[This translation is unofficial. In case of discrepancy, the Spanish version prevails]

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

IN THE KING'S NAME

the following

JUDGMENT

In the appeal of unconstitutionality No. 3848-2015, filed by the Parliament of Catalonia against Articles 20, 35(1), 36 (paragraphs 1, 2, 8, 22 and 23), 37(7) and the first final provision of Organic Law 4/2015, of 30 March, for the Protection of Citizens' Safety. The Government has appeared and made allegations. The rapporteur was Judge Juan José González Rivas, President of the Court.

I. Facts[1]

1. On 30 June 2015, an appeal of unconstitutionality brought by the Parliament of Catalonia against Articles 20, 35(1), 36 (paragraphs 1, 2, 8, 22 and 23), 37(7) and the first final provision of Organic Law 4/2015 of 30 March on the protection of citizen safety (hereinafter OLPCS) was entered in the General Registry of this Court. The grounds that justify the appeal of unconstitutionality are briefly exposed below:

a) Unconstitutionality of Article 20 OLPCS

The appellant, quoting STC 207/1996, distinguishes "bodily intrusions" (where certain external or internal elements of the human body are removed) from "body searches" (recognitions of the human body without harming it). The latter, according to this constitutional doctrine, may affect the right to privacy in general or, more precisely, to bodily privacy, whose constitutionally protected scope is determined by the "dominant criterion on personal modesty in our culture".

On the basis of this constitutional doctrine, the claim argues that, although external body searches cannot be considered a "bodily intrusion", not even an impact on bodily privacy, such interference shall be constitutionally lawful only if it has (a) a constitutionally legitimate purpose, constituted by "justified reasons of general interest appropriately provided for by law; (b) is expressly provided for and determined by a rule with the force of law and (c) is proportional to its purpose.

Concerning the legal provision, the appellant challenges "the use of vague and discretionary terms, both in determining the enabling cause of body searches and the situation that justifies the non-application of the formalities required for the search in paragraph 2". The appellant argues that the interference thus regulated in the provision does not meet the requirements of constitutional (STC 169/2001 of 16 July) and European case law (ECtHR Case of Gillan and Quinton of 12 January 2010): the existence of a constitutionally legitimate purpose and the sufficiency of the enabling legal provision.

[1] For the purposes of this translation, the following abbreviations will be used:
- Constitutional Court Judgment(s) will be hereinafter referred to as STC *(sentencia del Tribunal Constitucional)* or SSTC *(sentencias del Tribunal Constitucional)*
- Constitutional Court Order(s) will be referred to as ATC *(auto del Tribunal Constitucional) or AATC (autos del Tribunal Constitucional)*
- The Spanish Constitution will be referred to as SC

In this sense, it states that “the restriction of the right to personal privacy provided for in Article 20 OLPCS is not in accordance with the doctrine established by this Court and by the European Court of Human Rights in order to consider it legitimate. Therefore, we understand that the definition of the purpose to be achieved through its application is vague, as it allows for an excessively discretionary or even arbitrary action by the enforcement authorities only based on mere personal and subjective assumptions. Similarly, this action can be performed to search for a very wide variety of objects, which are not specified either by their nature or by their degree of danger. Likewise, the analysed provision lacks the elements required by constitutional case law to define this kind of intrusions, such as the fact that they are an exception or that they can be carried out individually, depending on the circumstances of each case. And finally, both paragraphs, 1 and 2, are totally vague with regard to an essential question: to what extent personal privacy may be invaded to carry out the body searches regulated therein and which, despite being described as external and superficial, may involve the partial nudity of a person”.

Finally, the appellant argues that “it is clear that the unconstitutionality flaws that we have just presented affect Article 20 LOPSC as a whole, including paragraphs 3 and 4, given the obvious connection and relationship between all of them.

b) Unconstitutionality of Articles 36 (paragraphs 1, 2, 8, 22), 37(7) and 35(1) OLPCS

With respect to Article 36(1) OLPCS, the appeal argues that the breadth and vagueness of the codified behaviour does not meet the requirements of certainty and clarity required by the constitutional case law, since it does not specify in any way the level of disturbance that the infringing action must have and what result it should produce. In this sense, following the wording of the provision that we are analysing, it is an open clause that allows for the punishment as a serious offence of any kind of disturbance, even a minor disturbance. Apart from infringing the principle of typicality due to its vagueness, it also violates the principle of proportionality that must exist between the behaviour and the penalty imposed (art. 25(1) SC). If we take into account the all-embracing nature of the statutory definition of the offence “disruption of citizen safety”, even the minimum penalty for this serious infringement can be particularly high and therefore disproportionate.

On the other hand, the appellant argues that the definition of the serious infringement regulated in Art. 36(2) OLPCS does not explain sufficiently the legal asset covered, which only refers to the protection of citizen safety, without any reference to the impact on the parliamentary function. In addition, the identification of the place where the meeting or demonstration that causes the disturbance occurs and which turns out to be a key element of the definition is not explained with the necessary precision to avoid ambiguity and confusion. It concludes that Article 36(2) OLPCS constitutes an overly open definition that violates the principles of legality (Article 25(1) SC) in conjunction with the principle of legal certainty (Article 9(3) SC) which may unduly discourage the exercise of the fundamental right laid down in Article 21 SC for the same reason.

With regard to Article 36(8) OLPCS, the appeal argues that the wording of the *actus reus* of the offence is identical to the one used, as we have seen, in Art. 36(1), in the sense that it only refers to "The disturbance", in that case, of a meeting or demonstration. Therefore, the conclusion is that it incurs the same unconstitutionality flaw as that of paragraph 1.

Regarding Article 36(22) OLPCS, the appellant claims that the reference to restrictions on navigation that are "imposed on the regulation" constitutes a blanket reference clause that does not allow to identify the type of behaviour that is subject to punishment (Article 25(1) SC). It fails to comply with the requirement by which the rule referring to the Regulation must set out the essential core of the prohibition. Indeed, paragraph 22 only punishes non-compliance with the navigation restrictions contained in the regulations but does not include any specific requirement regarding harm, nor does it try to avoid risks with respect to the protected legal asset that serves to specify the essential core of the administrative prohibition.

As for Article 37(7) OLPCS, the appellant warns that administrative offences consist of behaviours that are harmful to public legal assets, not to strictly private legal assets such as property, for which civil law provides for the necessary actions to restore the integrity and peaceful enjoyment of the holder's rights. In the appellant's view, the first paragraph does not clearly state the public legal asset protected by Article 37(7) OLPCS, in the sense that its wording does not necessarily lead to the establishment of a direct and clear connection with the protection of citizen safety, given that it does not indicate the harm or risk of the infringement, which entails a lack of clarity and certainty that violates the principles of typicality and legal certainty. This criticism can also be made on the statutory definition of the offence described in the second point of the same

paragraph, as it does not identify the law or the kind of offence to which it refers, nor does it specify the type of decision. With regard to the last clause, concerning the occupation of public roads for unauthorised street selling, there is no connection between the practice of street selling and citizen safety. Therefore, we understand that Article 37(7) OLPCS is contrary to Articles 25(1) and 9(3) SC.

Finally, the appellant believes that the fact of including in Article 35(1) OLPCS any infringement occurred at meetings or demonstrations that take place "in the immediate vicinity" of infrastructures or premises of parliamentary bodies lacks the necessary precision and clarity required by the statutory definition of the offence; therefore, that inclusion is contrary to the principle of typicality laid down in Article 25(1) SC and to the principle of legal certainty guaranteed by Article 9(3) SC.

c) Unconstitutionality of Article 36(23) OLPCS

The appellant argues that the punishable conduct contained in this provision does not specify enough the circumstances of its application and the consequences resulting therefrom, and therefore, in its view, Article 36(23) OLPCS is contrary to the principle of typicality laid down in Article 25(1) SC and, in conjunction with that principle, to that of legal certainty (Article 9(3) SC). Moreover, the fact that the scope and conditions of the authorisation to which it refers for the use of images and personal or professional data are not specified affects information activities and violates Article 20(2) SC.

According to the appellant, the unconstitutionality of the administrative offence provided for in Article 36(23) OLPCS implies that the application of Article 19(2) is excluded and therefore, it finds that a pronouncement on this question is not necessary.

d) Unconstitutionality of the first final provision OLPCS

The appellant invokes STC 21/1997, of 10 February (LG 3). According to this judgment and from a fundamental rights perspective, the relevant thing is not where the premises to apply for asylum are located, but the existence of a legal submission of applicants to a Spanish public authority, which must verify whether effective guarantees exist that protect the applicant against arbitrary *refoulement* (ECtHR of 21 January 2011, § 286).

Based on this doctrine, it argues that, although the tenth additional provision could be understood as a legitimisation for the extraterritorial action of the border police in the

regions of Ceuta and Melilla, it should be borne in mind that the actions of the State public authorities are subject to the rule of the Spanish Constitution and law.

In its view, the interception and rejection measures that have been laid down constitute a blatantly unlawful conduct that, by forcing the irregular alien to go back to the border line, make it impossible to apply immigration procedures and prevent the persons concerned from exercising the right to seek asylum and international protection which, to the appellant, constitutes a violation of Article 13(4) SC. They also hinder the relevant judicial review on the legality of administrative actions (Article 106(1) SC), thus affecting the right to effective judicial protection (Article 24 SC).

2. By order dated 21 July 2015, the Plenary of the Constitutional Court, at the request of the Third Section, agreed to accept this appeal of unconstitutionality and, in accordance with article 34 of the Organic Law on the Constitutional Court, to serve the appeal and the submitted documents to the Congress of Deputies and the Senate through their presidents, and to the Government through the Ministry of Justice, so that they could appear before the Court and make any pleadings they deemed convenient within 15 days. Finally, the start of the appeal process was published in the "Official State Gazette".

3. By means of a writ received at the General Registry of this Court on 24 July 2015, the State's attorney, on behalf of the President of the Government, stated that he appeared before the Court on behalf of the Government and requested the maximum extension of the time limit granted for submitting their pleadings, given the number of cases pending before at the Government Legal Service. By order of 1 September 2015, the Plenary agreed to accept the appearance of the State's attorney as legal representative of the Government and to extend the period granted in Order of 21 July 2015 by eight days.

4. By means of a writ received at the General Registry of this Court on 8 September 2015, the President of the Congress of Deputies reported that the Bureau had agreed to appear in this procedure, first, to make its pleadings on the legislative procedural flaws stated in the appeal as far as the Congress of Deputies was concerned, and second, to submit the appeal to the Directorate of Studies, Analysis and Publications (Dirección de Estudios, Análisis y Publicaciones) and to the Legal Service of the General Secretariat. In turn, by means of a writ received at the General Registry of this Court on 25 August

2015, the President of the Senate requested the appearance of that Body and offered its cooperation for the purposes of Article 88(1) LOTC.

5. By means of a writ received at the General Registry of this Court on 23 September 2015, the State's attorney made his pleadings and requested the dismissal of the appeal on the following grounds:

a) On the unconstitutionality of Article 20 OLPCS

The State's attorney, after presenting the main characteristics of the OLPCS and the grounds for the appeal, starts his pleadings by analysing the challenge to art. 20 OLPCS. He recalls that external body searches have been used as an effective means to prevent crime on many occasions and have led to multiple judicial decisions. To this end, it was necessary to address its legal regulation in order to grant greater protection to the rights of citizens that might be limited when carrying such searches.

The State's attorney argues that, if we want to understand and acknowledge whether the legislature has complied with the principle of proportionality established in the case law of the Constitutional Court (STC 55/1996 of 28 March, LG 3 and 5), considering the complete regulation of the concept of external body searches becomes necessary. Furthermore, it emphasises that the case law from the European Court of Human Rights provides for the legality of full body searches or complete nudity when necessary to ensure the safety of an establishment, thus avoiding riots or the commission of crimes (concealment of prohibited objects or substances); then the Court, taking into account the circumstances of each case, will examine if the suspicions were accurate and serious, and whether the searches were carried out in conformity with the rights set forth in the Convention and if they were consistent with the principle of minimal interference (ECtHR Case *El Shennawy v. France* of 20 January 2011; and ECtHR Case *Jaeger v. Estonia* of 31 July 2014).

All this allows to conclude that the regulation of body searches *ex* Art. 20 OLPCS complies with the principle of constitutional proportionality in three ways, since it establishes its necessity (protection of citizen safety), its basis and grounds (which prevents body searches from being arbitrary and unreasoned) and the way to carry them out, thus fully protecting the principles of non-interference, non-discrimination and protection of the fundamental rights concerned, in particular the right to personal privacy and dignity.

Regarding the analysis of the subject-matter of the challenge, the State's attorney refers to the pleading made in the appeal on the inaccuracy of the legal terms used, and opposes that the Council of State, in its Opinion 557/2014 of 30 March, issued on the Draft Law, already considered that it is possible to use undefined legal concepts without arbitrariness because "[t]he legal reason is not a mechanical reason and, therefore, the legislature cannot provide in detail for each and every circumstance of the case to which the law is to be applied, especially in matters as flexible as the preservation of citizen safety. Therefore, the use of undefined legal concepts and of the interpretation of the rule and the assessment of the facts in court is both appropriate and reasonable".

Finally, the State's attorney examines the relevant doctrine of the Constitutional Court (SSTC 207/1996, 57/1994 and 17/2013) and the European Court of Human Rights (ECtHR Case Gillan and Quinton of 12 January 2010), declaring the full constitutionality and legality of body searches with partial nudity regulated in Article 20 OLPCS.

b) On the unconstitutionality of Articles 36 (paragraphs 1, 2, 8, 22), 37(7) and 35(1) OLPCS

(i) The State's attorney considers that Article 35(1) OLPCS contains two defining elements of the infringement: on the one hand, the meeting must be held without prior notice to the competent authorities or even despite being forbidden by the authorities; and, besides, it must be held or take place physically at the infrastructures or premises to which it refers, or in their immediate vicinity. He then analyses in detail both elements of the statutory definition of the offence in conjunction with Articles 21 and 25 SC, and concludes that they are fully compliant.

In response to the specific challenge of the appeal, the State's attorney declares that "we do not share the appellant's opinion that the expression 'or in the immediate vicinity' is somewhat vague and that it violates the constitutional principle of typicality guaranteed by Article 25 SC. On the contrary, the above-mentioned expression contained in the rule constitutes an undefined legal concept that will be easy to determine by the competent administrative or judicial body that must apply the rule to the case, on the basis of either cognitive or valuating circumstantial elements, always of an objective nature. There is no vagueness and therefore, the descriptive rule does not create legal uncertainty, as the appeal claims".

(ii) Regarding the paragraphs challenged in Article 36 OLPCS, the State's attorney argues that, as the Council of State pointed out in its Opinion 557/2014, issued

on the Draft Law, the use of undefined legal concepts is possible without arbitrariness or lack of typicality on the infringements.

The *disruption of citizen safety* in the case described in Article 36(1) could occur when possible facts would have to be described hypothetically, in order to apply the rule in question and differentiate it from the criminal definition of the offence (e.g. to make the difference between this offence and the crime of public disorder described in Article 557 CC). The latter entails specific violence against persons or things, while Art. 36(1) describes a situation in which, although strong or direct violence is not exercised, the disruption may involve a behaviour that indeed hinders the holding of those collective or public events described in the punishment rule, thus turning the disruption into an unfair action.

However, it is not a question of determining the exact moment when the conduct described in Art. 36(1) could circumstantially change and become a crime that should be prosecuted in criminal proceedings, depending on the case and its circumstances; it is a question of deciding whether the classification of the administrative offence is correct *a priori* in accordance with the provisions of Article 25 SC. The subsequent vicissitudes to qualify the conduct in each case will be a matter of analysis for judges and courts or perhaps they will be solved by applying decisions on previous pretrial criminal issues. Let's move on to the constitutional legal level of assessment of the provision. The only case where Art. 25 SC is hindered is when the vagueness of the concept is absolute, something that does not happen in the wording of the offences defined in Article 36(1), which responds to the constitutionality criteria that the use of undefined legal concepts admits in the wording of the offence due to the unavoidable margin of minimal inaccuracy imposed by the very nature of things. The State's attorney further states that "it will be an exegetical task on the part of the interpreter and enforcer of the rules, who must carry it out following objective and non-discretionary guidelines that specify the scope of the provisions and make them foreseeable".

According to the State's attorney, the same can be said with regard to the description of the offence in Article 36(8), since the appeal makes exactly the same complaint in respect of that wording. Both *"disturbance" and "lawful meeting or demonstration"* are concepts that the interpreter can easily and objectively include as circumstances.

With regard to art. 36(2) OLPCS, and particularly on the argument of the appellants that the punishment is vague (Article 25(1) SC), the State's attorney argues

that "the reasons given regarding the previous paragraph may be reproduced, as they prove the constitutionality of the provision in this case. For instance, an example of this conduct could be –although its consideration as an example remains to the final interpretation of the courts– a case when demonstrators eventually cause violence, in the sense that they carry out actions that entail the use of force by the enforcement authorities in response to the perseverance of the demonstrators not to stop their dangerous or transgressive attitude regarding the conditions under which the demonstration should have taken place or that were part of the content of the prior communication".

With regard to the second ground for challenge, according to which this lack of definition of the offending type is a disproportionate deterrent to the exercise of the right of assembly, the State's attorney maintains that the provision penalises as a wrongful conduct any acts of threat or physical danger during the unlawful occupation of the seats housing legislative assemblies, regardless of whether this includes the submission of direct petitions (Article 77(1) SC). The legal asset covered is the protection of these buildings, as fundamental structures housing the seats of the legislature, as well as the possible impact on the activities carried out there; for this reason, the unconstitutionality of the expression "*serious disruption of citizen safety"* due to its alleged vagueness is ruled out.

On the one hand, even if the invasion or occupation or the material damage to buildings or premises does not actually occur, the threat or danger in itself is something that should be legitimately prevented. As a situation to avoid, the State's attorney believes that its reprehensibility cannot be objected from a legal-constitutional perspective. The special institutional significance of the seats of the *Cortes Generales* and of the legislative assemblies of the Autonomous Communities is the reason why the State's legislature has decided to codify the specific offence, without prejudice to the power of the authorities to dissolve demonstrations when public order is altered with danger to persons or property.

On the other hand, the Government's representative points out that the infringing behaviour is not a mere gathering or demonstration in a certain physical place, but the fact of seriously disturbing citizen's safety at the legislative chambers, as well as the possible impact on the normal functioning of the constitutional bodies of the State whose members represent national sovereignty or the citizens of the respective autonomous community. The legislature, exercising its right to implement legislative policies, understands that, between impunity and the crime against the State bodies as defined in

Article 495 CC, there should be an administrative offence that codified certain public disruptions before the legislative chambers –and not before any institution whatsoever– that may hinder or disrupt their legitimate exercise –when the plenary or the parliamentary committees, panels, research commissions, etc. are sitting–, without preventing it or constituting an attempt to invade the seats.

On the other hand, the State's attorney rejects that Article 36(22) OLPCS makes a blanket reference to administrative provisions and decisions because "the main element of the statutory definition of the offence that is directly codified in Article 36(22) is not the violation of regulations, but the dangerous external activity itself. Then, if it is effectively verified that the regulations have been infringed, that would be added to this danger and therefore, the wrongdoer would commit the serious infringement defined in this paragraph. In contrast to what the appeal claims, there is no vague or inaccurate reference to the regulations that impose restrictions on high-speed craft or light aircraft –in the sense as opposed to Article 25 SC–. An empirically proven dangerous use of an undefined legal concept would be the element that would cause the opening of disciplinary proceedings. If, later on, during the disciplinary proceedings, the competent authority verifies the infringement of any rule regulating –in the sense that it imposes regulatory restrictions of any kind on the activity of these high-speed vessels–, the serious offence described in paragraph 22 would be applicable. Therefore, the interpreter or the legal or administrative enforcer of Art. 36(22) will be responsible for verifying and establishing the specific rule.

(iii) The State's attorney starts by rejecting the unspecified nature of the term "occupation" which defines the offence set out in Art. 37(7) OLPCS. According to the Government's representative, it is beyond objection that the abnormal situation caused by a physical occupation against the will of an owner or holder of a property right must or, at least, should be classified as an offence and punished accordingly. In order to protect the fundamental right of assembly effectively, so that it is sufficiently and legally recognised in a democratic order, it is not necessary to violate the right to property, which is also constitutionally protected (Article 33 SC). The definition in the law of that unauthorised occupation as an infringement is a legitimate alternative to the general regulation of the right of assembly, as well as of its deployment and functionality.

The State's attorney neither shares the complaint made by the appellants on the lack of clarity of the provision in defining the occupation of public roads. The wrongful

act is shaped and characterised by the absence of authorisation or the inclusion of the occupied public road in the public route or space subject to prior communication, in whose case the occupation of the public road, even without physical resistance, is enough to commit the administrative wrongful act. In any case, the use of violent means would lead to an aggravation of the wrongful conduct. In conclusion, Article 37(7) OLPCS defines the infringement caused for holding meetings or demonstrations that are not protected by the Constitution, either because they were not previously communicated as set out in Article 21(1) SC, or because they exceed the communicated terms.

Finally, the State's attorney points out that conditioning the existence of an administrative offence to the fact that the conduct "does not constitute a crime" cannot be understood as vagueness or a lack of clarity, but as a manifestation of the *non bis in idem* principle. On the other hand, as far as "the occupation of public roads for unauthorised street selling" is concerned, he understands that such conduct, regarding the clarity in its definition and its integration into the sanctioning system by means of a formal law (i.e., apart from not violating Article 25 SC), possesses, as we understand, a dialectical connection with the public order in the sense that it is a public activity carried out in the streets or in public roads by occupying part of them or using them to carry out an activity that, even if it cannot be considered as a wrongful act under the regulations on trade (e.g. lacking the relevant authorisation granted by the local or regional authorities), we must insist that its nature of illegal activity directly performed on public roads involves a damage to the public order, regardless of the fact that general interest is also negatively affected from the perspective of the legislation on retail trading, because it develops this activity without the corresponding authorisation. Since no reference is made to the provision, that is, since the criminal conduct defined in the rule is not linked to the exercise of the right of assembly, it could be understood that this is the definition of an autonomous offence, regardless of the circumstances in which it is carried out. It cannot be said, however, that we are codifying an offence which is totally unconnected from the safeguarding of public order.

c) On the unconstitutionality of Article 36(23) OLPCS

The State's attorney starts his allegations by explaining the content of the contested provisions, the grounds for challenge and the development of their wording, in order to emphasise that the appellants make a basic interpretative error: the provision does not codify the "capture" of data, images... –which is free–, but their "use", and only under

certain circumstances –danger to the safety of agents and their families, etc.; lack of an express or tacit authorisation of the person concerned and lack of protection from the right to information, i.e. there is no prevailing public interest–.

According to the State's attorney, the right interpretation of the provision is the opposite to that of the appellants: in an alleged conflict between the right to information (Article 20 EC) and the unauthorised dissemination of information which may cause or may have caused a situation of danger to the security of an officer, the former prevails. As the procedural representation of the Government recalls, the limit to the right to information lies on the respect for other constitutionally recognised rights: i.e. an assessment should always be made based on the conflict between the public interest in information and the private interest; the assessment should be organised in accordance with the principles of proportionality and weighting. This assessment and weighting that journalists constantly perform at work should also be carried out by all citizens; nowadays, the dissemination of information is no longer limited to professionals, as technology offers citizens multiple means to receive and disseminate information (social networks). The freedom to inform entails the responsibility of the one who disseminates the information.

On the other hand, the State's attorney argues that there is no prior censorship contrary to Article 20(2) SC because, after examining its regulatory development, he concludes that the expression "unauthorised use" was included not to submit the dissemination of images or data to any kind of prior administrative control, but to express the non-violation of the right (actually, an exoneration of liability) when the holder of the right (i.e. the public official) whose image or date are going to be disseminated authorises it (a similar effect to that set out in Article 2(2) of Law 1/1982: "Unlawful interference in a protected area shall not be considered to occur when it is expressly authorised by law or when the holder of the right has given his or her express consent").

d) On the unconstitutionality of the first final provision OLPCS

The State's attorney, regarding the challenge to this provision, requests the inadmissibility of the appeal, as "there is no substantive connection between the State law and the autonomous jurisdiction, nor has the Parliament particular interest to appeal against this rule. While it is true that the Generalitat of Catalonia has some competences in the field of rights and freedoms of foreigners in Spain, as recognised in STC 236/2007, he cannot understand the extent to which their competences may be affected by a

regulation (the protection of borders) which is exclusive to the State, and which is also completely outside the territory of Catalonia (Spain's border with Morocco in Ceuta and Melilla), unless the content of Article 33(2) of the Organic Law on the Constitutional Court of Spain is made meaningless".

Next, the State's attorney addresses the alleged violation of the concept of rejection at the border of Articles 13(4), 24(1) and 106 SC, due to the total absence of any proceedings. In the first place, the attorney explains the meaning of the contested provision, since the new concept –rejection at the frontier– covers a legal vacuum with regard to a purely material action that takes place in the context of the border surveillance tasks that are entrusted to the Spanish State. This is done in order to add greater elements of legal certainty to the legitimate surveillance activities carried out in this unique territory, in accordance with the provisions and obligations contained both in EU – Article 12 of the Schengen Borders Code – and national legislation – Article 12(1)B(d) of Organic Law 2/1986 of 13 March on Security Forces and Corps (hereinafter OLSFC)–.

To oppose the claim of constitutional violation, the State's attorney declares that the special nature of the new regime lies in the fact that, unlike the procedures so far foreseen –refoulement and expulsion-, this regime acts at a previous stage in which foreigners try to overcome the obstacles that prevent access to Spain. Border rejection in Ceuta and Melilla is applied to cases other than those of refoulement, since the power of the State Security Forces and Corps to decide on the rejection is conferred on them to avoid the actual illegal entry into Spanish territory while its attempt is taking place. This would be a coercive action in the exercise of a legitimate power, designed to ensure that legality is not violated. With regard to the alleged absence of an *ad hoc* procedure, the State's attorney recalls that there are substantive proceedings at the Administration that take place without any kind of formalisation, and that does not mean that they are no longer legitimate; these are actions for the enforcement of an administrative power.

In short, the contested provision regulates the material border surveillance that is not exempt from limits. In addition to the limits expressly contained in the provision – observance of international human rights regulations and of the channels for obtaining asylum or international protection– those derived from the principles of consistency, appropriateness and proportionality required at all times to police forces –Article 5(2)(c) OLSFC– should not be forgotten either. The State's attorney concludes by stating that the provision exceeds the proportionality test required both by the case law from the Constitutional Court (STC 55/1996, LG 5) and the European Court of Human Rights,

since it is a measure that cannot be qualified as arbitrary because it serves to achieve the proposed objective; therefore, this measure is necessary and proportionate.

The violation of Articles 24(1) and 106 SC is also rejected by the Government's representative ad litem. Unlike all the cases included in the appeal, the addressees of the rule, apart from foreigners, are people who have neither legally nor effectively entered Spain. Apart from the respect for their personal dignity, which both the law and anyone cannot ignore, this is the reason why these people do not enjoy the fundamental rights recognised to foreigners who are in Spain (Article 13(1) SC). In accordance with the doctrine established in STC 72/2005 of 4 April, in conjunction with Article 19 SC, constitutional and legal guarantees shall not be applicable to those who are not in Spanish territory but seek to access illegally, regarding the necessary proceedings, with a hearing and a reasoned decision and the review of this decision by the courts (Article 24(1) SC); This without prejudice to the fact that the actions of the security forces and corps while enforcing the rejection at the border may be subject to judicial review, ex Article 106 SC, both in administrative and criminal proceedings, as is obviously the case in Ceuta and Melilla. However, any individual entitled to asylum or subsidiary protection may submit the corresponding application not only in Morocco, but also at the international protection application offices that are located at the border posts in Ceuta and Melilla.

Finally, all the arguments put forward support the rejection of the claim regarding Article 13(4) SC. This provision refers to a rule with the force of law to establish the terms in which citizens from other countries and stateless persons may enjoy the right of asylum in Spain. It is hard to understand how the contested provision could violate such a mandate, as it just includes a mandate to the legislature, but lacks objective content and its subjective scope differs from that of the contested provision itself, which does not regulate the right to asylum. From this perspective, the only possible objection would be the violation of a non-delegable Act of Parliament by this regulation, but it is clear that the contested provision is an Act as well. Determining the content of Article 13(4) SC by applying Article 10(2) cannot be the goal, as the appellants seem to pursue, since Article 10(2) SC is a provision that establishes an interpretative criterion of fundamental rights but which does not enable in itself the fleshing out of internal legislation. Further still, it is not determined what the content of such legislation may be. Should it be understood that the right to asylum is violated –though I do not share this point of view since that is not the purpose of Article 13(4) SC or of the contested provision–, it is appropriate to

claim that, as set out above, this provision does not infringe the right to asylum of aliens, who may legally exercise it.

6. By procedural order of 26 January 2021, the 28th day of the same month and year was designated for the vote and judgment on this appeal.

II. Legal Grounds

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

The purpose of the present constitutional procedure is to decide on the appeal of unconstitutionality filed by the Parliament of Catalonia against Articles 20, 35(1), 36 (paragraphs 1, 2, 8, 22 and 23), 37(7) and the first final provision of Organic Law 4/2015, of 30 March, for the Protection of Citizens' Safety (hereinafter, OLPCS), for violating several constitutional provisions, in the terms that have been *widely* referred to in the findings of fact and which will be essentially addressed while resolving each claim.

The State Attorney, on behalf of the Spanish Estate, has requested this Court to dismiss the appeal of unconstitutionality in its entirety, on the grounds summarised in the findings of fact, which will be briefly mentioned while analysing each claim. In addition, he requests the rejection of the appeal because it goes against the first final provision of the OLPCS.

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

2.- Influence of the previous STC 172/2020 on this procedure

STC 172/2020, of 19 November, resolves the appeal of unconstitutionality No. 2186-2015, lodged by more than 50 deputies regarding several provisions of the OLPCS. Some of the provisions appealed have also been challenged in this constitutional

procedure, and even for the same reasons to a large extent. For this reason, STC 172/2020 becomes relevant in this constitutional process from the following points of view.

(a) The constitutional significance of citizen safety is emphasised in all the challenges of this appeal, so that reference can be made to the considerations stated in legal ground (LG) 3 of STC 172/2020.

(b) The challenge of Articles 20; 35(1); 36 (paragraphs 1, 2, 8, 22 and 23); and 37(7) rely, inter alia, on the violation of several fundamental rights. References in STC 172/2020 to the constitutional doctrine on the right to privacy [LG 4 (B)], the principle of legality of penalties [LG 5], the right of assembly in places of public circulation and of demonstration [LG 6 (B)] and the right to freedom of information [LG 7 (B)] are relevant in this context.

(c) The "unauthorised" clause of Article 36(23) has been declared unconstitutional and null and void in STC 172/2020, and thus has made this appeal of unconstitutionality devoid of subject-matter in respect of the challenge that it addresses against the clause of Article 36(23). The same violations (that of the principles of tipicality ex Art. 25 SC and of legal certainty ex Art. 9(3) SC) claimed in the appeal of unconstitutionality no. 2896-2015 have been applied in this constitutional process to the part of Article 36(23) that remains in force. Therefore, it should be stated that this legal provision is not unconstitutional as long as it is interpreted in the terms laid down in legal ground 6 (C) of STC 172/2020. This conforming interpretation shall be included in the ruling.

(d) Regarding the challenge to Article 37(7), both arguments on which the claim is based and the reasons put forward by the State Attorney are expressed in terms similar to those used in the appeal of unconstitutionality no. 2896-2015. Therefore, we should refer to the statement of reasons made in legal ground 6 (F) of STC 172/2020 and, consequently, dismiss this challenge.

It was stated in that appeal of unconstitutionality that the right to provide arguments on the last clause of the second paragraph of Article 37(7) had not been removed. However, in the current appeal, as stated in the findings of fact, it is expressly argued that the legal provision -"The occupation of public roads for unauthorized street selling shall also be included"- violates Article 25(1) SC, in the sense that it does not specify the impact of street selling on the safety of citizens. This would involve a lack of clarity and certainty that would violate the principle of typicality ex Art. 25 SC.

The Court considers that this clause of Article 37(7), due to its systematic location in Law 4/2015, seeks to protect the safety of citizens, including the guarantee of the "use

of roads and other goods of public domain" [Art. 3(f)]. This legal provision, together with other provisions of the same law and in particular with Article 3(f) thereof, classifies as a punishable behaviour the occupation of public roads for unauthorised street selling provided that it hinders the common use of roads. Therefore, it does not constitute an offence that lacks the clarity and precision required by the principle of legality ex Art. 25 SC. A different question is to determine when unauthorised street selling hinders the common use of public roads, a decision entrusted to the law-enforcer in the light of the circumstances of the particular case. Based on the reasons set out above, the present challenge must be dismissed.

(e) As with the appeal of unconstitutionality solved in STC 172/2020, the challenge to the first final provision of the OLPCS is based on the fact that it hinders the control of legality regarding administrative action (Article 106(1) SC), the obtention of the effective protection of the Judges and the Courts by aliens (Art. 24(1) SC) and, finally, that the latter may enjoy the right to asylum (Art. 13(4) SC).

The State's attorney, regarding the challenge to this provision, presents an obstacle to claim the inadmissibility of the appeal, as the Parliament of Catalonia lacks standing because "there is no substantive connection between the State law and the autonomous jurisdiction"; secondly, it requests the dismissal of the merits by using the same grounds as in the appeal of unconstitutionality decided in STC 172/2020.

However, in STC 118/2016, of 23 June, LG 1(b), by drawing on the consolidated constitutional doctrine, we declared that "this lack of standing that is attributed to the appellants, must be rejected since, in accordance with Article 32(2) of the Organic Law on the Constitutional Court, the executive collegiate bodies and the Assemblies of the Autonomous Communities are entitled to bring an appeal of unconstitutionality against State laws, provisions or enactments having the force of law that may affect 'their own area of autonomy'. Although this last expression was initially understood in the doctrine of this Court in a strictly jurisdictional sense, with reference to the impact on the own and exclusive competences necessary to meet the corresponding interest (e.g. SSTC 25/1981 of 14 July, LG 3, and 84/1982 of 23 December, LG 2), we have subsequently considered that the standing to bring an appeal of unconstitutionality is not mainly aimed at preserving or limiting their own jurisdictional sphere, but at reaching "an objective cleansing of the legal system through the nullity and voidance of the unconstitutional rule' (STC 199/1987 of 16 December, LG 1). Thus, to this day 'it can be affirmed that the substantive conditions to the standing of the Autonomous Communities that entitles

them to challenge State laws represent a true exception', in such a way that 'the standing of the Autonomous Communities to bring an appeal of unconstitutionality is not designed to challenge a violated jurisdiction, but to cleanse the legal system'. This applies to 'all those cases where there is a material connection between the State law and the jurisdiction of Autonomous Communities' (STC 110/2011 of 22 June, LG 2)".

In addition, STC 236/2007 of 7 November, quoting STC 48/2003 of 12 March, specified that the question of the material connection between the State law and the jurisdiction of Autonomous Communities "cannot be restrictively interpreted" (LG 1). In that STC 236/2007, which addressed the challenge of a State law aimed at governing the rights and freedoms of aliens in Spain, the Court held that "there is a close link between the provisions of that Organic Law on rights and freedoms of aliens in Spain and the matters cited in the fields of autonomous activity of the Autonomous Region of Navarre".

The first final provision of the OLPCS includes a rule that affects the entry of aliens into Spanish territory, as well as the conditions to exercise their right to asylum and the subsidiary international protection, issues that may have some impact on the sectoral areas of activity of the Generalitat of Catalonia. As a conclusion, it must be stated that the material connection between the OLPCS and the jurisdiction of the Generalitat of Catalonia exists and therefore, the standing of the Generalitat in the appeal of unconstitutionality should be recognised.

Regarding the merits of the case, and given that both the appellant and the respondent rely on identical grounds to those used in the appeal for unconstitutionality no. 2896-2015, we should insist on the fact that the first final provision of the OLPCS is not unconstitutional "provided that it is interpreted as indicated in legal ground 8(C)" of STC 172/2020. This conforming interpretation shall be included in the ruling.

3.- The challenge to Article 20(1) OLPCS

A.- In the appeal of unconstitutionality no. 2896-2015 the appellant deputies challenged Article 20(2) OLPCS because, in their view, it excessively restricted the right to personal privacy (Article 18(1) SC). In STC 172/2020, after describing the constitutional doctrine on this fundamental right in LG 4 (B) and describing the action enabled by the contested provision in LG 4 (C), we analyse the challenge, and in LG 4 (D) we conclude that: "This action satisfies the compliance with the principle of proportionality, as it responds to a legitimate aim -the prevention of the commission of crimes or administrative offences and the preservation of public security and coexistence-

and is suitable and necessary for its achievement". As for the appellant, the challenge filed goes against Article 20 OLPCS as a whole and not only against its second paragraph. Moreover, the reason behind this is not that the intervention authorised by this rule is disproportionate as regards the right to privacy; the real reason is that this measure restricts the right to privacy in a way that does not meet the requirement of being laid down in the law with sufficient precision; thus, the appellant considers that this measure ignores the requirement of "the quality of the law" referred to by ECtHR Case of Gillan and Quinton, of 12 January 2010.

Despite the significant difference between both challenges, and for reasons of consistency with the decisions of STC 172/2020, we should refer to the reasons given in legal ground 4 thereof, in particular with regard to the regulatory content that must be attributed to the contested provision and to the repeated constitutional doctrine on the impact of body searches on the right to privacy, doctrine that had been developed (STC 207/1996, of 16 December) in relation to the activities carried out in the course of investigations under the direct control of the judicial authorities and that has also been applied in its essential parameters to STC 172/2020 as regards the actions that the security forces and corps may perform as safety administrative officers by virtue of Art. 20 OLPCS.

B.- Concerning the legal provision, the appellant challenges "the use of vague and discretionary terms, both in determining the enabling cause of body searches and the situation that justifies the non-application of the formalities required for the search in paragraph 2". The appellant understands that "vagueness and discretion are found both in the definition of the purpose intended through body search, and in the nature of the objects aimed to be found". The appellant also adds that "[t]he lack of determination when regulating the type of search set out in this provision is even more serious [...], as it prevents the assessment of the degree of the most likely impact on bodily privacy". Finally, it argues that the interference thus regulated in the provision does not meet the sufficiency requirement of the enabling legal provision imposed by constitutional (STC 169/2001 of 16 July) and European case law (ECtHR case of Gillan and Quinton v. the United Kingdom, of 12 January 2010).

The State's attorney opposes these arguments as the Council of State, in its Opinion 557/2014 -which was issued on the draft law- already considered that it is possible to use undefined legal concepts without arbitrariness because "[t]he legal reason

is not a mechanical reason and, therefore, the legislature cannot provide in detail for each and every circumstance of the case to which the law is to be applied, especially in matters as flexible as the preservation of citizen safety. Therefore, the use of undefined legal concepts and of the interpretation of the rule and the assessment of the facts in court is both appropriate and reasonable". The State's Attorney concludes by stating that ECtHR Case of Gillan and Quinton v. the United Kingdom admits that the requirement of reasonable suspicion of wrongdoing, which is expressly set out in Article 20 OLPCS, is precise enough from the perspective of the so-called "quality of the law".

Consequently, the "quality of the law" of the restriction on the right to privacy regulated in Article 20 is controversial as to (a) the enabling cause of the search and in particular the purpose that makes it possible; (b) the situation justifying the non-application of the formalities required by paragraph 2 for the body search; (c) the nature of the objects to be searched; and (d) the type of search and how it impacts privacy. The Court will examine this question separately in relation to each of these aspects.

C.- According to the above arguments, the first controversial issue focuses on the different understanding that the parties make of the standard of protection of Article 8 ECHR that the ECtHR has established in its Judgment Gillan and Quinton v. the United Kingdom. This Court, which holds in high regard the ECtHR case law when interpreting the scope of fundamental rights (in this case, the right to privacy ex Art. 18(1) SC), finds that the ECtHR establishes in that judgment (§§ 29 and 30) that the Terrorism Act 2000 (the British terrorist act of 2000) provides for two search mechanisms: (a) Sections 41-43 provide for the search of persons by a police officer when there is reasonable suspicion; (b) Sections 44-47 are not subject to the requirement of "reasonable suspicion". Also, referring to the powers derived from Section 44, the judgment affirms that "[o]f still further concern is the breadth of the discretion conferred on the individual police officer. The officer is obliged, in carrying out the search, to comply with the terms of the Code [of Practice, adopted by the Home Office on 1 April 2003]. However, the Code governs essentially the mode in which the stop and search is carried out, rather than providing any restriction on the officer's decision to stop and search. That decision is, as the House of Lords made clear, one based exclusively on the "hunch" or "professional intuition" of the officer concerned. Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched" (§ 83). Based on this argument, the ECtHR stated that the

search carried out on the appellant under Section 44 of that Act violated Article 8 ECHR, as the legal restriction had not been formulated with sufficient precision to be foreseeable.

Article 20(1) OLPCS provides that "[e]xternal and superficial body searches of the person may be carried out when there are rational indications to assume that they may lead to the discovery of tools, objects or other items relevant to the exercise of the investigative and preventive functions entrusted by law to the security forces and corps". This rule does not authorise the police officer to carry out a search whenever he deems it appropriate in accordance with his subjective criterion. On the contrary, it refers to the fact that body search shall be used only when "there are rational indications", thus subjecting the decision to verifiable and objective reasonableness in each particular case and making this intervention measure sufficiently foreseeable, preventing it from the danger of arbitrary use if it depended entirely on the subjective criterion of police officers. In conclusion, the restriction on the right to privacy caused by external body searches is provided for in Article 20(1) OLPCS, a rule with the force of law. In addition, this legal provision determines the scope of such restriction with sufficient precision so that its use is not unforeseeable for the holders of that fundamental right. In view of the above, this challenge must be dismissed.

A similar pronouncement was made in STC 17/2013 of 31 January, LG 14, when we analysed the sufficient determination of another administrative procedure regarding body search (that carried out in detention centres for foreigners). The appellant claimed that the intervention measure constituted an unlawful interference with the right guaranteed by Article 18(1) SC "given the vagueness of the provision" that covered it. The judgment dismissed the challenge because "the measure provided for in Article 62(d)1 of the Organic Law on Aliens may only be taken when it is essential to specific situations that endanger the safety of the establishment". In that case, as in this one, the Court rejects that the legal provision constitutes an unlawful interference with the right to privacy, as seen from the perspective of a sufficient legal provision, as it expressly subjects the exercise of the power of restriction to an objective parameter that may be verified in relation to the circumstances of the specific case.

D.- Article 20(2) OLPCS points out the safeguards that lead to the practice of body searches without unduly infringing the right to privacy (it must be carried out by an officer of the same sex and in a reserved place out of sight of third parties). The appellant argues that the condition to exempt compliance with these safeguards ('the exception of

emergency situations -where there is a serious and imminent risk for the officers involved') is provided for in law without sufficient precision. To the appellant, this involves a restriction of the right to privacy without the necessary "quality of the law". The Court considers, however, that this rule adds another restriction to the individual's privacy, as the search may occur under 'the exception of emergency situations - where there is a serious and imminent risk for the officers involved', a condition that acts not as a subjective assessment of the officer, but as a parameter that can be interpreted in accordance with a criterion of objective rationality that may be verified in each particular case. Bearing in mind the fact that this is a more severe restriction on the right to privacy, paragraph 2 defines the enabling cause more precisely than paragraph 1, since it determines that the risk must be (a) serious, (b) imminent and (c) refer to the officers and not to any other legal asset involved. For these reasons, the Court considers that the delimitation of the restriction of the right to privacy provided for in Article 20(2) OLPCS satisfies the requirement of the "quality of the law" and therefore, this challenge must be dismissed.

E.- Regarding the other two elements of the definition of the restriction on privacy that have been challenged, STC 172/2020 established that "Article 20 OLPCS does not cover [...] cases of full nudity" [LG 4(C)] and stated that the objects to be searched are determined by reference to Article 18 OLPCS. The Court considers that, in the light of the limitation of the right to privacy, Article 20 OLPCS is in accordance with the constitutional requirement by which the law defines with sufficient precision the restrictions on fundamental rights, so this challenge is also dismissed.

F.- The appellant expressly addresses the complaint "against Article 20 OLPCS as a whole, including paragraphs 3 and 4, given the obvious connection and relationship between both". The challenge to paragraphs 3 and 4 shall also be dismissed, as its sole basis is the connection with the preceding paragraphs, in which none of the unlawful interferences alleged have been found.

4.- The challenge to Article 35(1) OLPCS

Art. 35(1) OLPCS defines as "serious offences: 1. Meetings or demonstrations that have not been communicated or that have been prohibited at infrastructures or facilities where basic services are provided for the community or in the immediate

vicinity, as well as trespassing into the premises, including overflight, where, in any of these cases, a risk to the life or physical integrity of persons has been caused".

The attorney of the Parliament of Catalonia justifies this challenge by affirming that "the inclusion within this type of infringement of meetings or demonstrations "in the immediate vicinity" of infrastructures or premises lacks the necessary precision and clarity that constitutional case law requires for the definition of the offence. [...] We therefore understand that the term "or in the immediate vicinity" in Article 35(1) OLPCS is contrary to the principle of typicality laid down in Article 25(1) SC and to the principle of legal certainty guaranteed by Article 9(3) SC".

The State's attorney does not share "the appellant's opinion that the expression 'or in the immediate vicinity' is somewhat vague and that it violates the constitutional principle of typicality guaranteed by Article 25 SC". On the contrary, to him "the above-mentioned expression contained in the rule constitutes an undefined legal concept that will be easy to determine by the competent administrative or judicial body that must apply the rule to the case, on the basis of either cognitive or assessment circumstantial elements, always of an objective nature".

To decide on this challenge, as defined by the arguments of the parties to the appeal, it is necessary (a) to establish the constitutional doctrine on the relationship between the principle of typicality ex Art. 25(1) SC and the use of undefined legal concepts in the definition of the infringing behaviour; and (b) to verify whether the use made by Article 35(1) OLPCS of the term "immediate vicinity" is consistent with that constitutional doctrine.

A.- Unlike the formal guarantee of the principle of legality of penalties and of non-delegable legislation included in order to protect individual freedom, the typicality of infringements is imposed by Article 25(1) SC, depending on the legal certainty of the person. To this end, it calls for "the regulatory pre-determination of infringing behaviours [...] with the highest precision, so that citizens may know the prohibitions in advance and thus foresee the consequences of their actions" (inter alia, SSTC 145/2013 of 11 July; and 160/2019 of 12 December).

The Court, after STC 62/1982 of 15 October 1982, LG 7 c), has reiterated that "this does not mean that the principle of criminal legality is infringed in cases where the definition of the offence includes concepts whose delimitation allows for a margin of consideration" or, in other words, that "the requirement of *lex certa* included in Art. 25(1)

SC does not infringe the regulation of such unlawful cases through undefined legal concepts, [...] given that legal concepts cannot reach an absolute degree of clarity and accuracy because of the very nature of things" (STC 69/1989 of 20 April, LG 1; and similarly, STC 145/2013, LG 4).

In order to ensure that the definition of the offence through undefined legal concepts is in accordance with the principle of typicality constitutionalised in Article 25(1) SC, the aforementioned STC 69/1989, LG 1, requires that "its materialisation is reasonably foreseeable in terms of logic, technique or experience" or, in other words, "statutory definitions that are so open-ended that their application or non-application depends on an almost arbitrary decision from the courts, in the strict sense of the word "arbitrariness", shall be contrary to the provisions of Article 25(1) SC" (STC 89/1993 of 12 March, LG 2; and similarly, the aforementioned STC 145/2013, LG 4).

Moreover, in the light of the principle of typicality, the verification of the sufficiency or inadequacy of this task of regulatory pre-determination may be done "in view of the [...] legal and case-law context of the criminal provision, since the legal order is a complex and integrated reality within which each of the unique provisions acquires meaning and significance – also in the criminal sphere" (STC 89/1993, LG 2).

It is also a constant constitutional doctrine that the requirement of typicality, within the field of administrative sanctioning law, does not fall exclusively on the legislature; on the contrary, "regulatory cooperation in the classification of infringements is accepted" (inter alia, STC 160/2019). Therefore, and except for the case (SSTC 162/2008 of 15 December; and 160/2019) in which the legal reference to an indeterminate set of regulations makes it difficult to know what is forbidden in an abstract process of constitutionality control, the only aspect that can be analysed is that a law considered in itself is in accordance with the principle of typicality when its direct application is set out, without any collaboration from any implementing regulation.

In this appeal of unconstitutionality, the complaint affirms that several aspects of Articles 35(1) OLPCS ("or in the immediate vicinity"), 36(1) OLPCS ("disturbance"), 36(2) OLPCS ("outside the seats") and 36(8) OLPCS ("disturbance") are not in accordance with the principle of typicality ex Art. 25(1) SC, as these expressions are so open-ended that their accuracy depends on an almost arbitrary decision by the enforcer. As none of these statutory definitions refers to regulatory cooperation and do not have any implementing regulations, it can be concluded that their direct application is foreseen without regulatory intermediation and therefore, it is convenient that the Court examines,

as the appellant requests, whether they are in accordance with the principle of typicality ex Art. 25(1) SC.

B.- According to the constitutional doctrine outlined (STC 89/1993, LG 2), as regards regulatory pre-determination, the verification of the sufficiency of the use of the expression “and in the immediate vicinity” in Art. 35(1) OLPCS may be made “in view of the [...] legal and case-law context” of this provision.

Article 35(1) OLPCS does not classify any meeting or demonstration that has not been communicated or that has been prohibited as a very serious offence, but only those that are located “at infrastructures or facilities where basic services are provided for the community or in the immediate vicinity”. Thus, and bearing in mind that Article 3(g) OLPCS considers “the guarantee of the conditions of normality in the provision of basic services for the community” as one of the purposes that this law protects, the Court considers that a systematic interpretation shows that one of the typical elements of the behaviour defined in Article 35(1) OLPCS is that it obstructs or otherwise alters the normal functioning of basic services for the community.

In this legal context, even if it is undeniable that the expression “and in the immediate vicinity” limits the infringing behaviour, this actually means “something that is very close or next to something” and consequently, it refers to something that is very close or next to the infrastructures and premises. In order for the behaviour to be punishable, the circumstances that determine the seriousness of the offence must be present, i.e. a risk to the life or physical integrity of the people.

Thus, together with the geographical criterion of proximity or high closeness, there must be a risk for the abovementioned legal assets. Therefore, the materialisation of the wording does not depend on an almost arbitrary decision by the administrative or judicial bodies, without prejudice to the fact that it gives the enforcer a margin of appreciation to adapt the statutory definition to the particular and changing circumstances of reality.

For the reasons set out above, the Court considers that the use of the expression “and in the immediate vicinity” to describe the infringing behaviour does not imply that Article 35(1) OLPCS has ignored the substantive guarantee of typicality imposed on it by Article 25(1) SC and, consequently, we dismiss the present challenge.

5. The challenges to Article 36(1) OLPCS

Art. 36(1) OLPCS defines as "serious offences: 1. the disruption of public safety in public events, sports or cultural performances, solemnities and religious services or other meetings attended by many persons, when they do not constitute a criminal offence".

The appeal claims that this provision violates two specific aspects, which appear in Article 25(1) SC. Article 36(1) OLPCS allegedly harms the principle of typicality because it omits any precise information as to what level of disturbance the statutory definition should include and what result it should produce. On the other hand, it would also violate the principle of proportionality between infringement behaviour, which is reflected in the disturbance of citizen safety and therefore includes a slight alteration of it, and the punishment. The appeal also argues that the penalties provided for serious offences, including those that meet the minimum amount, are particularly high and thus excessive to punish minor disruptions to the safety of citizens.

On the contrary, the State's attorney defends that the statutory definition contained in Article 36(1) OLPCS responds to the constitutionality criteria that the use of undefined legal concepts admits in the wording of the statutory definition due to the unavoidable margin of minimal inaccuracy imposed by the very nature of things. It further states that "it will be an exegetical task on the part of the interpreter and enforcer of the rules, who must carry it out following objective and non-discretionary guidelines that specify the scope of the provisions and make them foreseeable".

We will then proceed to analyse separately the two alleged violations of constitutionality regarding Article 36(1) OLPCS.

A.- The principle of typicality set forth in Article 25(1) SC requires that the punishment must be foreseeable and not surprising through regulatory pre-determination. This requirement of *lex certa,* as developed in the legal ground 4(A), does not preclude the use of an undefined legal concept such as "disturbance of citizen safety" to define the infringing behaviour, provided that its materialisation is reasonably foreseeable in terms of logic, technique or experience.

In accordance with the terms by which the appeal observes the right to provide arguments that is granted to the appellant, the Court must focus on whether Article 36(1) is sufficiently precise on two issues: (a) the level of disturbance of citizen safety that is

part of the offence, and in particular if it covers non-serious disturbance; and (b) whether the infringing behaviour requires the production of a result and what it should be.

With regard to the first question, it should be emphasised that Article 36(1) OLPCS must be interpreted in the context of the legal system to which it belongs in order to identify what level of disturbance of citizen safety represents an infringing behaviour and whether or not it includes minor alterations to the safety of citizens. In other words, a punishment rule may appear incomplete in itself, but it will not be able to ignore the principle of typicality ex Art. 25(1) SC if it can be supplemented by reference to the legal context to which it belongs (STC 89/1993, LG 2).

On the one hand, it should be noted that the OLPCS indicates in some of its kinds of offences that certain "actions causing very serious harm" (Art. 35(2)) or "the serious disturbance of citizen safety" (Art. 36(2)), or simply, "the disturbance of citizen safety", as in this case (Art. 36(1)) shall be punishable. This way of classifying infringements in the OLPCS allows us to assess, in contrast with several legal provisions, that Article 36(1) OLPCS defines as a type of offence any disturbance of citizen safety, thus including the kind of disturbance that involves a slight alteration of that legal asset.

Article 36(1) gives rise to a second clarification as to what kind of disturbance of citizen safety should be described as one of these serious offences. Its last clause excludes those constituting a criminal offence from its statutory definition. Article 558 of the Criminal Code (CC), located in Title XXII of Book II, titled "Felonies against public order", provides that "Those who seriously disturb order at the hearing of a court or tribunal, at public acts inherent to any authority or corporation, of an electoral college, public office or establishment, educational centre, or when sports or cultural events are held, shall be punished with a sentence of imprisonment from three to six months or a fine from six to twelve months". In addition, Organic Law 1/2015, amending the Criminal Code, which abolishes the offence codified in Article 633 CC relating to the slight disturbance of order in public acts, stated in its Preamble, in order to clarify why misdemeanours against public order were eliminated, that "as far as misdemeanours against public order are concerned, the cases of relevant alterations are already punished as crimes".

With regard to "meetings attended by many persons" other than those set forth in Article 558 CC, Article 557 punishes for a crime of public disorder "[t]hose who, acting as a group or individually but as part of a group, alter the public peace causing injury to

persons, damaging property, or threatening to do so, shall be punished with a sentence of imprisonment of six months to three years".

Thus, since 2015, the Criminal Code no longer punishes minor disturbances of public order as misdemeanours, considering that the criminal punishment should be limited to some serious disruptions of this legal asset (with regard to those described in Articles 557 and 558).

In conclusion, after a systematic reading of Article 36(1) OLPCS, which puts it in connection with other provisions of the OLPCS and with Articles 557 and 558 CC, it can be said that the concept of "disturbance of citizen safety" as determining the infringing behaviour is not so open-ended that it clashes with the requirements of typicality ex Art. 25(1) SC, to the extent that it refers to any disturbance of this legal asset that cannot be codified as crime by virtue of Articles 557(1) and 558 CC.

In order to decide on the second aspect of the appeal – if the provision is sufficiently precise to clarify whether the infringing behaviour requires the production of a result and what it should be –, it is also necessary to take into account the general way of classifying infringements used by the OLPCS. Attention should be paid to the fact that the provision sometimes defines the infringing behaviour by referring to the mere production of a risk to life, physical integrity or other legal assets related to citizen safety (inter alia, Articles 35(1), 36(5), 36(11) and 37(14)). However, in other provisions, the punishable behaviour is identified with the notions of "disturbance", "alteration" or "harm" (see Arts. 35(2), 36(2), 36(3) and 37(3), among others). Article 36(1) OLPCS belongs to the second type; thus, the infringing behaviour is predetermined in an additional way, in the sense that its materialisation requires a real and effective impact (and not a mere risk) on the concerned legal asset -in this case, citizen safety in any of the aspects set forth in Article 3 OLPCS.

Finally, in relation to this second aspect, it may be concluded that Article 36(1) OLPCS sets out a statutory definition that should be classified as contrary to the principle of typicality ex Art. 25.1 EC because its materialisation is not reasonably foreseeable in terms of logic, technique or experience.

B.- On the proper proportionality between the infringing behaviour and the corresponding punishment, STC 60/2010, of 7 October, LG 7 (a), stated, from an institutional perspective, that "our prosecution [..] is limited by the recognition at this seat of the 'exclusive power of the legislature to set out criminally protected legal assets,

criminally punishable behaviours, the type and amount of criminal punishments, and the proportionality between the behaviours it seeks to avoid and the sentences with which it seeks to achieve so'". Consequently, in that decision, the Court held that "the prosecution performed by this court must therefore be very cautious. It merely verifies that the criminal law does not produce clear and useless coercion which makes the rule arbitrary and undermines the elementary principles of justice inherent in the dignity of the person and the rule of law' (STC 136/1999 of 20 July, LG 23; also, SSTC 55/1996 of 28 March, LG 6 et seq.; 161/1997 of 2 October, LG 9 et seq.; AATC 233/2004 of 7 June, LG 3; 332/2005 of 13 September, LG 4)".

This constitutional doctrine has been applied when prosecuting the appropriate proportionality between administrative infringements and sanctions in the AATC 20/2015 of 3 February, LG 4; 145/2015 of 10 September, LG 4; 187/2016 of 15 November, LG 5; and 43/2017, of 28 February, LG 2. Moreover, the aforementioned ATC 145/2015 established that "this doctrine is transferable to the administrative scope of sanctions; also 'a fundamental right to abstract proportionality between the penalty and the seriousness of the offence cannot be deduced from Article 25(1) SC' (STC 65/1986 of 22 May, LG 3,in fine). Based on the above, ordinary courts are the main actors that should determine whether the guarantee provided for in Article 25(1) SC has been observe as regards its application". It concludes that "it is not for this Court to rule on whether it is appropriate or adequate, from an abstract point of view, the decision by the legislature to punish the behaviour described in Article 195(2) LGT with a fixed amount of 15 per 100 of the amount unduly entered as a negative tax base".

In addition, and this time from a significant substantive perspective, STC 60/2010 of 7 October reasoned in LG 7 (a) that "the Constitution itself, far from subjecting the legislature's action to the same substantive limits regardless of the object on which that action is intended or the type of decisions it includes, provides for stricter limits in the case of criminal rules than in other decisions by the legislature, mainly due to the scope of the effects of those decisions since, the more intense the restrictions on constitutional principles and, in particular, on rights and freedoms recognised in the Constitution are, the more exhaustive the substantive requisites of constitutionality of the rule from which those principles arise". This substantive approach is relevant because the effects of the administrative punishment rules have, in principle, a lesser scope than those that result from strictly criminal rules.

Article 36(1) OLPCS defines as a serious offence "the disturbance of citizen safety", including minor alterations to the safety of citizens for the reasons stated above. Article 39(1)b OLPCS provides that the minimum punishment level for a serious infringement shall be a fine of between EUR 601 and EUR 10,400. The appellant Parliament argues that it is excessive to impose such heavy fines on those who engage in a behaviour that slightly alters public safety.

Applying the consolidated constitutional doctrine outlined above, this Court considers that the decision of the legislature to associate a slight disturbance of citizen safety, occurred under the particular circumstances described by Article 36(1) OLPCS, with a fine of between EUR 601 and EUR 10,400 does not imply "clear and useless coercion which makes the rule arbitrary and undermines the elementary principles of justice inherent in the dignity of the person and the rule of law". LG 7(a) of STC 60/2010 of 7 October.

The legislature has a wide margin to determine the extent of the punishment that is desirable in order to abstractly protect the legal asset involved in Article 36(1) OLPCS, which is the protection of citizen safety in a specific situation, in the course of public events attended by many persons. This Court, with particular attention to the needs of protecting citizen safety in situations in which a large number of people meet, considers that Article 36(1) OLPCS in conjunction with Article 39(1)(b) OLPCS does not represent an excessive use on the part of the legislature of the wide margin of choice it has.

It states, however, that "this judgment by the Court is specifically determined by its procedural channel, in which it exclusively examines the rule from an abstract perspective, and must therefore be understood as such without prejudice to the appropriate proportionality analysis ex Art. 25(1) SC that will be carried out by the corresponding judge and ultimately by this Court through an appeal for constitutional protection *(amparo)*, at the time of application of this legal provision, when attention must be paid to the precise circumstances of the specific case.

For the above reasons, Article 36(1) OLPCS – in conjunction with Article 39(1)(b) OLPCS – does not incur the alleged violation of the principle of proportionality ex Art. 25(1) SC and, consequently, this second aspect of the challenge to Article 36(1) OLPCS must be dismissed.

6.- The challenge to Article 36(2) OLPCS

Art. 36(2) OLPCS defines as "serious offences: 2. The serious disturbance of citizen safety that occurs on the occasion of meetings or demonstrations outside the seats of the Congress of Deputies, the Senate and the Assemblies of the Autonomous Communities, even if they are not sitting, when it does not constitute a criminal offence".

The appeal includes two unconstitutionality claims regarding Art. 36(2) OLPCS. The first is arises from the requirements of Article 21 SC and focuses on the clause "even if they are not sitting". STC 172/2020 has dismissed an identical challenge directed against the same clause of Article 36(2) OLPCS. In order to follow a criterion of doctrinal consistency, we should refer to the reasons set out in legal ground 6 of that judgment and, consequently, that this specific challenge to Article 36(2) OLPCS be dismissed.

The appellants present another unconstitutionality claim regarding Article 36(2) OLPCS. This time, it focuses on the clause "outside the seats", as it is such an open wording that it does not comply with the requirements of the principle of typicality ex Art. 25(1) SC. As for the State's attorney, he maintains that "the reasons given regarding the previous paragraph may be reproduced, as they prove the constitutionality of the provision in this case", thus referring to the constitutionally admitted use of undefined legal concepts to define offences.

According to the constitutional doctrine outlined in the legal ground 4 (A) of this resolution, the principle of typicality as a manifestation of the substantive guarantee of the sanctioning legality does not preclude the use of undefined legal concepts when describing the punishable behaviour, provided that "their materialisation is reasonably foreseeable in terms of logic, technique or experience", something that can be carried out "in light of the [...] legal and case-law context" in which the punishing rule is framed.

This Court already had the opportunity to highlight the legal assets protected by the offence defined in Article 36(2) OLPCS. In STC 172/2020, the Court reasoned extensively on this issue and concluded that "[t]he significance of parliamentary seats [...] is double and therefore, they are worthy of legal protection. On the one hand, they shelter the effective performance of representative functions through the functioning of the legislative body in its various forms and formations. On the other hand, inherent in them even when no parliamentary activity is underway, is their character as institutional representation of the popular will, so that they constitute a symbol of the highest constitutional value. In view of the dual significance of parliamentary seats, this Court considers that Article 36(2) OLPCS is aimed at preventing that serious disturbance of

citizen safety on the occasion of meetings or demonstrations before parliamentary institutions could (a) hinder the normal functioning of the parliamentary body in its different forms and formations or (b) result in the disregard of the symbol embodied in the parliamentary seats that may reasonably contribute, by itself or by inciting other behaviour, to endangering the peace and harmony of citizens [Article 3 c) OLPCS] or, more generally, to condition other citizens to freely exercise their rights and freedoms granted by the legal system [Article 3 a) OLPCS]".

In this legal context, the expression "outside the seats", is a term equivalent to "in front of" or "before" and given the purpose of the rule, the demonstration must be close to the buildings, since, without such proximity, it does not seem that the normal functioning of the organ can be hindered or the symbol embodied in the parliamentary seats disregarded.

The term "outside" must be equated with the term "before" established in Article 494 of the Criminal Code, which punishes those who "promote, direct or lead demonstrations or other kinds of meetings before the seats of the Congress of Deputies, of the Senate or a Legislative Assembly of an Autonomous Community, when in session, altering their normal operation".

In short, the regulatory content of the contested provision derives from the particular legal context for the protection of citizen safety in which it is included, and provides the enforcer with a margin of appreciation to adapt the offence to the better achievement of the purposes for which it serves, taking into account the particular and changing circumstances of reality.

For the reasons set out above, the Court considers that the use of the expression "outside the seats" to delimit the infringing behaviour does not imply that Article 36(2) OLPCS has ignored the substantive guarantee of typicality imposed on it by Article 25(1) SC and, by virtue of this criterion, we dismiss the present challenge.

7.- The challenge to Article 36(8) OLPCS

Art. 36(8) OLPCS defines as "serious offences: 8. The serious disturbance of legal meetings or demonstrations, when it does not constitute a criminal offence".

The reasons stated in the appeal to challenge Article 36(8) OLPCS are that "this rule uses a wording to describe the *actus reus* of the offence that is identical to that used in paragraph 1 of the same article, as we have seen, to clarify that it only refers to "the

disturbance", in this case, of a meeting or demonstration. Thus, there is an unconstitutional flaw as in paragraph 1, to which we referred".

As for the State's attorney, right after his arguments regarding the challenge to Article 36(1) OLPCS, he continues by claiming that "[t]he same can be said as to the description of the infringement in paragraph 8 of the same article, as the appeal complains about the same aspects with respect to that wording".

In view of the fact that this challenge has been defined by the parties in the terms set out above, the Court finds that it must be dismissed on the basis of the same arguments used to consider that Article 36(1) OLPCS did not violate the dimension of the principle of typicality invoked in the appeal of unconstitutionality. In other words, Art. 36(8) OLPCS does not ignore the nature of the principle of typicality invoked in the appeal of unconstitutionality because the term "disturbance", as interpreted in the context of other sanctioning OLPCS rules (Articles 35(2), 36(2) and 36(3), among others) and in the light of the relevant provisions of the Criminal Code (Arts. 557(1) and 557 bis.1.3a), is an undefined legal concept whose materialisation is reasonably foreseeable in terms of logic, technique or experience.

8.- Delimitation of the challenge to Article 36(22) OLPCS

Art. 36(22) OLPCS defines as "serious offences: 22. The failure to comply with navigation restrictions on high-speed vessels and light aircraft".

This challenge, like the four immediately preceding, focuses on the principle of legality of penalties. However, unlike those, it does not invoke the typicality rule as part of the substantive guarantee of that principle. It focuses, on the contrary, on its formal guarantee, also provided for by Article 25(1) SC. The appellant argues that Article 36(22) OLPCS "only punishes non-compliance with the navigation restrictions contained in the regulations, but does not include any specific requirement regarding harm, nor does it try to avoid risks with respect to the protected legal asset that serves to specify the essential core of the administrative prohibition". As for the State's attorney, he rejects that this is a blanket reference to regulatory provisions and asserts that "the main element of the offence that is directly codified in Article 36(22) is not the violation of regulations, but the dangerous external activity itself. [...] The dangerous activity empirically proven would be the element that would cause the opening of disciplinary proceedings".

In order to resolve the question thus raised, it is necessary (a) to define the challenge precisely and what is being sought from this Court, an issue that will be

addressed in this legal ground 8; (b) to examine the constitutional doctrine on the scope of non-delegable legislation in sanctioning matters, which will be dealt with in the legal ground 9; and, finally, (c) to apply this doctrine to the present case in the legal ground 10.

The substantive guarantee of the principle of criminal legality protects legal certainty. It requires a precise definition of the infringing behaviour at the regulatory level. Usually, what occurs with administrative penalties is that sufficient regulatory pre-determination can be achieved by combining the rule with the force of law and the implementing administrative provisions. Therefore, in order to assess whether the substantive guarantee is met, it is necessary, in principle, to focus on the level of pre-determination of the infringing behaviour that results from the implementing regulations and not so much from its legal provision. However, as has been pointed out, this challenge does not question Article 36(22) OLPCS from the perspective of the substantive guarantee; thus, we will not dwell on anything relating to the regulatory development to which the provision expressly refers.

The only aspect the appellant complains about regarding Article 36(22) OLPCS is that it does not respect the formal guarantee of the principle of legality of penalties. This dimension requires, in order to protect individual freedom, that the essential elements of the offence -the core of the prohibition- be established directly by the legislature as the depositary of popular representation. Consequently, the Court will decide on this challenge on the basis of the content of Article 36(22) OLPCS itself and of the legal context in which it is integrated, without taking into account the regulations that order the restrictions on navigation to which the legal rule refers.

9.- Constitutional doctrine on the scope of non-delegable legislation in matters of punishment

The Court has established a general criterion as to the scope of the non-delegable legislation in matters of punishment and, in addition, has applied it in a number of cases that resulted in different decisions, some considering their constitutionality and others their unconstitutionality. We will examine the general criterion set in constitutional doctrine (A) and its applications (B) separately.

A.- The Court has found that the technique of legislation by reference or blanket reference to regulations, leaving the definition of what constitutes a punishable behaviour

to the latter, is not in accordance with the formal guarantee of the principle of legality of penalties ex Art. 25(1) SC (inter alia, STC 160/2019 of 12 December, LG 4).

However, in STC 3/1988, of 21 January, LG 9, in the prosecution of a punishment rule on safety, we affirm that "the scope of this non-delegable Act of Parliament 'cannot be as rigorous on the regulation of administrative offences and penalties as with criminal penalties and elements of the offence in a strict sense, for reasons that concern the constitutional model of distribution of public powers, or by the nature in some way insuppressible of the regulatory power in certain matters (STC 2/1987, of 21 January), or, finally, because of requirements of prudence or opportunity that may vary in the different spheres of territorial (STC 87/1985, of 16 July) or material organisation'. The mandate of Article 25(1) determines the necessary coverage of the sanctioning power of the Administration in norms with the force of law, but does not exclude that these norms contain reference to regulations, provided that the essential elements of the wrongful conduct (i.e. that only those actions or omissions that can be subsumed in a norm with the force of law are considered infringements) and the nature and limits of the penalties to be imposed are sufficiently determined. Thus, Article 25(1) SC forbids any regulatory reference that 'makes possible the implementation of an independent regulation that is not clearly subordinated to the Law' (STC 83/1984, of 24 July), but does not prevent regulatory collaboration in the field of the punitive legislation". We have reiterated this constitutional doctrine in identical or similar terms in SSTC 101/1988, of 8 June, LG 3; 113/2002, of 9 May, LG 3; 26/2005, of 14 February, LG 3; 229/2007, of 5 November, LG 2; 104/2009, of 4 May, LG 3; and 145/2013, of 11 July, LG 4.

B.- The Court has had the chance to apply this doctrine on the scope of non-delegable legislation in sanctioning matters on several occasions, and in some it has declared the unconstitutionality of the contested provision, while in others it declared its full constitutionality.

Among the former, we may include SSTC 341/1993, of 18 November; 162/2008, of 15 December, LG 2; STC 81/2009, of 23 March, LG 5; 13/2013, of 28 January, LG 4; and 160/2019, of 12 December, LG 4.

STC 341/1993, of 18 November, declared the unconstitutionality of the provision that defined the violation of the obligations and prohibitions established "in the specific regulations or in the police implementing regulations" as minor offences on citizen safety,

considering that this reference allowed the regulation to set out new obligations or prohibitions the contravention of which gives rise to a punishable offence".

The same conclusion was reached in STC 162/2008, of 15 December, which declared Article 31.3(a) of Law 21/1992 of 16 July on industry unconstitutional and null and void; in that judgment, "[t]he non-compliance with any other statutory requirement not included in the preceding paragraphs" was classified as minor offence. The Court held that the sanctioning provision was contrary to the principle of legality in its formal aspect because, even if it had the force of law, it "did not contain the essential elements of wrongful conduct" and thus allowed for the existence of "an independent statutory regulation not subject, even in its fundamental lines, to the will of the citizens' representatives, at the expense of "the essential guarantee that the principle of non-delegable legislation entails" (LG 2).

For the same reasons, STC 81/2009 declared article 69.3 C) of Law 10/1990 of 15 October, on sport, unconstitutional and null and void. This provision established that all actions or omissions that had not been defined as serious or very serious offences in that Act and that "were contrary to the rules and regulations applicable to sport events" would be considered as minor offences. The Court held that "neither the mere limitation of the matter indicated in the reference regulations -sports events-, nor the fact that offences already defined in the Act as serious and very serious are excluded from that statutory regulation [...] can be considered as a minimum legal description of the punishable behaviours". It is also argued that "[t]he mere substantive limitation of the reference object and the logical exclusion of the behaviours already classified as offences under the Law does not make it possible for the rule addressees to know what other behaviours may become punishable through the statutory regulation and integration enabled by Article 69.3 C) of Law 10/1990, of 15 October, on sports, which is contrary to the principle of non-delegable legislation of Art. 25(1) SC".

Similarly, STC 13/2013 declared that Article 16.2(b) of Law 20/1998 of 27 November on the organisation and coordination of urban transport in the Autonomous Community of Madrid violated Article 25(1) SC. This provision defined as a serious offence "the non-compliance with the essential conditions of the authorisation or licence, unless it must be considered a very serious offence". These essential conditions were defined in the first six sections of the provision; the seventh section, i.e. the one declared unconstitutional, set out that "any other essential condition established in the regulation could be considered as such". The Court considered that, although the undefined legal

concept “essential conditions for authorisation or licence” was a legal parameter that guided the regulation to some extent, due to the absence of deeper legal accuracy, it constituted “a wide and insufficient regulatory guide from the perspective of the principle of legality of penalties”.

STC 160/2019 (LG 4) reached the same conclusion. This judgment found that the provision that defined as a minor offence “the non-compliance with the rules of the Autonomous Community of Madrid in the field of public events and entertainment, when not defined as a serious or very serious offence”, not only violated the substantive aspect of Article 25(1) SC, as has been pointed out, but also its formal aspect by considering that “[t]his provision, insofar as it refers to regulatory requirements in order to define minor offences, constitutes one of the forbidden legal practices of Article 25(1) SC”. As stated in this judgment, “[e]ven if the punishing provision has the force of law, it does not contain any of the essential elements of wrongful conduct; thus, its sole reference to the rest of the regional regulations in the field enables the existence of an independent statutory regulation, not subject, even in its fundamental lines, to the will of the citizens’ representatives.” It is also argued that this conclusion is not disallowed “either because of the existence of a generic subjective delimitation of the legal operators to whom this regulation is addressed in general and which is contained in the articles of Law 17/1997, or by the mere narrowing of the objective field referred to in the reference rules -the field of public events and entertainment, otherwise very wide, diverse and complex–, or because of the fact that serious and very serious offences are excluded. None of these aspects, nor the combination of all of them, gives a minimum legal description of the punishable behaviours that allows to establish the sufficient limit required by Article 25(1) SC for the participation of the Administration in the definition of penalties. The mere subjective and substantive delimitation and the logical exclusion of the behaviours already classified as offences does not make it possible for the rule addressees to know what other behaviours may become punishable through the statutory regulation and integration enabled by Article 39(4) of Law 17/1997”.

In the second group of judgments, we may include SSTC 104/2009 of 4 May, LG 3; and 145/2013, of 11 July, LG 4, apart from STC 3/1988 of 21 January, which has already been mentioned. These judgments found that the formal aspect of the principle of legality of penalties was not violated ex Art. 25(1) SC; thus the Court dismissed both questions of unconstitutionality against Article 9 of Royal Decree-Law 3/1979 of 26 January, on the Protection of Citizen Safety; Article 91(b)1 of Law 25/1964, of 29 April,

on nuclear energy, and art. 16, paragraphs 2 and 10, of Royal Legislative Decree 4/2004 of 5 March, approving the consolidated text of the Corporate Tax Law. The reasons for dismissal were that the legal provision questioned in this case defined very precisely the scope of activity within which the infringing behaviour had to take place and that this substantive sector was affected by the notes of diversity and complexity that made regulatory collaboration irreplaceable.

This is not a changing constitutional doctrine but a constant understanding of the scope of non-delegable legislation in sanctioning matters imposed by Article 25(1) SC, the application of which gives one result or another, depending on the circumstances of the legal provision that was subject to consideration in each of the constitutional proceedings referred to above. Therefore, we should determine the relevant elements of Article 36(22) OLPCS and, based on them, decide "whether the essential elements of the wrongful conduct are sufficiently determined in it", or if, on the contrary, the reference it makes to the regulation "enables the implementation of an independent regulation that is not clearly subordinated to the Law".

10. The interpretation of Article 36(22) OLPCS in accordance with the Constitution

Article 36.22 OLPCS, as a brief provision integrated into the regulatory system of citizen safety and referring to other sets of regulations, is a legal rule to which various prescriptive contents could be attributed. For the following reasons, the Court considers that Article 36(22) OLPCS only conforms to the requirements of formal legality arising from Article 25(1) SC provided that it is in accordance to the following conforming interpretation, which shall be included in the ruling.

From the content of Article 36(22) OLPCS and its location within the OLPCS, it is clear that the infringing behaviour is defined by three elements, which are set out in headings (A), (B) and (C) and lead to the consideration in section (D) that Article 36(22) OLPCS, thus interpreted, does not infringe the formal aspect of the legality of penalties.

A.- Article 36(22) OLPCS establishes that the scope of activity in which the infringing behaviour must occur is that of high-speed vessels and light aircraft.

The greater or lesser extent to which the punishment defines the area in which the infringing behaviour should take place has been decisive in our previous resolutions. We have considered that it does not contradict the formal guarantee ex Art. 25(1) SC, given

that it sufficiently narrowed that area and thus conditioned regulatory development, the sanctioning law referring to "the activity carried out in nuclear and radioactive premises" (STC 104/2009, of 4 May, LG 5) or that mentioning "not any behaviour in tax matters, but those specifically related to the so-called "related-party transactions" (STC 145/2013, of 11 July, LG 6). We understood the contrary and declared its unconstitutionality for violating Article 25(1) SC when the sanctioning law actually referred to the regulations governing "sport events" (STC 81/2009 of 23 February, LG 5) or "public shows and entertainment" (STC 160/2019 of 12 December, LG 3).

The Court finds that Article 36(22) OLPCS provides that only those behaviours performed within a very limited scope of activity shall be punishable under that law, since it does not refer to the use of any vessels or aircraft, but only to the use of high-speed vessels and light aircraft, which is a very specific subsector subject to a regulation distinguished by its technical and detailed nature. Thus understood, Article 36(22) OLPCS conditions regulatory development from an initial point of view, and prevents that its regulation does not depend on the law at all.

B.- Secondly, Article 36(22) OLPCS sets out that the infringing behaviour will involve the non-compliance with the restrictions on navigation in either of these two areas.

The legal regime governing the use of high-speed craft and light aircraft includes many aspects, including their identification and that of their operators, the compulsory training that they must prove, the conditions under which a licence is required, the cases in which it is compulsory to inform the competent authority of any events that have occurred and, of course, the restrictions on navigation, among others. In an attempt to make a difference with respect to other areas, Article 36(22) OLPCS provides that the action punishable under this type of infringement is "the failure to comply with the restrictions on navigation" and not any other mandatory rules of these legal regimes.

Among the restrictions on the navigation of high-speed vessels and light aircraft, there are restrictions aimed at coordinating the achievement of the interests involved in these modes of navigation and at avoiding their mutual interference, in which case they are an expression of a special type of administrative police. In addition to these, other restrictions on the navigation of these modes of transport are specifically envisaged for public safety purposes. The latter, which deserve priority attention in this constitutional process, seek to ensure the protection of the aspects of public safety affected by such

navigation and not the orderly management of navigation. Unlike the others, the last restrictions on navigation are an expression of the administrative safety police.

The Court considers that the challenged provision, as part of the organic law governing the legal regime of citizen safety, should be understood in the sense that it only codifies the failure to comply with navigation restrictions on high-speed vessels and light aircraft imposed for reasons of public safety as a serious offence.

The reasons that may justify the implementation of these restrictions on navigation in order to protect public safety can be of very different content and significance. Only to mention a few, it is possible to prohibit or restrict the navigation of high-speed vessels and light aircraft because of the risk they cause to strategic infrastructures or to national security, because of the danger of collision with other means of transport operating in ports or airports, because of the proximity to agglomerations of buildings or meetings of persons, etc. In addition, it is possible to ensure these protection purposes through many different means, e.g. by setting reserved spaces or areas of exclusion of a specific nature and extent, which may be shaped as permanent or temporary spaces or areas, or as an absolute or conditional prohibition subject to a specific authorisation. This variety of protection purposes and of mechanisms and techniques through which it is implemented is confirmed, respectively, by Royal Decree 1119/1989 of 15 September, which regulates the traffic of special high-speed vessels in Spanish maritime waters, and by Royal Decree 1036/2017 of 15 December, which regulates the civil use of aircraft piloted by remote control.

In conclusion, the restrictions on the navigation of high-speed vessels and light aircraft aimed at achieving public safety purposes is a subject distinguished by its "complexity and diversity", aspects that we considered relevant (STC 104/2009, LG 5) to declare that a sanctioning rule that resorts to a reference to the regulation to integrate certain complementary aspects of the infringing behaviour does not violate the principle of legality ex Art. 25(1) SC in its formal aspect. The Court considers, and this interpretation will be included in the judgment, that Article 36(22) OLPCS defines the non-compliance with the restrictions on navigation imposed for reasons of public safety as a serious offence, which constitutes the essence of the punishable legal behaviour, and leaves to the development regulations the precise content on the modalities, extension and other relevant conditions of such restrictions on navigation.

C.- As a third element of the infringement type determined in this provision, Art. 36(22) OLPCS involves that only non-compliance resulting in a violation of citizen safety will be punishable.

The restrictions on navigation established to ensure the effective coexistence of the interests involved in these two activity subsectors may be accompanied in their specific regulations by the provision of infringements and penalties in the event of non-compliance. This set of infringement shall be considered as committed in case of non-compliance with these restrictions, since the purpose of this penalty system is to support the orderly management of navigation in these areas. However, the penalty system provided for in Article 36(22) OLPCS is different. This system aims at avoiding that actions carried out in these subsectors adversely affect the safeguarding of citizen safety; thus, it should be understood that the type of infringement set out in Article 36(22) OLPCS includes a harm to citizen safety as one of its constituent elements.

For this reason, in order to consider that the infringing behaviour provided for in Article 36(22) OLPCS has occurred, the non-compliance with any of the restrictions on navigation imposed in order to guarantee public safety is not enough. Also, such non-compliance must result in a harm for the safety of citizens. Therefore, the State's attorney is right when he asserts in his arguments that "the main element of the offence that is directly codified in Article 36(22) is not the violation of regulations, but the dangerous external activity itself ".

This impact on citizen safety included in Article 36(22) OLPCS must be integrated within the principles that constitute the axis of the new regulation of citizen safety approved by Organic Law 4/2015. As already stated in STC 172/2020, LG 7 (C), Article 4(3) OLPCS sets forth that police intervention -and even more so, sanctioning activities- is only justified "by the existence of a specific threat or objectively dangerous behaviour that is reasonably likely to cause real harm to public safety". Thus, the Court finds that Article 36(22) OLPCS codifies as a serious offence those behaviours that, apart from involving a non-compliance with the restrictions on navigation imposed for reasons of citizen safety, result in a real harm to citizen safety or a specific threat that could reasonably lead to such harm.

D.- The considerations made under the above headings (A) to (C) allow us to state that Article 36(22) OLPCS not only defines in a precise manner the scope of activity in which the infringing behaviour must take place, but also defines the essential elements of

the infringing behaviour, which are the (a) non-compliance with the restrictions on navigation in those sectors imposed for reasons of citizen safety (b) resulting in a real harm to citizen safety or a specific threat that could reasonably lead to such harm. This sets forth the protected legal asset and sufficiently describes what the punishable behaviour consists of. The above reasoning, taking into account the repeated constitutional doctrine outlined and in particular SSTC 3/1988, 104/2009 and 145/2013, leads us to consider that Article 36(22) OLPCS -thus interpreted- contains, either expressly or because of its systematic location within the OLPCS, the core of what is forbidden by the infringement it regulates. Therefore, it should be ruled out that the formal guarantee of the principle of legality of penalties is unknown and, consequently, this challenge should be dismissed. This conforming interpretation shall be included in the ruling.

This conclusion is without prejudice to the constitutional doctrine set out in SSTC 341/1993, 162/2008, 81/2009, 13/2013 and 160/2019. In these judgments, the provisions that left the definition of infringing behaviour to statutory rules were upheld, since the legal rules considered were substantially different to the provision under consideration. The legal rules judged and declared unconstitutional in SSTC 162/2008, 81/2009, 13/2013, 160/2019 merely codified as an offence the non-compliance with statutory obligations. The legal provision under consideration also requires that such non-compliance with statutory obligations creates a disruption or a specific threat of disruption to citizen safety; thus, unlike those obligations, it sufficiently defines the core of what is forbidden.

The case of STC 341/1993 is different, since it declared the unconstitutionality of a penalty provision of Organic Law 1/1992 on the protection of citizens' safety (the violation of the obligations and prohibitions established "in the specific regulations or in the resulting police implementing regulations"). The difference lies in that, while the provision of Organic Law 1/1992 openly referred to any specific regulations, Article 36(22) OLPCS defines the scope to which the regulations referred to very precisely.

11. The Court, on the basis of the reasons expressed in the preceding legal grounds, agrees that the appeal has become devoid of its subject-matter as regards the challenge to the "non-authorised" clause of Article 36(23) OLPCS, that the rest of Article 36(23) and point 2 of Article 37(7) are not unconstitutional provided that they are interpreted in the terms set out in LG 2 of this judgment and, finally, that the appeal of unconstitutionality is dismissed for the remainder.

RULING

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

First. To dismiss the inadmissibility claim regarding the challenge against the first final provision of Organic Law 4/2015, of 30 March, for the Protection of Citizens' Safety.

Second. To declare that this appeal of unconstitutionality has become devoid of subject-matter as regards the challenge to the "non-authorised" clause of Article 36(23) OLPCS.

Third. To declare that Articles 36(23) and 37(7) are not unconstitutional provided that they are interpreted in the terms set out, respectively, in LG 2 (c) Article 36(23) and in LG 2 (d) Article 37(7).

Fourth. To state that the first final provision incorporating the tenth additional provision in Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, is in accordance with the Constitution, provided that it is interpreted as indicated in legal ground 2 (e).

Fifth. To declare that Article 36(22) OLPCS is not unconstitutional as long as it is interpreted in the sense that the behaviour that it criminalises consists in the (a) non-compliance with the restrictions on navigation in those sectors imposed for reasons of citizen safety (b) resulting in a real harm to citizen safety or a specific threat that could reasonably lead to such harm.

Sixth. Dismiss the appeal of unconstitutionality for the remainder.

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

Signed and sealed in Madrid, 28 January 2021

The President	The Vice president
Andrés Ollero Tassara	Santiago Martínez-Vares García
Juan Antonio Xiol Ríos	Pedro José González-Trevijano Sánchez
Antonio Narváez Rodríguez	Alfredo Montoya Melgar
Ricardo Enríquez Sancho	Cándido Conde-Pumpido Tourón
María Luisa Balaguer Callejón	

Dissenting opinion given by Judge Mr. Cándido Conde-Pumpido Tourón to the judgment issued regarding the unconstitutionality appeal no. 3848-2015.

By virtue of the power conferred on me by Article 90(2) of the Organic Law on the Constitutional Court, and with full respect for the views of my colleagues, I hereby cast this dissenting opinion to the judgment issued in the appeal of unconstitutionality no. 3848-2015. The reasons are the same as those I had the chance to assert at the plenary held to discuss the present case, as well as at the plenary organised to discuss the appeal of unconstitutionality no. 2896-2015, after which STC 172/2020 of 19 November was issued.

For reasons of consistency with what was stated during the debate of the exposition previously made by Judge Fernando Valdés Dal-Ré in the appeal of unconstitutionality no. 2896-2015, I hereby express my disagreement with what was finally approved and I reaffirm my agreement with the approach of the initial text that was then presented.

I refer to the general considerations regarding citizen safety and its constitutional regulation, which are included in paragraph 1 of the dissenting opinion made by Judge María Luisa Balaguer Callejón in Case no. 2896-2015, because they essentially match the reasons for my discrepancy with the final resolution.

In addition, and concerning the challenge of the particular regime for Ceuta and Melilla with regard to the rejection at the frontier of foreigners who attempt to enter illegally, I should simply point out that I believe that this Court should have set out more clearly that the constitutionality of the so-called “rejection at the frontier” should include as a requisite the existence of genuine and effective access to the means of legal entry.

Madrid, 28 January 2021.

Dissenting opinion given by Judge Ms. María Luisa Balaguer Callejón to the judgment issued regarding the unconstitutionality appeal no. 3848-2015.

By virtue of the power conferred on me by Article 90(2) of the Organic Law on the Constitutional Court, and with full respect for the views of the majority as reflected in the judgment, I hereby cast this vote, leaving a record of the grounds for my position disagreeing with the ruling and the reasoning behind it.

Almost all of the dissenting arguments are reflected in the dissenting opinion of STC 172/2020 of 19 November, so I will just refer to them where appropriate.

1. The judgment against which I oppose this dissenting opinion is based on the same concept of citizen safety that underlies STC 172/2020, and that is expressly recognised in LG 2(a).

This approach ignores the fact that the regulations on public safety should be based on a premise of guarantee and minimum intervention in the scope of fundamental rights, as I stated in my dissenting opinion to STC 172/2020. I would just like to highlight the key idea of that disagreement: if the judgment adopted on 19 November and the current one had been based on the premise that the "Organic Law for the Protection of Public Safety should not be a law for the control of citizens, but a rule for the control of the power exercised over citizens" -i.e. that the full exercise of rights must be the rule and restriction the exception-, the conclusions reached would have been different in both judgments. It is worth insisting on this idea: the purpose of the citizens' safety regulations is not to ensure the comfort or tranquillity of the citizenry, which, of course, can be altered when third parties occupy the public space, demonstrate or gather to, for example, express their discontent or demands in some sense. The constitutionally legitimate purpose of a law as this one is to avoid risks to common safety and to set out a list of sufficient guarantees to avoid excessive restrictions on the exercise of rights by the enforcement authorities. Any excess regarding this target raises doubts on the constitutional adjustment of the rule.

2. I also stated in the dissenting opinion of STC 172/2020 that "the abstract test of constitutionality can be neither blind nor ignorant of the social reality on which it must be projected". Again, the present judgment seems to ignore the social and regulatory

context in Spain, after dismissing the challenge to Art. 37(7) OL 4/2015, aimed at chasing unauthorised street selling, a phenomenon known in Spain as “top manta”.

The Organic Law No. 1/2015 of 30 March, amending the Criminal Code (CC), which was adopted on the same day as the Organic Law under constitutionality control herein, amended the articles regulating offences against intellectual property (Arts. 270(4) and 274(3) CC), thus tightening the punishment applied to the sale of (musical and film) works and goods (from registered trademarks) that are usually marketed in street selling without authorisation. These articles even include sentences of imprisonment (from six months to two years in certain cases). This reform not only strengthened the punishment; by shifting the infringing behaviour of the (disappeared) misdemeanours to crimes, it puts offenders in a worse situation by extending the statute of limitations and causing the possible opening of a criminal record. Taking into account that the most common profile of the “manteros” (street sellers) is that of a foreign person in an irregular administrative situation, this reform makes it difficult to obtain a residence permit and promotes expulsion.

In parallel, the Organic Law on Citizen Safety adds Article 37(7) and therefore, criminally prosecuted conducts may also be defined as administrative offences with the sole modification of the purpose pursued by the punitive rule, thus having concurring offences and crimes. Therefore, the street sale of goods protected by intellectual property (Arts. 270(4) and 274(3) CC) may constitute a crime regarding the protection of a property interest linked to the exploitation of both types of property, and on the other hand, it may also be prosecuted in administrative proceedings because the unauthorised occupation of public roads poses a risk to public safety. Of course, any criminal prosecution involves the pretermission of the administrative regime on penalties until a criminal judgment is issued. But even at this point, two administrative regimes on penalties could be combined in cases where the Autonomous Communities provide in their rules on trade that street selling without authorisation is an administrative offence, or in the case a city ordinance does so. This mixed concurrence clearly occurs in Catalonia, as regarding street selling, Article 73(5) of Law 18/2017 of 1 August, on trade, services and fairs, classifies its performance without the authorisation of the corresponding city council as a serious offence. In short, we have a clear example of concurring punishments; solving this is not easy if we take into account the inaccuracy of

Article 37(7) OLPCS, which seems to define the infringing behaviour by exclusion, thus establishing the mere occupation of public space as detrimental to citizen safety, without the need for disruptions in the public order, without taking into account that the lack of administrative authorisation for street selling may also be punishable and without considering that most products sold under these circumstances will allow to subsume this behaviour into the acts covered by Criminal Law.

Given the perplexity that these circumstances cause on the appellant Parliament, the judgment only considers that Article 37(3) OLPCS, due to its systematic location in the Law, "seeks to protect the safety of citizens, including the guarantee of the 'use of roads and other goods of public domain' [Art. 3(f)]". In my opinion, a tautology is evident. The judgment should have justified, where appropriate, why in this case the protected asset is not the (intellectual) property of third parties, but the safety of citizens, which on the other hand, is not that affected if we think of the well-known activity of the "manteros". This activity does not necessarily hinder the common use of public roads, and the vagueness of the concept, together with the mixed concurrence of wrongful acts, opens the way to the arbitrary use of the sanctioning power attributed to the public authorities. It cannot be ruled out that this type of activity has a negative impact on the protection of the right to property, even in the area of tax, because it is a commercial activity that is not subject to taxation, or in the area of employment, as it involves the performance of a job in the underground economy. But the law does not explain that all this may pose a risk in itself to citizen safety, and, of course, the judgment does not justify it. As the stated purpose of the provision is not sufficiently substantiated, it is difficult to argue that the principle of typicality should be respected (Article 25(1) EC), because this lack of basis translates into a lack of an appropriate definition of what the scope of application of the provision should be: first, the meaning of the word "occupation" is not specified; nor is the number of people that must occupy the public road for street selling without authorisation to understand that they hinder the use of that road. Third, it does not specify either whether violence or intimidation should be involved, or whether the simple simultaneous presence of persons in such a common place, even in a totally peaceful manner, would be sufficient.

The margin of vagueness of the provision is directly related to the wide power of action granted to the "the law enforcer" as the judgment calls it, i.e. the law

enforcement officials responsible for applying the punishment measures. That wide margin cannot be disconnected from the very special circumstances of the people who carry out this type of street sale: they are mostly, but not exclusively, foreigners without a work permit, often sub-Saharan who are frequently in an irregular administrative situation, which compels them to make their living out of an underground economy controlled, to a large extent, by mafias. They are socially excluded people, a situation that forces them to engage in these kinds of activities. Chasing these people by applying the administrative law on penalties does nothing but push them further to the margins of society. Besides, this measure is quite ineffective in this case as a preventive measure against the commission of future offences. The requirement of a clear criminal offence should have led to the unconstitutionality of this rule. I understand that the criminal offence is absent in this case and therefore, Article 37(7) OLPCS should have been declared unconstitutional. As other provisions that are the subject of this appeal of unconstitutionality, and of the appeal solved in STC 172/2020, it does not comply with the constitutional requirement of taxativity of the sanctioning provisions, thus generating greater legal uncertainty than the one it seeks to fight.

3. I also disagree with the constitutionality test made in Legal Ground 3 of the judgment with regard to Article 20 OLPCS.

Previous STC 172/2020 already referred to paragraph 2 of that provision and I refer to what I said in my separate opinion on this particular issue. In this case, the appellants challenge Article 20 OLPCS in full. The proposed control parameter also differs from that of the appeal of unconstitutionality no. 2896-2015, as it now focuses on the inadequacy of the law to determine the restriction of the right to privacy in the terms provided for in the contested provision.

The arguments put forward in my previous separate opinion on the analysis of Art. 20(2) OLPCS also serve to express my current opposition, since they already address the issue of the quality of the law that is now being raised more broadly by the appellants.

The judgment maintains that the rule's reference to the fact that "external and superficial body searches of the person may be carried out when there are rational indications to assume that they may lead to the discovery (...)", includes a requirement (the existence of rational indications) that subjects the decision to "verifiable and

objective reasonableness in each particular case and makes this intervention measure sufficiently foreseeable, preventing it from the danger of arbitrary use if it depended entirely on the subjective criterion of police officers". But, as I said in my opinion to STC 172/2020, this provision deemed to act as a guarantee "does not satisfy the canon of foreseeability, because it does not specify the precise grounds for adopting such a measure. Nor does it specify which instruments or objects that, due to their relevance -potential for generating a serious risk to public safety- could justify it; nor the facts or circumstances that could trigger police intervention (criminal or dangerous behaviour susceptible to administrative offence, their commission or the simple threat or intention to commit them, etc.)". The mere reference to the existence of rational indications is by no means objective; on the contrary, it is fundamentally contingent and deeply subjective, as it depends on the assessment of those indications by the police officer.

The judgment strengthens its side by invoking the case law contained in previous STC 17/2013 of 31 January, to which I also referred in my dissenting opinion to STC 172/2020, even if I did so to adhere to the same dissenting opinion that four judges signed against that judgment. That opinion challenged the lack of quality of the law and recalled that the guarantee of the legal provision regarding restrictions to the exercise of fundamental rights "is not limited to the fact that the measure is authorised by the law, but, in accordance with minimum requirements of the quality of the law and observance of the essential content of the right -as a mandate addressed to the fundamental rights legislature- (Article 53.1 SC), it is imperative that in such regulation the legislature predefines, as the first obliged to weigh up conflicting rights or interests, those cases, conditions and guarantees in which it seems appropriate to adopt measures restricting fundamental rights".

In the present case, as in SSTC 17/2013 and 172/2020, regulatory pre-determination is insufficient. And this is stated here with respect to Article 20 OLPCS in full; therefore, I understand that it violates the right to bodily privacy of Article 18(1) SC and should have been thus declared unconstitutional and null and void.

4. Finally, I refer to the content of my dissenting opinion to STC 172/2020 on all matters relating to the first final provision of the OLPCS [which is addressed in LG 2 (e) of this decision]; with regard to art. 36(6) OLPCS (LG 6 of this judgment), which sets

out that demonstrations in front of parliamentary seats are a serious offence; and in the considerations I made there concerning the inadequacy of interpretative judgments when a sanctioning law is subject to a constitutionality test. As I said then, the principles of preservation of the law and interpretation in accordance with the Constitution may not always be compatible with the guarantee of legal certainty (Article 9(3) SC) and taxativity (Art. 25 SC), a factor that is projected in this case on the interpretation in accordance with the Constitution that the judgment carries out regarding Art. 36(22) OLPCS (LG 8).

This separate opinion ends with the same idea I stated in the opinion of STC 172/2020: the approved judgment, as happened with the one approved on 19 November 2020, is in my view irreconcilable with the very idea of the restrictive interpretation of the limits to the exercise of fundamental rights. Besides, it also validates the chilling effect on the exercise of the right to protest laid down in Organic Law 4/2015, and contributes to the stigmatisation of those who exercise this right and of people that see themselves constrained to remain on the margins of a society that should pursue their integration to help them leave that life.

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

Madrid, 28 January 2021.