face considerable difficulties when it comes to responding to the growing arrival of immigrants and asylum seekers. The ECtHR does not underestimate the burden and pressure that this situation poses for those states in question, aggravated by the context marked by the current economic crisis. It is particularly aware of the difficulties related to migration by sea, which brings with it additional complications for states controlling the borders of Southern Europe. Nevertheless, considering the absolute nature of the rights protected by the article, these considerations cannot exempt a state from their obligations arising from this provision.

The ECtHR again (case of De Sousa Ribeiro v. France, 13 December 2012) noted that ECHR Article 13 guarantees, in national law, the availability of an appeal to enforce the rights and freedoms of the convention, and that this is applied. The efficacy of an appeal in the sense of Article 13 does not depend on a certain favourable result for the applicant. Furthermore, to be effective, the appeal process required by Article 13 must be available in law and in practice; in particular in the sense that there must not be unjustifiable obstacles to its exercise by acts or omissions on the part of the state subject to appeal. The convention requires the state to give the appellant an effective opportunity to contest the expulsion or denial of permission to remain and to have a sufficiently exhaustive examination and provide appropriate procedural guarantees via a competent internal organisation which is sufficiently independent and impartial.

In the case of A.C. and others v Spain, 22 April 2014, it was declared that, in the matter of expulsion from the territory, an appeal devoid of effective automatic suspension did not comply with the conditions of effectiveness required by Article 13 of the convention. Rightly, these principles are applied when the expulsion exposes the appellant to the real risk of attacks against their life. Although the court recognises the importance of speedy appeals, that must not be prioritised at the expense of the essential procedural guarantees for protecting the appellants from expulsion to Morocco. The key is, then, “knowing if there are effective guarantees which protect the appellant from arbitrary return, direct or indirect” (cases of M. S. S. v. Belgium and Greece, 21 January 2011, and A. C. and others v. Spain). And these guarantees operate on the margin of whether “the border marking the territorial area of Ceuta or Melilla” is, or is not, Spanish territory, as those who carry out the detection and rejection of foreign individuals are
members of state security bodies and they are obliged to guarantee “all the rights and freedoms outlined in Title 1 of the Convention which are pertinent to the situation” of these people (the case of Hirsi Jamaa).

Therefore, in light of these legal premises, it does not seem that said provision guarantees that rejected individuals can exercise the rights pertaining to asylum seekers (Art. 13.4 CE), resorting in that case to the protection of the Spanish courts (Art. 24 CE) in order to be able to perform a check on the legality of administrative action (Art. 106.1 CE).

References


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Notes

1 The Congress of Deputies (The Lower Chamber of the Spanish Parliament) has recently decided to initiate a process in order to change some aspects of this law, but the final outcome of this initiative is still uncertain. http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas.