Strasbourg, 22 March 2021 **CDL-AD(2021)004**

Opinion No. 826/2015 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SPAIN

OPINION

ON THE CITIZENS' SECURITY LAW

Adopted by the Venice Commission
at its 126th Plenary Session
(online, 19-20 March 2021)

on the basis of comments by

Mr Richard BARRETT (Member, Ireland)
Mr Iain CAMERON (Member, Sweden)
Mr Nicolae EŞANU (Substitute Member, Republic of Moldova)
Ms Regina KIENER (Member, Switzerland)

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I. Introduction

1. By letter of 9 October 2015, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on the Organic Law on Citizens' Security (CDL-REF(2021)021), hereinafter "Law no. 4/2015" or "the Law". The preparation of this opinion was adjourned on account of elections and pending examination of several provisions of the Law by the Constitutional Court of Spain. The latter having rendered its main judgment on 19 November 2020 (CDL-REF(2021)012), the work was finally resumed.

2. Mr Richard Barrett (member, Ireland), Mr Iain Cameron (member, Sweden), Mr Nicolae Eşanu (substitute member, Republic of Moldova) and Ms Regina Kiener (member, Switzerland) acted as rapporteurs for this opinion.

3. Due to the pandemic-related travel restrictions, and a visit to Spain having been impossible, between 11 and 19 February 2021 the rapporteurs held a series of online meetings with the office of the *Defensor del Pueblo*, the office of the President of the Constitutional Court of Spain, Ministry of Foreign Affairs, Ministry of Interior, Ministry of Justice, Ministry of the Presidency, members of the *Cortes Generales* (both from the Congress and the Senate), as well as with civil society. The Commission is grateful to the Ministry of Foreign Affairs of Spain and to the Permanent Representation of Spain at the Council of Europe for the help in the organisation of the online meetings.

4. This opinion was prepared in reliance on the English translation of the Law and of the judgments of the Constitutional Court of Spain provided by the Spanish authorities. The Spanish authorities also submitted to the Venice Commission written comments on the draft opinion, which will be addressed below.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings with the Spanish authorities and other interlocutors. It was adopted by the Venice Commission at its 126th Plenary Session (online, 19 March 2021).

II. Background

A. General remarks and scope of the opinion

6. "Citizens' security" is a complex legal concept, entrenched in the Spanish Constitution[1] and developed in jurisprudence of the Constitutional Court of Spain. According to the Preamble to the Law, the purpose of the Law is "to protect people and property and to maintain the public peace", essentially through the "regulation of police interventions", but also by covering other matters. Law no. 4/2015 regulates a vast array of issues: general principles governing the exercise of the police powers (Chapter I), regulations related to the personal identification documents (IDs) and ID checks (Chapter II), powers of the police to enter and search premises and vehicles, to do body searches, to conduct road checks, to exercise control of demonstrations and other public events, use surveillance cameras, etc. (Chapter III). It further regulates specific areas where the police may exercise administrative controls - circulation of weapons, drugs and other dangerous substances, functioning of private security services, internal security measures on some sites, etc. (Chapter IV). Finally, it defines the regime of administrative fines for various breaches of the law (related to public order on the streets, drug abuse, prostitution, carrying of weapons etc.) and the procedure for imposing or challenging the fines (Chapter V). The Law also contains final and transitional provisions, one of which ("additional provision 10") allows the police

[1] Article 104 para. 1, in the context of the constitutional mandate of the security forces, to be read along with the concept of "public safety" in Article 149 para. 1 (29), describing the competencies of the State and the possibility of creation of police forces in the self-governing communities.

in the Spanish autonomous towns of Ceuta and Melilla to prevent illegal border-crossing by aliens.

7. Law no. 4/2015 replaced an earlier Law on the Protection of the Citizens' Security of 1992 (Organic Law no. 1/1992). Both laws are based on the extensive understanding of the "citizens' security", share broadly similar structure and cover the same areas of interaction between the police and the society. However, Law no. 4/2015 is much longer and more detailed in describing the powers of the police and the corresponding obligations of private individuals, companies and other State institutions. For example, Law no. 4/2015 establishes rules for external body searches, introduces restrictions on demonstrating around parliamentary buildings, allows the use of CCTV footage, prohibits unauthorised filming of police agents, etc. That level of details was absent from the 1992 law. In addition, Law no. 4/2015 makes it possible to sanction through administrative procedures certain offences which before were defined as crimes (such as disobedience to the orders of the police).

8. As explained to the rapporteurs, the original focus of the Law, supported by the then ruling majority of *Partido Popular*, was on the policing of mass public gatherings. In the first years after the adoption of the Law, therefore, the sanctions provided by it were imposed most often for disorderly behaviour during demonstrations, "occupy" actions and other similar contestation movements. In 2015, 87 872 fines were imposed under this law. In 2018 this figure rose to 249 665 per annum. The overall amount of fines imposed under the Law in 2018 amounted to 149 million EUR (the average fine was about 600 Eur).[2]

9. With the advent of the pandemic in 2020 the focus of the Law shifted: it started to be massively used for the enforcement of health restrictions (confinements, curfews, etc.). Due to the fragmented nature of the Spanish police forces (which include the National Police, *Guardia Civil*, regional police forces and local police offices), it is difficult to obtain a comprehensive statistical information about the application of this Law throughout the country. It is understood that the intensity of sanctions varied in different regions. According to the office of the *Defensor del Pueblo*, in the spring 2020 1 130 441 fines were imposed by various police forces just for one of the offences provided by Article 36 para. 6 (disobedience to the authority – see the more detailed analysis of this provision below).[3]

10. In essence, Law no. 4/2015 is a sort of "police code" defining the role of the police in the society. Police forces have a "monopoly of violence", so this Law is one of the most important piece of Spanish legislation from the human rights perspective. The Law provides for measures which may interfere with the freedom of expression (Article 10 of the European Convention on Human Rights, the ECHR) and the freedom of assembly (Article 11 of the ECHR), with the right to privacy (Article 8 of the ECHR) and with the respective guarantees set out in the ICCPR and other international documents. It also, in the final provisions, regulates matters related to the international refugee law. Interference with a right does not mean that the right has been violated. However, it cannot be denied that Law no. 4/2015 has at least the *potential* of affecting a broad range of fundamental rights. This explains why it has attracted criticism from the civil society and from many political forces which opposed its adoption in 2015, on account of its "repressive potential".

11. The Law is too vast, heterogenous and detailed for the Venice Commission to examine it comprehensively. Moreover, some of its provisions refer to other legislation (such as, for example, Organic Law 9/1983, of 15 July 1983, regulating the right to assembly, or Law 30/1992, of 26 November 1992, regulating the public administration system and the administrative

[2] Source : https://cadenaser.com/ser/2020/01/27/tribunales/1580115359_144382.html (based on the Mininstry of Interior statistics)

[3] Relevant statistical information on the application of the law (in Spanish, also based on the Ministry of Interior figures) may be found here: https://www.publico.es/politica/ley-mordaza-millon-multas-implantacion-ley-mordaza-superan-563-millones-euros.html

procedure) which the Venice Commission was not requested to review. Therefore, the Venice Commission will concentrate only on those elements of the Law which have been highlighted in the domestic discussion and which, in its opinion, deserve to be considered in the first place. Absence of remarks on other provisions of Law no. 4/2015 (or contained in other laws) should not be seen as tacit approval.

B. Two judgments of the Constitutional Court of Spain

12. After the adoption of the Law, a group of opposition MPs challenged some of its provisions before the Constitutional Court, by way of an abstract control of constitutionality. In 2019 there were two legislative elections and after the second the parliamentary majority has changed.

13. On 19 November 2020, the Constitutional Court of Spain (the CCS) issued its first judgment on the Law. At the outset, the CCS distinguished between the notions of public safety, public security, and public order. It then analysed the specific provisions of Law no. 4/2015 and concluded that most of them are not unconstitutional. In particular, the CCS upheld the provisions on body searches (Article 20 para. 2) and those establishing liability for demonstrations near the buildings of national and regional parliaments, even when those are not in session (Article 36 para 2). As to the provisions defining the responsibility of organisers for breaching the conditions for the conduct of the demonstrations (Article 30 para. 3 in combination with Article 37 para. 1),[4] the CCS found them "conditionally constitutional" – provided that they are interpreted in the particular manner indicated in the judgment. A similar approach was used for Article 37 paras. 3 and 7, defining offences of disruption of pedestrian traffic and unlawful occupation of dwellings and buildings: these provisions were also declared constitutional in the light of the detailed explanations given by the CCS as to the statutory rule. Finally, the CCS also considered that "additional provision 10" – allowing for the rejection at the border of aliens trying to cross borders illegally in Ceuta and Melilla – is also constitutional, provided that it is "applied to individual entries", that it allows for judicial review, and that it respects the international obligations of Spain.

14. Only one provision of the Law was declared unconstitutional by the CCS, and only in part. Article 36 para. 23 prohibited the "unauthorised" use of photo and video images of police officers at duty or in a private setting. The CCS held that the reference to "unauthorised" images implies the need for an authorisation, which is a form of censorship. The CCS thus affirmed that the taking of such pictures cannot be limited, while their use – which may endanger protected interests – may be lawfully restricted. The CCS thus ruled that the reference to the "unauthorised" use of the pictures should be excluded from the law.

15. In parallel with the constitutional complaint introduced by the MPs, Law no. 4/2015 was challenged before the CCS by the Parliament of Catalonia on broadly similar grounds. On 28 January 2021 the CCS issued its judgment in this second case (CDL-REF(2021)027). This judgment mostly reiterated the findings of the judgment of 19 November 2020. To the extent that the second constitutional complaint went beyond the first one or was argued on different legal grounds, the CCS dismissed it as well. Thus, the CCS found that Article 35 para. 1 (prohibiting unlawful demonstrations around objects of basic infrastructure) and Article 36 paras. 1 and 8

[4] Which is defined in Organic Law 9/1983, of 15 July 1983, regulating the right to assembly, and include, inter alia, the duty of the organisers to "adopt the measures necessary for the proper holding of such assemblies and demonstrations" (Article 4 para. 2), providing for the subsidiary liability of organisers for the damage caused by the participants (Article 4 para. 3). Law no. 9/1983 also provides for the duty of prior notification of the authorities – 10 days before the event or, in urgent cases, 24-hours' prior notification (Article 8), and establishes requirements to the content of the prior notification (Article 9), allows the State authorities to modify time or place or format of the demonstration (Article 10), on the public order grounds.

(prohibiting disruption of public order in public events, sportive or cultural performances, and disruption of the normal course of lawful public events) are constitutional.[5]

C. The perspective of reforming Law no. 4/2015 in the light of the two judgments of the Constitutional Court

16. In the judgment of 19 November 2020, the CCS argued in essence that if the contested provisions of the Law are interpreted in good faith and with due regard to the principles of proportionality and *in dubio pro libertate*, in the light of the explanations given by the State Attorney, and taking into account the relevant jurisprudence of the CCS and the European Court of Human Rights (the ECtHR), they are not unconstitutional (with the few exceptions mentioned above). The judgment of 28 January 2021 follows the same logic.

17. As was explained to the rapporteurs, the CCS has traditionally tried to avoid invalidating a norm when it is possible to give it a constitutionally compliant interpretation. In one of its previous judgments the CCS formulated its approach in the following terms: "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 it may be, capable of producing laws that a ruler cannot misuse". [6]

18. It is true that the contested provisions *may* be interpreted and applied in a manner compatible with the Constitution of Spain and with international human rights law. And if any of those provisions, contrary to this assumption, has been misapplied, this can be put right by way of a constitutional review of specific cases *in concreto*.

19. This approach to the review of statutory norms is based on the assumption that the administrative and judicial practice follow the guidelines formulated by the CCS. In practice, however, the Law will be applied by police and security forces, and often enough decisions must be taken as an immediate reaction to certain – often spontaneous or unforeseeable – events or behaviours of citizens, that is, without a previous formal legal procedure which would allow for a careful legal assessment of the appropriate measures and the proportionality of their use. Therefore, in practice, the interpretation and application of the norms in harmony with international human rights standards and the rights and freedoms set out in the Constitution, as argued by the CCS, may be difficult to achieve. If a statutory norm leads to many abuses in practice, this norm must be changed, circumscribed, or accompanied by additional safeguards, even if in theory it is constitutionally acceptable. The fact that the CCS confirmed its constitutionality does not affect this analysis: the legislator retains the possibility to improve such norms. The Venice Commission therefore invites the Spanish legislator to revise the Law in order to make its provisions more precise and foreseeable, and less prone to misuses.

20. As explained to the rapporteurs, despite the great number of fines imposed under the Law, only a fraction of them has been contested before the administrative courts and, apparently, the CCS has not yet had a chance of reviewing those cases *in concreto*. In such circumstances, it is difficult for the Venice Commission to evaluate whether the practical application of the Law is in conformity with the Spanish Constitution and Spain's international obligations. The Parliament of Spain is currently considering a bill proposing to modify Law no. 4/2015. Without commenting on the specific legislative proposals, the Venice Commission encourages the legislator to carry out an in-depth assessment of the practical operation of the Law and its impact – especially in the

[5] The CCS also found that Article 36 para. 22 (introducing restriction on the navigation of high-speed vessels and light aircrafts) was compatible with the Constitution, but this aspect of the law will be left outside of the scope of the present opinion.
[6] 238/2012 of 13 December, LG7

areas which pertain to the right to privacy or freedom of assembly.[7] Given the "repressive potential" of the Law, such review should be conducted regularly, at reasonable intervals.

III. Analysis

A. Powers of the police and definition of offences

21. Law no. 4/2015 contains a number of open-ended provisions which entrust the police with broad powers but do not indicate in which situations these powers may or may not be used (except as regards the principle of proportionality, see below).[8] The Law also defines certain administrative offences in an equally vague manner – for instance, Article 37 para. 4 penalises "showing disrespect towards law enforcement official". This formula is wide open to subjective interpretations.[9] Such flexibility of many provisions of the Law may be illustrated by the fact that although originally the Law was designed to counter very specific threats to public order (mostly related to violent protests), in 2020 it started being applied to enforce public health restrictions introduced in the wake of the pandemic. This was made possible because of the all-embracing formula used, in particular, in Article 36 para. 6, establishing liability for "disobedience […] to the authorities".[10] Before addressing some specific examples of overbroad provisions, a general observation on the practical application of such legislative approach is needed.

22. The principle of legal certainty, which is one of the fundamental elements of the Rule of Law, requires *inter alia* that statutory norms be formulated clearly, and their application be foreseeable.[11] As repeatedly stated by the ECtHR, the law must be "formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct".[12]

23. The requirement of clarity in legal rules also follows from the principle of equal treatment under the law. Leaving too much discretion to an administrative body or a judge (even the most reasonable and well-intended one) to decide, in the circumstances of each specific case, what is proportionate and what is not, will be detrimental both to the legal certainty (understood as the predictability of State action) and to the principle of equal treatment, because even reasonable people can disagree in their assessment of the proportionality. Finally, such wide discretion can disturb the balance of powers in a democratic State in that it can mean, in substance, delegating

[7] On the last point the Venice Commission recalls its recommendations in the revised Joint Venice Commission - ODIHR Guidelines on Freedom of Peaceful Assembly (3rd Edition), CDL-AD(2019)017, para. 100, where it stated that "to ensure that legislation […] relating to freedom of peaceful assembly are up-to-date and continue to adequately address current needs, the regulatory framework in this area should be periodically reviewed. It might therefore be desirable to place a statutory duty upon the relevant state authority to keep the law under review in light of evolving practice, and to make recommendations for reform if necessary. Such reviews should take account of evaluations of existing law and practice undertaken by independent monitoring initiatives. Such reviews can, in turn, help inform States' periodic reports to relevant regional human rights organizations, Treaty Bodies and the Universal Periodic Review (UPR)."

[8] For instance, Article 7 (2) of the law provides that "the competent authorities […] may request from individuals their help and collaboration to the extent necessary for the fulfilment of the purposes laid down in this [Law], especially in cases of serious public calamity or extraordinary disaster, provided that this does not involve any personal risk to them." Is it about the police having to resort to a private person's property in emergency situations, for example by requiring a vehicle or entering a property? Is it about the obligation to tip off police and report on observations? This provision does not establish neither the scope of the police powers' (and the corresponding obligation of individuals) nor the situations when this power can be used. The list of those broadly formulated police powers which can be found in Law no. 4/2015 can be continued

[9] Only in 2017, according to a report of Amnesty International (*Sal a la calle si te atreves*), over 20 000 fines have been issued under this provision alone by the national police forces, which shows that the notion of "disrespect" is used very frequently, and may well be interpreted very broadly.

[10] The Government indicated, in their written comments, that "this sanctioning alternative has not been used for a long time". Specifically, they refer to Decree 926/2020 declaring the "state of alarm" which gave to the regional authorities both the regulatory and sanctioning competence to deal with the pandemic. However, Decree 926/2020 was enacted on 25 October 2020 (see https://www.boe.es/eli/es/rd/2020/10/25/926), which means that the sanction provided by Article 36 para. 6 had already been in use for several months before that moment in order to enforce the pandemic-related restrictions.

[11] See the Rule of Law Checklist, CDL-AD(2016)007, para. 58 et seq.

[12] ECtHR, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 95 and 96, ECHR 2008-...

to the executive authority (the police) the power to determine the content of the regulated (prohibited) conduct.

24. The Venice Commission is aware that in practice there is a natural limit to the clarity of the law. The multiplicity of different situations that can arise as regards policing public order means that it is not unusual for legislation to provide for a general power for the police to take measures necessary to maintain order in public places, where these are proportionate in the circumstances.[13] Laws should be clear, but not overly casuistic.

25. The Government, in their written comments, stress that the previous law (that of 1992) contained equally vague definitions, and that in many legal orders the police have similar broadly defined powers. While this may be true, in the opinion of the Venice Commission it does not absolve the legislator from the duty to formulate statutory provisions as precisely as possible, and, where an exhaustive definition is practically impossible – to improve the foreseeability of the law by using other legal techniques which will be described below.

26. Indeterminacy of a statutory norm may sometimes be compensated by the application of the constitutional principles – such as proportionality, non-discrimination, efficiency, respect for rights and freedoms, etc. These principles are enumerated in Article 4 of Law no. 4/2015. In addition, the Preamble to the Law also describes at length the proportionality test and stresses the need to find a proper balance between public order and individual or collective freedoms. Finally, the two judgments of the CCS as well as its constitutional jurisprudence in general, and the case-law of the ECtHR may serve as a guidance for the police interventions and application of fines. This is positive.

27. The citizen, however, is rarely an expert in constitutional law. When a police officer refers to a generally worded power in a statute as a basis for breaking up a meeting, entering premises, or checking the interior of a car, how is the citizen to know that this power in practice is supposed to be interpreted narrowly or qualified by reference to constitutional principles or the constitutional jurisprudence? Constitutional principles tend to be vague, and, as such, are insufficient to provide a legal basis for an intervention.[14] Members of police and security forces are also typically not trained constitutional lawyers.

28. The analysis of whether the law is sufficiently clear and foreseeable depends on the context, and, in particular, on the sphere the law in question regulates. According to the Swiss Federal Court, for instance, the degree of preciseness of a legal norm depends, among other things, on the issues to be regulated, on the complexity and predictability of the decision required in the individual case, on the norm's addressees, on the severity of the infringements on constitutional rights and on the question whether, in the circumstances, a decision is only possible and appropriate in the individual case. To a certain extent, the indeterminacy of norms can be compensated, as it were, by procedural guarantees, and particular importance must be given to the principle of proportionality.[15]

29. The Venice Commission in the Rule of Law Checklist emphasised that foreseeability "is essential in criminal legislation".[16] The CCS judgment of 19 November 2020 takes a similar view, stressing that administrative regulations should not be as precise as the norms of the criminal legislation. The Venice Commission agrees with this approach in principle; the main question, however, is how to distinguish "administrative" from "criminal" legislation. The Commission notes in this respect that certain types of "disorderly behaviour", which are now described in the Law and are punishable by way of administrative fines, have been previously regulated by the Criminal

[13] See eg. the Swedish *Polislag* (1984:387), section 13
[14] The ECtHR has earlier been sceptical to Spanish arguments that unclear statutory law can be made clearer by implicit reference to constitutional norms - see *Valenzuela Contreras v. Spain*, no. 27671/95, 30 July 1998
[15] See, for example, BGE 128 I 327 E. 4.2 S. 340
[16] Rule of Law Checklist, cited above, para. 59

Code. The legislator should not evade the difficult task of formulating clear and precise rules in the criminal law sphere by simply re-characterising the offences as "administrative". The severity of the administrative penalties (which may go up to 600 000 Euros for the most serious breaches – see Article 39 para. 1 of the Law) brings these offences within, or very close to, the criminal law sphere, as this is interpreted by the ECtHR, pursuant to the so-called *Engel* test.[17] In such circumstances, it is particularly important that the relevant offences be formulated in the law with necessary precision. Many states have chosen to move certain matters from the criminal law to administrative law, in part to relieve the burden from the ordinary courts of dealing with minor matters. However, there is a difference between making, for example, a *traffic offence* (such as speeding) an administrative offence and making *a public order offence* an administrative offence. In the case of the former there will often be objective, empirical evidence of the penalised conduct in the form of traffic cameras, radar, etc. In the case of the latter, the evidence that penalised conduct has occurred will in many cases will be the word of the police officer. While it cannot be said that a prohibition exists against moving minor offences from the sphere of criminal law to administrative law, assuming the rights of fair trial etc. are respected, there can be reasons for striving after as high a degree of precision as possible, as well as for providing, where appropriate, compensatory safeguards (see below, paras. 34 et seq.).

30. Clarity of the legislation is also an important requirement as regards coercive powers which police forces have in every legal order: arrest, search, seizure, use of physical force and weapons, etc. In any encounter between a police officer and a private individual, both should have a more or less clear understanding of the limits of the police officer's powers and the scope of the obligations of the individual.[18] As a rule, the more severe the impact on individual rights and freedoms, the stronger the democratic legitimacy and the precision of the norm should be.

31. In sum, "quasi-criminal" offences against public order and/or coercive powers of the police should be described in the Law with more precision, and the nature of the prohibited behaviour or the type and extent of the coercive powers of the police should be clear from relevant provisions of the statute. The Venice Commission therefore encourages the Spanish authorities to subject Law no. 4/2015 to careful revision from a human rights perspective in order to make the language of the Law and its scope of application more precise.

32. The indeterminacy of the provisions of the Law can be remedied through different means. First of all, it can be done by references to the principle of proportionality: actually, the Law follows this path by repeatedly stressing this principle in the Preamble, in the opening articles and in the provisions regulating specific powers of the police. This is positive.

33. The next avenue is to adopt detailed regulations at sub-legislative level, which would develop the provisions of the Law in the light of the jurisprudence of the CCS and the ECtHR.[19] The Spanish Government shared with the Venice Commission certain instructions which define the powers and duties of law enforcement officers in more detail, in particular in those situations which are regulated by Law no. 4/2015 – most importantly, an instruction on body searches and

[17] The classic *Engel* test ("the legal classification of the offence under national law", "the very nature of the offence" and "the degree of severity of the penalty that the person concerned risks incurring") have been more recently developed, in the context of administrative proceedings for the disorderly behaviour – in the Grand Chamber judgment of *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, ECHR 2009.

[18] The Council of Europe Code on Police Ethics suggests that the legislation guiding the police shall be accessible to the public and sufficiently clear and precise, and, if need be, supported by clear regulations equally accessible to the public and clear.

[19] In this context, see the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990). For instance, according to paragraph 1, Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review. See also the recommendations set out in the Council of Europe's Committee of Ministers Recommendation Rec(2001)10 on the European Code of Police Ethics.

on the application of penalties for the "disobedience" to the authorities or their agents and the lack of respect or consideration towards a member of a law enforcement agency (Instruction no. 13/2018 of 17 October 2018). However, it is unclear to what extent this and other internal instructions of the police on policing of demonstrations, ID checks, etc. reflect the recent constitutional jurisprudence of 2020-2021. If this jurisprudence is not reflected in the police instructions, this should be done as a matter of priority. Otherwise, the extensive explanations contained in the CCS judgments will remain dead letter.[20]

34. Such regulations should not only exist but should also be brought to the knowledge of all police officers, in order to guide them in their daily work. At the meeting with the rapporteurs the Spanish authorities asserted that the standard curriculum of training of police officers in Spain includes human rights questions. Together with their written observations, the Government of Spain shared with the Venice Commission detailed information on the National Human Rights Office in the National Police, which provides guidance on human rights issues, and helps implementing a Human Rights Training Plan for all National Police staff, which includes annual programming of talks, courses, conferences, colloquia, and workshops on the subject. The annexes to the Government's written comments also describe various trainings and courses which are proposed to police officers throughout their career and which are instrumental in combatting police violence, racial profiling, gender discrimination and other abuses in police work. The Venice Commission is grateful to the Spanish Government for these useful clarifications.

35. In any event, supplementing vague laws with detailed regulations at the sub-legislative level should only be seen as a temporary solution, and it is always preferable to make statutory provisions more precise and clearer.

36. Another option consists of strengthening the internal "follow-up mechanism" within the police itself. At the meeting with the Spanish interlocutors the rapporteurs learned that police officers are required to submit internal reports on the use of the coercive powers, but these are, of necessity, very brief. The main purpose of this reporting appears to be to make it possible to establish a register of offenders, as repeat offences is a factor in determining sanctioning levels. The first question which arises in this regard is whether millions of people who committed disobedience in the context of Covid-related restrictions deserve to be registered as public order recidivists. Such use of the register of offenders may be problematic because the context of public health non-compliance is different from that of public order infringement which is the focus of the Law. In any event, there appears to be no follow-up in the sense of using these reports to analyse patterns of the use of police powers, in order for example to facilitate subsequent internal inspection of police forces, or units within these forces. Nor does it appear that any external body has the task of following up these reports. In many States there are allegations of abusive behaviour by the police (such as arbitrary ID checks, discriminatory profiling, etc.).[21] Providing for a reporting obligation, and clearly indicating what sort of data must be recorded facilitates the task of examining whether or not these allegations are well-founded. The same applies to formal complaints against the police. The representatives of the civil society expressed the view that internal complaints mechanisms within the police are quite efficient to combat corruption, but not so efficient when it comes to the excessive use of coercive powers by the police vis-à-vis members of the general public.

[20] In the 2019 annual report the Spanish Ombudsman recommended, in relation to the Citizens' Security Law, "to have an action protocol on the use of force, providing clear and accurate instructions to police officers on how and in what circumstances they should use both force and regulatory weapons and antiriot equipment, in order to reinforce legal certainty amongst agents and citizens."

[21] See UN HRC, Communication 1363/2005, *Rosalind Williams Lecraft v. Spain*, 19/10/2009,

37. Such "follow-up mechanisms" are thus not limited only to revealing possible abuse of police powers[22] but can also show patterns of behaviour – e.g. possible overuse of certain powers by the police in the exercise of their competencies. Overuse of police power may sometimes result from an overly mechanical adherence to quantitative targets set by a hierarchy for a given unit, or an individual officer. Generalised reports on the use of powers, based on aggregate data, could for example be submitted for consideration to Parliament, which would allow it to identify the "weak spots" of Law no. 4/2015 and fix them by way of a legislative amendment. The office of the *Defensor del Pueblo* (Spanish Ombudsman) may play a useful role in this process.

38. Finally, it may be necessary to pay attention to the existing mechanisms of judicial review of police action. All interlocutors agreed that only a small number of the very numerous fines imposed under Law no. 4/2015 has been challenged before the administrative courts. This can be seen as evidence of public acceptance of the sanctioning power. However, it may equally be a sign that there is a widespread view that judicial review is not easily accessible or does not offer reasonable chances of success in the disputes with the administration. The representatives of civil society expressed the view that many people are deterred from pursuing a case because of the "discount" a person receives when s/he accepts the penalty,[23] together with the cost and considerable delays involved in taking a case to the administrative courts.

39. In sum, as a general recommendation, the Venice Commission invites the Spanish authorities to approach the revision of Law no. 4/2015 from several angles. It is necessary to revise its provisions on coercive powers of the police and "quasi-criminal" penalties with a view to making them more precise. Where it is difficult to do so in the Law itself, the authorities should ensure that the constitutional jurisprudence is translated into more specific instructions which are made well-known to the police and to the general public. The competent executive authority should also ensure that the principle of proportionality is strictly applied, that effective internal follow-up mechanisms are put in place and that the information so collected is submitted to parliamentary scrutiny. Finally, judicial review of individual complaints about potential police abuses should be accessible and effective.

40. In their written comments the Spanish authorities argued that instructions for action developing the statutory provisions and the implementation of internal follow-up mechanisms are already in place. If this is the case, the Venice Commission invites the Spanish authorities to evaluate whether those instructions/mechanisms are in line with the parameters described above (see in particular paragraph 36).

B. Personal checks and external body searches

41. Article 18 para. 1 of the Law allows the police to conduct "checks on persons, property and vehicles" in public places. These "checks" can be conducted when there is "evidence" that they will lead to the discovery of weapons and dangerous objects or objects which may be used to "commit crime" or "disturb citizens' security". Article 20 para. 1 permits the police to conduct superficial and external body searches in public places 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." The difference between "personal checks" and "body searches" is not entirely clear; in any event, both provisions share the same flaws.

42. The CCS judgment of 19 November 2020 contains useful clarifications about the methods and the level of intrusiveness of body searches, how and by whom they can be done (they may

[22] In the context of the policing of assemblies, the revised Joint Venice Commission - ODIHR Guidelines on Freedom of Peaceful Assembly, cited above, para. 233, noted that "it is good practice for an independent oversight body to review and report on any large scale or contentious policing operation relating to public assemblies".
[23] The Venice Commission stresses that the "discount" in itself is not a problem. See further para. 77.

result in partial nudity, for example).[24] However, two additional aspects of the checks and body searches deserve to be addressed.

43. The first is the question of whether checks and searches should be supported by an *individualised* suspicion or can be justified simply by a general mandate of the police to prevent crime and maintain order. Body searches based on an objectively held suspicion that the person targeted by the search has committed or is about to commit a specific crime are not controversial. By contrast, searches without such an individualised suspicion are more problematic. This concerns, for example, random searches of people lingering in an area prone to the criminal activity, or indiscriminate searches of all people who happened to be near a scene of crime. Examples of such search powers may be found in some legal orders,[25] but they are more difficult to justify.

44. The second judgment of the CCS (that of 28 January 2021) underlines that a body search should always be justified by a "reasonable suspicion". However, it is still unclear whether this suspicion needs to be individualised. The reference in the judgment to body searches in the detention centres for aliens is telling: these searches are justified if they are "essential to specific situations that endanger the safety of the establishment". The outstanding question is whether body searches on the streets and in other public places can be justified by the reference to a "situation" in general or should be linked to the behaviour or individual features of the person searched.

45. As transpires from the ECtHR judgments in cases of *Gillan and Quinton v. the United Kingdom*[26] and *Beghal v. the United Kingdom*[27] the ECtHR stopped short of declaring all non-individualised searches contrary to the Convention. In any event, for the ECtHR, such search powers should be accompanied by adequate procedural safeguards reducing the risk of abuses: temporal and geographical limitations on the power of the police to conduct such searches, effective recording/reporting duty of the police officers exercising searches, executive and parliamentary oversight of the practice of such searches (see paras. 36 et seq. above on "follow-up mechanisms"), etc.

46. The second question relates to the purpose of personal checks and searches. The CCS reiterates that searches should aim at discovering "objects which are being carried and may be used with the aim of committing a crime or offence, or of *altering public security*" (italics added). While a body search aimed at discovering a tool or an object of *a crime* (an illegal gun, for example, or a stolen property) are not objectionable, the reference to the citizens' security in Article 18 permits the police to conduct body searches irrespectively of the gravity of the danger the police is trying to avert. Similarly, reference to the "preventive functions" in Article 20 para. 1 implies that a search may be justified even if the objects sought are not related to any criminal activity, but to insignificant offences or minor infringements of public order.

47. The Venice Commission is mindful that Article 20 para. 4 mentions the principle of proportionality, and that the Preamble, Article 4 of the Law ("Principles governing the action of the public authorities in respect of citizen's security") and the judgment of the CCS repeatedly refer to the proportionality test as well. This implies that, normally, the police should not exercise intrusive powers for minor reasons. However, as stressed above, simple reliance on constitutional principles is not the best defence against abuses. Articles 18 and 20 confer too much discretion on the police officers, which can result in indiscriminate checks and searches for no serious reason, or, what is worse, for ulterior purposes covered by general references to the need to protect public order.

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[24] There is ECtHR practice on this issue, see *Wieser v. Austria*, no. 2293/03, 22 February 2007.
[25] See Jacques de Maillard, Daniela Hunold, Sebastian Roché & others (2018) Different styles of policing: discretionary power in street controls by the public police in France and Germany, Policing and Society
[26] ECtHR, *Gillan and Quinton v. the United Kingdom*, no. 4158/05, ECHR 2010 (extracts)
[27] ECtHR, *Beghal v. the United Kingdom*, no. 4755/16, 28 February 2019

48. The Venice Commission therefore recommends reconsidering this provision; the Law should link the searches and personal checks to the discovery and prevention of offences *of certain gravity* and provide that, as a rule, they should be conducted on the basis of an individualised suspicion, the existence of which should be demonstrated by the police officer initiating the search in his or her reports. As to indiscriminate/random searches, if they cannot be avoided, they can only serve a legitimate purpose[28] and their use should be circumscribed by geographical and temporal limits, by describing the context in which such searches may be conducted and accompanied by procedural safeguards, including the appropriate follow-up mechanisms.

49. With all that in mind, the Venice Commission stresses that the evidentiary standard necessary to justify checks/searches should not be too high. As pointed out by the ECtHR, "the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them."[29] So, while it is important that some objective justification for a targeted search or a search operation exists, it does not need to be of the same level as required to detain or, *a fortiori*, convict a person.

C. Spontaneous demonstrations and the liability of the organisers

50. The next area which has attracted much criticism domestically is the approach of Law no. 4/2015 to policing of non-notified mass events, and the liability for organising such events. Following the logic of the Law, the ensuing analysis of the Venice Commission will be focused on the regulation of *peaceful* demonstrations, even if some breaches of public order or other disruptive behaviour may occur. This opinion will not deal with clearly non-peaceful gatherings, involving coordinated and persistent assaults on State institutions and other similar violent incidents which can be described as "riots".

1. Dispersing spontaneous demonstrations

51. The right to assembly in Spain is regulated by Law no. 9/1983, of 15 July 1983. Under Article 4 of Law no. 9/1983, the organizers of the demonstrations are "responsible for the good order" at the demonstration and shall adopt measures necessary for the proper holding of such demonstrations. Under its Article 5 the authorities may dissolve demonstrations which are unlawful under the Criminal Code or, in the alternative, when "disturbances of public order occur, with danger to persons or property". Article 8 of this law requires the organisers to give a 10-days' advance notification to the authorities in writing about the upcoming demonstration, or, in urgent cases – a 24-hours' advance notification. Article 9 describes the information which should be included in the notification. Article 10 provides that if "disturbances of public order may occur, with danger to persons or property", the authorities may prohibit the demonstration or, if appropriate, propose the modification of the date, place, duration or itinerary thereof. The authorities' refusal or the modification of the format of the demonstration may be appealed before a court; the organisers have 48 hours to file an appeal (Article 11).

52. Article 23 para. 1 of Law no. 4/2015 allows the authorities to disband demonstrations in the cases provided by Article 5 of Law no. 9/1983 (cited above). Article 23 specifically mentions that disbanding should be preceded by a warning (unless the demonstrators use weapons and other dangerous objects) and should be a measure of last resort.

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[28] On this see ECtHR, *Roth v. Germany*, nos. 6780/18 and 30776/18, 22. October 2020, paras. 70 and 72 in particular.
[29] ECtHR, *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, para. 56, ECHR 2012. The idea that the authorities have a certain margin of appreciation in establishing whether the organisers of a demonstration have a violent intent can be found in the revised Joint Guidelines on the Freedom of Assembly, cited above, para. 49.

53. Some representatives of the civil society complained to the rapporteurs that spontaneous demonstrations are not recognised in the Spanish legal order, and that the police often proceeds to disbanding them for the sole reason that they have not been notified. Indeed, Law no. 9/1983 does not mention spontaneous demonstrations explicitly.

54. At the outset, the Venice Commission reiterates that the duty of the organisers to notify the authorities in advance is a normal requirement in every democratic State. It permits the police to take necessary precautions, in order to co-ordinate different needs placed on the use of public space: prioritise different requests, divert traffic, dispatch more police on the ground to prevent encounters with possible counterdemonstrators, etc.[30] As any legal duty, it would be ineffective if non-compliance would not be sanctioned.

55. However, in some situations the obligation to notify cannot be met for objective reasons. This concerns spontaneous mass gatherings, or those demonstrations which were notified in advance but attracted more people than planned, or unexpectedly diverted from the original itinerary, etc. The Venice Commission has previously stressed that "the authorities must take reasonable and appropriate measures to facilitate assemblies that are convened at short notice or in response to an urgent or emerging situation (including spontaneous assemblies, flash mobs and non-notified assemblies) as long as they are peaceful in intent and execution."[31] The ECtHR also stressed that disbanding of assemblies "solely because of the absence of the requisite prior notice, without any illegal conduct by the participants" is contrary to the Convention.[32]

56. The CCS in its judgment of 19 November 2020 explained that a demonstration cannot be banned following a notification, unless there are "well-founded grounds" to conclude that a "situation of substantial disorder' may arise in the place of public circulation concerned". The CCS further stressed that the existence of a risk of "substantial disorder" should be objectively demonstrated, and that it should be of a certain intensity (which was described *inter alia* as "circulatory collapse which makes it impossible to provide essential services affecting the safety of persons or goods"). This approach is fully compatible with the position of the ECtHR which held that a certain level of disruption to normal traffic and ordinary life in general by mass gatherings is inevitable and must be tolerated,[33] and to the approach of the Venice Commission itself which acknowledged that some temporary disruptions of daily life and of rights of others may be tolerated to protect the freedom of assembly.[34] Article 23 of Law no. 4/2015 explicitly embraces the principle of proportionality when it says that forced dissolution of a demonstration is a measure of last resort.

57. So, from Article 5 of Organic Law no. 9/1983, Article 23 of Law no. 4/2015 and from the interpretation given by the CCS it follows that the authorities cannot dissolve demonstrations – even those not notified in advance – unless there is an ascertainable risk of "substantial disorder". It would be preferable, however, that this criterion be more clearly formulated in the law. For example, the Swedish law on Public Order specifically exempts spontaneous demonstrations from a requirement to notify in advance. The Swedish law requires that there be an interference with the order on the street before the police can break it up.[35] In the opinion of the Venice Commission, it would be useful to include in the legislation - both in Law no. 4/2015 and in Law no. 9/1983 – an explicit rule requiring the police to tolerate spontaneous demonstrations if they do not cause serious breaches of public order.

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[30] ECtHR, *Primov and Others v. Russia*, no. 17391/06, para. 117, 12 June 2014
[31] CDL-AD(2020)030, Kosovo - opinion on the Draft Law on Public Gathering, para. 38, and the revised Joint Guidelines on Freedom of Peaceful Assembly, cited above, para 171
[32] ECtHR, *Bukta and Others v. Hungary*, no. 25691/04, para. 36, ECHR 2007-III.
[33] ECtHR, *Barraco v. France*, no. 31684/05, paras. 43 and 48, 5 March 2009
[34] See the revised Joint Guidelines, cited above, paras. 139 and 143
[35] *Ordninglagen* 2:4

2. Liability of the organisers for failure to notify/deviation from the notification

58. Law no. 4/2015 establishes a liability for breaching the requirement to notify the authorities about a demonstration. Thus, Article 37 para. 1 of the law defines as a minor offence "holding meetings in places of public circulation or demonstrations in breach of the provisions of Articles 4 para. 2 [(on the duty of the organisers to ensure good order at the demonstrations)], 8 [(on the duty to notify the authorities)], 9, 10 and 11 of Organic Law 9/1983, […] for which the organizers or promoters shall be responsible". A minor offence is punishable by a fine ranging from 100 to 600 Euros.[36] If a non-notified or prohibited demonstration took place near the "infrastructure providing basic services to the community" and created a risk to life and physical integrity of persons, such behavior of "organisers and promoters" is considered to be a serious offence and is punishable with a fine which may go from 30 000 to 600 000 Euros.

59. Article 30 of Law no. 4/2015 defines the organisers as those who either submitted the notification, or 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".

60. The Venice Commission has previously warned against excessive burdens imposed on the organisers of mass events. As stressed in the revised Joint Guidelines on Freedom of Assembly, the State remains under a positive obligation to provide adequately resourced policing arrangements necessary for maintaining public order and safety.[37] Therefore, the obligation of the organisers to adopt measures necessary for the proper holding of demonstrations (see Article 4 of Law no. 9/1983) should not be construed too broadly. The primary obligation of the organisers is to clearly discourage any disorderly behavior, inform forces of order of any incidents which may affect public safety, etc. However, this obligation cannot be interpreted as requiring that the organisers take up all the responsibilities of the police at such events.

61. The CCS in its judgment of 19 November 2020 explained that, in the field of administrative law, penalties cannot be imposed "solely on the basis of the result and without regard to the diligent conduct" of the alleged offender. It further reiterated that a penalty can be imposed on an organiser only for "willful misconduct or fault". It may be reasonably inferred that where a demonstration is spontaneous, even a 24 hours' advance notice may be impossible. The organisers or promoters of such events should not be punished for failure to comply with this legal requirement, for want of fault. Similarly, the reasoning by the CCS implies that the organisers cannot be held liable for the deviations from the format of the demonstration indicated in the notification, which cannot be reasonably foreseen or prevented by means which the organisers dispose. The Venice Commission is of the view that if the Law is read in the light of the detailed explanations given by the CCS in the judgment of 19 November 2020, its provisions are acceptable.

62. Again, this interpretation of the Law implies that the police knows and understands the complex legal theory developed in the CCS judgment. It would be much easier if the Law itself contained necessary qualifications, thus excluding the risk of overly formal application of Article 37 para. 1 (i.e. punishment for the mere absence of prior notification or deviation from the notification requirement) and without taking into account the situations where complying with this obligation is impossible. [38]

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[36] In 2018, this provision has been applied 138 times and resulted in 38,750 Eur in fines; the average amount of the fine was therefore 280 Eur.
See https://cadenaser.com/ser/2020/01/27/tribunales/1580115359_144382.html

[37] Cited above, para. 156

[38] See the ECtHR case of *Laguna Guzman v. Spain*, no. 41462/17, 6 October 2020, concerning forceful dispersion of a spontaneous gathering in the aftermath of an official demonstration. In this case the ECtHR held that there had been a violation of Article 11; it noted in particular that the spontaneous protest had been peaceful up until its dispersal and

63. The Venice Commission has earlier stressed that the lack of clarity as to the liability of organisers for the deviant actions of some of the demonstrators may have a chilling effect on the freedom of assembly in a country. Experience shows that it can never be excluded that demonstrators determined to use violence mingle with those demonstrating peacefully. In a leading decision, the Swiss Federal Supreme Court expressly affirmed a "chilling effect" for the exercise of the right to assembly and free speech if the costs for policing a demonstration are charged indiscriminately, as they discourage those entitled to the fundamental right from exercising it.[39] The Court held that organisers could only be held liable if their behaviour was "utterly incomprehensible". From the point of view of proportionality, the maximum fee of CHF 30 000 could only be considered in exceptional cases - a large rally with massive violence was mentioned by the Court - if several organisers were involved, in which case they were only proportionally liable. The Court ultimately considered the provision to violate the principles of equality and proportionality due to its indiscriminate nature and annulled it. Similarly, the Venice Commission and the ODIHR, in the revised Joint Guidelines, formulated their common approach as follows: "liability will only exist where organizers or stewards have personally and intentionally incited, caused or participated in actual damage or disorder."[40]

64. In sum, the Venice Commission recommends to specify in the Law that organisers and promoters of demonstrations cannot be brought to liability for the failure to notify the authorities or for non-compliance with the format of the demonstration set out in the notification if the gathering was spontaneous or if the deviation from the originally planned format of the demonstration could not be reasonably foreseen or prevented by means available to the promoters and organisers.

65. The Spanish authorities argue, in their written submissions, that Article 21 of the Constitution of Spain (which recognises the right to peaceful assembly) demands "without exception" that prior notification thereof be made to the competent authority if the demonstration is to be held in places of public transit. They insist that allowing spontaneous demonstrations in the law would "clearly contradict article 21 of the Constitution". In their words, rather than expressly allowing in the law for spontaneous demonstrations, the administration should "refrain" from imposing sanctions on organisers for holding such demonstrations, if the purpose of holding it "was to provide an immediate and peaceful response to a recent event". For the Venice Commission, the ECHR-compatible interpretation of Article 21 of the Spanish Constitution does not seem impossible. The guidance given to the authorities in the CCS judgment of 2020 seems to be consonant in the ECtHR jurisprudence on this matter. However, should allowing for spontaneous demonstrations directly in the law be found incompatible with the text of the Constitution, the legislator could indeed choose the other avenue suggested in the Government's comments. In the view of the Venice Commission, the law might specify that the organisers might be exceptionally excused from the general duty to notify and enumerate the conditions when it is possible. Such formula would put accents differently: spontaneous demonstrations remain a justified exception from a general duty to notify. At any rate, in the opinion of the Venice Commission, the "principle of toleration" should be explained in the law itself, and not simply follow from the practice of administrative and judicial bodies. The law should also make it clear that the "principle of toleration" relates not only to the *ex post* administrative liability of organisers, but also to the actions of the police *during* such spontaneous events. The police should not dissolve such gatherings for the sole reason that they have not been notified and should also tolerate some disturbance of the normal city life they might cause – this clearly follows from the case-law of the ECtHR cited in the judgment of the CCS.

considered that the authorities had not provided relevant and sufficient reasons justifying the dispersal of the demonstration.

[39] BGE 143/147, of 2017

[40] Cited above, para. 37

66. The Venice Commission also recommends reviewing the formula used in Article 35 para. 1 of the Law which provides that if a non-notified demonstration takes place near "infrastructures and facilities providing basic services to the community" and creates a risk to life and physical integrity of persons, this brings the offence in the category of very serious offences, and may eventually bring the amount of the fine to 600 000 Euros.

67. The Venice Commission does not dispute that creating a risk to life and physical integrity is a serious offence and may, in principle, justify more serious sanctions (as compared to those disturbances which merely disrupt normal city life or economic activity, for example).[41] However, the second condition – namely the vicinity of such non-notified demonstrations to "infrastructures and facilities providing basic services to the community" – may be construed very broadly. In theory, any place in a city may be found to be close to some sort of facilities of infrastructures of that kind. Is a supply of water a basic service, and what if a non-notified demonstration was held near a water pipeline? The CCS judgment of 28 January 2021 commented at length at the notion of "vicinity" and did not find this provision unclear: the CCS stressed that "it gives the enforcer a margin of appreciation to adapt the statutory definition to the particular and changing circumstances of reality". The Venice Commission agrees that because of the "changing circumstances of reality" it may be difficult to give an exhaustive list of such "infrastructure and facilities". However, it still could be useful either to narrow down the formula used by the Law,[42] or at least to give examples which would provide guidance to the police, judges, and the general public about the kind of facilities the legislator has in mind. If, however, the amount of fines is justified solely by the risk to life and limb, then the reference to "infrastructures and facilities" is redundant.

D. Level of the penalties and effective judicial review

68. The Law provides for 3 types of administrative offences: minor, serious and very serious. The fines for minor offences range from 100 to 600 Eur, for serious – from 600 to 30 000 Eur, and for very serious – from 30 000 to 600 000 Eur. As to the breaches going beyond the "very serious" offences, sanctions for them are provided by the Criminal Code.

69. The Venice Commission recalls that offences such as the failure to provide advance notice of an assembly or the failure to comply with route, time and place restrictions imposed on an assembly should not be punishable with prison sentences or heavy fines.[43] The "heaviness" of the fines cannot be assessed *in abstracto*. In Spain, the minimal monthly salary is 850 EUR.[44] Certain demonstrations, and in particular anti-austerity protests of the past decade, which triggered the adoption of the Law, often attract people with less-than-average income. It is positive that Article 33 of the Law mentions the economic capacity of the offender as a factor which must be taken into consideration in defining the amount of a penalty, but it is understood that this only affects the choice of the level of the fine between the set maximum and minimum amounts for each category. In the light of the above, the amount of penalties set in the Law appears relatively high.

70. The CCS touched upon the question of proportionality of the sanctions in its judgment of 28 January 2021. In particular, the CCS held, referring to its earlier jurisprudence, that it is not its role to decide on the proportionality of the sanctions *in abstracto*, and that this question should be addressed in the circumstances of the specific case by an ordinary judge or, eventually, by the CCS itself within the *amparo* procedure. This is a very prudent approach, respecting policy choices made by the legislator. However, this approach risks overlooking the chilling effect such

[41] On the proportionality of the sanctions in this particular case see the next section below.
[42] See a similar analysis of the prohibition in the law to hold religious assemblies near educational institutions, CDL-AD(2018)002, Armenia - Joint Opinion on the Draft Law amending the Law on Freedom of Conscience and on Religious Organisations, para. 48
[43] Revised Joint Guidelines, cited above, para 36.
[44] See Average Salary in Spain 2021 - The Complete Guide (salaryexplorer.com)

heavy sanctions may have generally on the freedom of assembly. Even if in practice the maximum sanctions are never used,[45] the mere existence of such fines in the Law may discourage people from engaging in the peaceful protest activities. The chilling effect is further intensified by the vague and open-ended character of some of the provisions defining offences: where the borderline between acceptable and reprehensible behaviour is not entirely clear and the sanctions are high, a citizen would rather make a choice in favour of *not exercising* a fundamental right, out of precaution. So, while it is understandable that the CCS prefers to wait until a suitable case arrives within the *amparo* proceedings, the legislator should take a more pro-active position and review the sanctions as such, not least through the prism of the "chilling effect" they may have.

71. The high level of penalties is worrying not only from the perspective of Article 11 of the ECHR (freedom of assembly), but also because penalties for serious and very serious infringements set out in Article 39 may bring these proceedings into the realm of the criminal law, meaning that Article 6 paras. 2 and 3 of the ECHR (guaranteeing fair hearing in criminal cases) and Article 7 (enshrining *inter alia* the principle *nulla crimen nulla poena sine lege*) would apply.[46] This, in turn, raises a number of complex questions which the legislator must address.

72. The first is the quality of the statutory norms defining the offences. The Venice Commission reiterates that clarity and foreseeability of norms are particularly important in the criminal legislation. The problems associated with Article 37 para. 4 (disrespect) have already been mentioned (see paragraph 21 above). The other problematic provision in this respect is Article 36 para. 6 of the Law which defines the "disobedience or resistance to the authorities or their agents in the exercise of their duties" as a serious offence.[47] As explained to the rapporteurs, this provision covers not only desobedience to the lawful orders given by the police officers *within the framework of this Law,* but *any* disobedience to *any* official order or regulation. Thus, this provision has been massively used in the 2020 during the pandemic and the state of alarm for imposing fines for the breach of the isolation regime and other similar restrictions. Article 36 para. 6 seems to be a catch-all provision which permits the police to impose fines (which may go up to 30 000 Eur) for basically any kind of unlawful behaviour.

73. The Venice Commission is aware of the great difficulties Spain has experienced, and is still experiencing, as a result of the pandemic. It is understandable that the authorities needed to find quickly some legal instruments to curtail the spread of the virus, and therefore used the legal instruments at hand. Such a course of action was understandable in the early stages of the pandemic. However, to use Article 36 para. 6 in this way represents a considerable departure from the original interpretation given to this provision, which, as the Venice Commission understands it, required disobedience of a specific instruction given by a police officer, acting within the law. While this new interpretation may be compatible with the wording of the provision, it illustrates the dangers in formulating statutory norms of this kind in too flexible a manner. Instead of the Government having to go to Parliament to ask for specific powers to deal with an emergency, which Parliament can then grant subject to sunset clauses and other safeguards, the Government can use existing powers, by means of a re-interpretation. There may be a substantial measure of agreement among commentators in Spain on the need for some public order power to enforce lockdown measures, but there is still room for legitimate disagreement on

[45] According to the Spanish interlocutors, the 600 000 Eur fine has never yet been imposed in practice

[46] The reasoning of the Grand Chamber judgment in *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, para. 55, ECHR 2009, suggests that the nature of the offence of disorderly conduct brings it close to the criminal law sphere. Although in this case, unlike in *Sergey Zolotukhin*, the law only provides for the pecuniary fines, and no deprivation of liberty, the amount of those fines is extremely high, so the question of qualification of those penalties as "criminal" may arguably arise. The fact that some of the offences described in this law has previously been qualified as "criminal" in the domestic law reinforces this conclusion.

[47] This provision is much larger than a similar offence (qualified at the time as minor) described in Law no. 1/1992 – Article 26, h): "Disobeying the orders of the authority or its agents, issued in direct application of the provisions of this Law, […]".

what sort of powers, how long these should be in place and what safeguards should apply.[48] Moreover, such an approach opens the way to sanctioning people for violating even more far-reaching government decrees in the future.

74. The second question relates to the applicability of the procedural guarantees provided by Article 6 of the ECHR to the administrative proceedings under Law no. 4/2015. Article 6 guarantees equality of arms and the respect for the presumption of innocence, plus several more specific guarantees in para. 3, like the right to a lawyer. Several features of the administrative procedure under consideration may fall short of those standards.

75. In particular, Article 52 establishes a (rebuttable) presumption of truthfulness of police reports drawn within the administrative proceedings related to the offences described in the Law. It is not unusual for a judge to trust depositions of police officers and follow such a "presumption of truthfulness" in practice – this is a case in many jurisdictions. But giving police reports a special evidentiary weight is a more questionable approach, from a Rule of Law perspective.[49] The effect is that the burden of proof is shifted to the citizens, in matters of substance rather than regulation, where a significant sanction may follow by default. All this is even more questionable as there does not seem to be a right to legal aid in these proceedings (on this see more below).

76. Several other features of the administrative procedure put the defendant in a weak position. Thus, penalties imposed under the Law are directly enforceable, once the final administrative decision is taken (see Article 53 para. 1).[50] Under Article 54 the defendant may avoid paying the full amount of penalty, and pay only a half, but under condition that he or she accepts the facts described in the police report and waives the right to appeal to a court. This rule does not apply to the fines for very serious offences, but, still, it can place the alleged offender before a difficult choice: pay 15 000 Eur "on the spot" or lodge an appeal with the risk of having to pay 30 000 Eur (plus legal costs).

77. The Government insist that the option of a reduced fine exists in many other contexts (for example, violation of traffic rules) and does not impinge on the right of access to judicial review. Indeed, this instrument (forfeiture of the right to appeal in exchange of a reduction of penalty) is known in many legal orders and is not objectionable *a priori*, but it carries with it the same problems which exist with the institution of plea bargaining, albeit on a less serious level. And, in any event, this is only one factor in making judicial review less attractive in practice. The problem in the Spanish context is that such a difficult decision (akin to a plea bargain) should be taken by the defendant very quickly – within 15 days after the decision to impose a fine has been taken (see Article 53 para. 1), and with the understanding that the police report would enjoy a special status in the evidentiary basis. Furthermore, the defendant will often have to take this decision alone, since in such situations the Spanish law does not provide for a right to a lawyer paid by the State. Finally, as explained to the rapporteurs, in order to appeal against the penalty before a court the defendant would have to be represented by a lawyer and pay for his or her services, as well as for the services of *procurador* (another type of a legal representative under the Spanish law). That may effectively deter the presumed offender from seeking judicial review of the administrative decision imposing the penalty.

[48] On the emergency measures and the role of Parliament in controlling them see CDL-AD(2020)014, Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections, in particular paras. 62 et seq.
[49] As correctly pointed out by the Spanish authorities, certain types of presumptions of fact are not *per se* contrary to the principle of presumption of innocence: see ECtHR, *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, para. 28.
[50] The Government explained that, under Article 90.3 of Law 39/2015, of 1 October 2015, on the Common Administrative Procedure of the Public Administrations, enforceable fine may be suspended as a precautionary measure by the administration, at the request of the interested party if the latter is about to file a contentious-administrative appeal.

78. These factors place a presumed offender in a net procedural disadvantage vis-à-vis the administration. This raises a serious question about the compatibility of the administrative procedure with the fair trial guarantees of Article 6 of the ECHR. The Venice Commission urges the Spanish legislator to look at the administrative procedure from a criminal law perspective in order to ensure that presumed offenders enjoy at least minimal guarantees required under Article 6 of the ECHR.

79. The representatives of civil society considered that there was a difficulty in practice in accessing judicial review, especially for poor people. The Spanish authorities disagreed, arguing, in their written reply, that a "considerable" number of administrative penalties have been annulled through administrative channels, that the possibility exists of brining civil claims, and that the administrative court rulings declaring the nullity of said penalties "are not infrequent". In the absence of more precise information or analysis of the statistics of application of those penalties, and in the light of the procedural obstacles outlined above (see paragraphs 74 -77), the doubts about the efficiency of the judicial review of administrative penalties persist.

80. This recommendation does not have the same force as regards lesser penalties provided by the Law which cannot be qualified as "criminal" in nature and for which a "lighter" procedure may be provided.

E. Rejections at the border in Ceuta and Melilla

81. Law no. 4/2015 introduces an additional provision 10 to Organic Law 4/2000 of 11 January 2000, on the rights and freedoms of foreigners in Spain and their social integration. The extra provision allows the rejection of aliens attempting illegal entry at the border fence of the Spanish autonomous towns of Ceuta and Melilla. The rejection is to be carried out "in compliance with international human rights and international protection standards to which Spain is a party". Finally, additional provision 10 directs that 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 regulations on international protection.

82. According to some representatives of the civil society,[51] additional provision 10 has regularised a practice of rejection at the border that has already been commonplace for many years. There is no official data on summary expulsions, since for the Spanish authorities these "rejections" happen outside of the Spanish territory and do not give rise to any administrative procedures. Given the manner in which those rejections are executed, no individualised treatment of the potential asylum seekers is possible.

83. The CCS judgment of 19 November 2020 confirmed the constitutional validity of additional provision 10, albeit with some qualifications. The reasoning of the CCS can be summarised as follows. Aliens, even those in irregular situation on the Spanish territory, do not lose all of their fundamental rights. The right to asylum is not a fundamental right, but it is recognised under the Spanish law. The rights of aliens in this context are defined by Organic Law 4/2000, of 11 June 2000 (on the Rights and Liberties of Foreigners in Spain and their Social Integration) and developed in Royal Decree 557/2011 of 20 April 2011. These provisions provide for several situations in which an irregular alien may be returned to his/her country of origin and, in particular, mention the situation of aliens intercepted at the border or in the vicinity. Aliens enjoy the right to legal protection, they have a right to an adversarial hearing of their cases, can enjoy free legal assistance and an interpreter, may make submissions and fille appeals. By rejecting aliens at the border, the Spanish authorities exercise jurisdiction over them, so all provisions of the legislation on aliens apply. Indeed, the rejection at the border is a coercive measure which is not governed by the rules of administrative procedure, but the aliens can lodge an appeal against such actions before the courts. Moreover, when proceeding to the "rejection at the border" the police forces

[51] Information provided by Novact, International Institute for Nonviolent Action

are always required to respect the dignity of aliens and respect international obligations of Spain. That entails "paying special attention to particularly vulnerable categories of people" (unaccompanied minors, children, pregnant women, old and disabled people etc.).

84. The CCS further examined the findings of the Grand Chamber of the ECtHR in the 2020 case of *N.D. and N.T. v. Spain.*[52] The ECtHR in this case was confronted with the attempts by foreigners to penetrate the Spanish territory in Ceuta and Melilla by taking advantage of their large numbers and by using force. Additional provision 10 seems to be applicable to the attempted mass breakthroughs, but it also applies to those foreigners who try crossing the border in Ceuta and Melilla individually. In any event, the newly introduced legal regime is not contrary to the position of the ECtHR. The judgment of the ECtHR in *N.D. and N.T* recognised that the acts of rejections at the border fences were within Spain's jurisdiction. However, it introduced a two-prong test which permitted the Grand Chamber to conclude that this practice of mass rejections without individual removal decisions was not contrary to Article 4 of Protocol no. 4 to the Convention (ban on collective expulsion): such mass rejections were legitimate because they were triggered by the culpable conduct of the foreigners trying to cross the border (by taking advantage of their large numbers and using force) and provided that there was as a genuine and effective access to means of legal entry.

85. In conclusion, the CCS found that additional provision 10 was in accordance with the Constitution, provided that it is "applied to individual entries", that rejections are subject to full supervision by the courts, and that they are compliant with international obligations.

86. The Venice Commission acknowledges that Spain finds itself in a difficult situation. As any sovereign State, it has an undeniable right to protect its borders from illegal entries. Furthermore, due to its geographical situation, it is bound by an obligation before its European Union partners to guard the exterior borders of the Schengen area. At the same time, Spain has to respect its international obligations in the field of international human rights and refugee law, and not to infringe the most fundamental rights aliens have under the Spanish Constitution.[53] Both the CCS in its judgment of 19 November 2020, and the ECtHR in the *N.D. and N.T* case recognised this tension and tried to find a proper balance between the competing obligations of Spain under its own Constitution and under the international law.

87. The reasoning of the CCS and of the ECtHR go essentially in the same direction, even if the scope of the finding of the ECtHR in *N.D. and N.T* was narrower (it only concerned mass rejections). Both judgments are "conditional", i. e. based on the assumption that other essential guarantees are in place (effective individual examination of asylum requests in specially allocated "entry points", judicial review of refusals, special attention to vulnerable categories aliens, etc.). These assumptions may be overly optimistic and may prove wrong in the circumstances of individual cases.

88. The Venice Commission does not have a mandate to analyse the whole body of the Spanish legislation on refugees, on the process of treatment of asylum requests, and of the judicial review of refusals. Even more so, it cannot examine the *de facto* situation of migrants in Morocco, or the individual circumstances of migrants who have chosen to penetrate the Spanish territory illegally instead of using the official "entry points". The CCS was in the same situation, which explains the approach it has taken.

[52] ECtHR, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020

[53] The principle of non-refoulement follows from Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 3 of the Convention relating to the Status of Refugees, as well as Article 4 of Protocol no. 4 (prohibition of collective expulsion of aliens). Article 3 of the ECHR prohibiting inhuman and degrading treatment and torture is also of relevance in this context.

89. The Spanish legislator, however, is in a different position: it may look at this problem from a "bird's eye" view and check whether the system of processing asylum requests works efficiently and ensures the right of individualised treatment.

90. As to additional provision 10, it may be developed further, in order to implement some of the recommendations given by the CCS. Most importantly, the Law should specify that the rejection at the border is not an *obligation* but a *possibility*, and that police officers intercepting migrants at the border fence may proceed in a different manner, if, in the circumstances, they see that those specific aliens have cogent reasons for not using ordinary entry points for asylum-seekers. Some guidance as to the situations where such decision must be taken (notably with reference to the vulnerable categories of prospective asylum-seekers, amongst other relevant criteria) may be developed at the sub-legislative level. Furthermore, the legislator may review the legislation on the functioning of the official entry points and on the judicial review of the refusals to grant the asylum in order to insure that they provide a viable alternative to illegal border crossing and offer reasonable chances of individualised treatment of asylum requests.

IV. Conclusion

91. The Venice Commission has prepared this opinion on the Organic Law on Citizens' Security (Law no. 4/2015) at the request of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe.

92. Law no. 4/2015 covers a vast array of questions. The Venice Commission cannot assess all of them, and has therefore focused on the provisions which have attracted most attention domestically: regulations on checks and body searches in public places, policing of spontaneous demonstrations and liability of organisers thereof, severe administrative penalties provided by the Law and the rejection of aliens at the Spanish border in the autonomous towns of Ceuta and Melilla.

93. Most of these issues have been addressed in two judgments of the Constitutional Court of Spain (CCS), of 19 November 2020 and of 28 January 2021. With one exception, the CCS refrained from invalidating the contested norms but rather gave them a constitutionally compliant interpretation. The Venice Commission in its analysis relies heavily on the findings of the CCS. However, the Commission is of the view that if a statutory norm leads to abuses in practice, this norm should be changed, circumscribed, or accompanied by additional safeguards, even if in theory it is constitutionally acceptable. The parliament of Spain is currently considering a bill proposing to modify Law no. 4/2015. The Venice Commission encourages the legislator to carry out an in-depth assessment of the practical operation of the Law and its impact on human rights and freedoms. Given the "repressive potential" of this Law, such review should be conducted regularly.

94. Law no. 4/2015 contains a number of open-ended provisions which entrust the police with broad powers but do not indicate in which situations these powers may be used, or what sort of measures can be taken by the police. Some offences are also formulated in the Law in an overly extensive manner. The Commission acknowledges that it is not unusual for the legislation to provide for a general power for the police to take measures necessary to maintain order in public places, but it recalls that clarity and foreseeability of the law ensure equal and non-arbitrary treatment and legal certainty (understood as the predictability of State action). This is particularly important in the criminal law sphere. Due to the nature of the offences and the seriousness of fines provided for them under Law no. 4/2015, they can arguably fall within the ambit of the criminal law. The Venice Commission therefore recommends that such "quasi-criminal" offences and/or coercive powers of the police should be described in the Law with more precision.

95. The Venice Commission also recommends adopting detailed regulations at sub-legislative level, which would reflect the recent constitutional jurisprudence and serve as a guidance to the

police in their daily work. It is also important to strengthen the internal "follow-up mechanism" within the police itself, which would help identifying patterns of the use of police powers, detect abuses (such as arbitrary ID checks, discriminatory profiling, etc), facilitate subsequent internal or external inspections of police forces, and, ultimately, enable Parliament to analyse the practice of the use of coercive powers and amend the legislation accordingly. It may also be necessary to reinforce the existing mechanisms of judicial review of police action and make them more efficient and accessible.

96. The Venice Commission took note of the detailed explanations of the Spanish Government which argued that such internal instructions and follow-up mechanisms are already in place. If this is the case, this is positive, but the Venice Commission nevertheless encourages the Spanish authorities to evaluate whether those instructions/mechanisms are in line with the parameters described above (see in particular paragraphs 36-37).

97. The Venice Commission also makes the following specific recommendations as regards the text of Law no. 4/2015:

- as regards articles 18 and 20 (personal checks and external body searches in public places), the Law should link them to the purpose of discovery and prevention of offences of a certain gravity and provide that, as a rule, they should be conducted on the basis of an individualised suspicion. As to indiscriminate/random searches, their use should be circumscribed and accompanied by procedural safeguards, including appropriate follow-up mechanisms;
- Law no. 4/2015 should specify that the authorities should tolerate demonstrations – even those which were not notified in advance or which deviate from the conditions set out in the notification – unless there is an ascertainable risk of "substantial disorder". Organic Law no. 9/1983 (on the right of assembly) should also be amended accordingly. The Spanish legislator has discretion as to how this "principle of tolerance" should be incorporated into the law, so that the statutory formula is compatible with Article 21 of the Constitution;
- Law no. 4/2015 should specify that organisers and promoters of demonstrations cannot be brought to liability for the failure to notify the authorities or for non-compliance with the format of the demonstration set out in the notification if the gathering was spontaneous or if the deviations could not be reasonably foreseen or averted by means available to the promoters and organisers;
- the amount of penalties provided by Law no. 4/2015 – especially those for serious and very serious offences (up to 600 000 Eur in the latter case) – appears quite high, in the Spanish context. In view of the imprecise definition of some offences (most notably Article 36 para. 6 which speaks of "disobedience to the authorities"), these fines may have a chilling effect on the exercise of the freedom of assembly. The amounts of the fines should therefore be reconsidered;
- some of the penalties provided by Law no. 4/2015 can be characterised as "criminal" in essence. Therefore, the procedure in which they are imposed should satisfy some basic requirements of fair trial provided by Article 6 of the European Convention on Human Rights, under its criminal limb. The presumption of truthfulness of the reports of the police, the immediate enforceability of heavy fines and the lack of entitlement to legal aid counsel weaken the position of the defendants vis-à-vis the state. The legislator should ensure that presumed offenders enjoy at least the minimal guarantees required under Article 6 of the ECHR;
- on the rejections of foreigners trying to illegally cross the Spanish border in the autonomous towns of Ceuta and Melilla (additional provision 10 to Organic Law no. 4/2000), the Venice Commission acknowledges that Spain finds itself in the difficult situation of having to defend its borders and at the same time comply with its obligations under international law. Even though additional provision 10 has been found to be "conditionally constitutional", the Commission considers that the Law should specify that police officers should not proceed with the rejection at the border if, in the circumstances,

they see that an alien has cogent reasons for not using the ordinary procedures for seeking asylum.

98. The Venice Commission hopes that these recommendations will be useful in the parliamentary debates concerning possible amendments to Law no. 4/2015 and other relevant legislation. It remains at the disposal of the Spanish authorities and the Parliamentary Assembly for further assistance in this matter.