

Issues for consideration on Article 21 (right to peaceful assembly) of the International Covenant on Civil and Political Rights: the case of Spain

By Daniel Amelang, Attorney at Law based in Madrid (Spain)

Article 21 of the International Covenant on Civil and Political Rights establishes that “*the right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others*”.

Spanish Law recognizes this right under its very own Article 21 of the Spanish Constitution: “*1. Se reconoce el derecho de reunión pacífica y sin armas. El ejercicio de este derecho no necesitará autorización previa. 2. En los casos de reuniones en lugares de tránsito público y manifestaciones se dará comunicación previa a la autoridad, que sólo podrá prohibirlas cuando existan razones fundadas de alteración del orden público, con peligro para personas o bienes*”.

Spain has a long tradition of protest, stemming from the opposition to the Francoist dictatorship and continuing throughout the democratic system. This has allowed for free expression in public of the most diverse demands and opinions, most frequently in opposition to decisions taken by the executive and the legislature and, on rare occasions, in support of the latter.

However, during the last few years, coinciding with the deep recession of the Economic Crisis of 2008 and the protests it sparked (three General Strikes between 2010 and 2012, the *Indignados* or May 15th Movement of 2011, the pro-referendum protests in Catalonia which began in 2009, feminist protests and strikes, etc.), the rights recognized under both Articles 21 are under serious peril in Spain.

Definition of ‘peaceful assembly’ and ‘violence’

Perhaps the most worrisome trend we can detect is how the term ‘peaceful assembly’ is being interpreted by Courts and Prosecutors.

‘Peaceful assembly’ should be understood as the right or ability of people to come together and collectively express, promote, pursue, and defend their ideas. I believe it requires the expression of an idea through a gathering, but that it does not necessarily entail an appeal to the public opinion, for a collective has every right to take to the streets and express their sentiment without needing to connect to other people. And because International Law recognizes an inalienable right to take part in peaceful assemblies, it follows that there is a presumption in favour of holding peaceful assemblies. Assemblies should be presumed lawful, subject to the permissible limitations set out in article 21 of the International Covenant on Civil and Political Rights.

Its use can cause disruption of traffic, of freedom of movement in overcrowded streets, and even the political disappointment of observing political groups with opposite ideas march on the streets.

There is a practically unanimous consensus in Spanish society that an assembly can never be acceptable when violence is employed. However, there are different views on what the concept ‘violence’ means in the context of a demonstration, general strike, and other forms of public assembly. Is cutting traffic a form of violence? Is picketing in front of a business during a strike a

form a violence? What about passive resistance (sitting down on front of the police in a passive manner, chaining oneself to a fixed structure, refusing to open a door to let the police in, etc)?

The problem is that Article 21 prohibits jeopardizing ‘public order’, but our legal system has never given us a definition of what this term means. It is up to our Courts to determine what ‘public order’ is, and to interpret – individually, for each case – when the public order has been disrupted, with either Criminal or Administrative repercussions.

For instance, the Spanish Constitutional Court ruled in 1995 (Sentence 88/1995, May 8th) that “*public order should be considered disrupted when third parties are in harms way [...] but the mere cutting of traffic shall not be considered a violation of Article 21*”. However, on a daily basis we find criminal proceedings being initiated for peaceful and temporary cutting of roads or railways. A recent example took place last February, when the Investigating Judge number 24 of Barcelona dropped all charges against demonstrators who had peacefully blocked the exit of a high speed train in the Barcelona-Sants station during a strike on November 8th 2017.

The increase in charges for demonstrating and assembling on the street since 2011 is notable. And, in many cases, the charges are only related to ‘disruption’, and not active violence.

But this is not the only danger political activists face in Criminal Courts. The violent conduct of certain individuals participating in the assembly is, on certain occasions, attributed to the group as a whole, and render an assembly as a whole not peaceful.

On the ongoing trial regarding the events surrounding the October 1st, 2017 referendum in Catalonia, activists Jordi Cuixart and Jordi Sànchez are being charged with participating and promoting a concentration (specifically on September 20th, 2017) to protest the search carried out by police authorities of Catalan Government buildings. The calls for protests were unanimously peaceful, and the general attitude of the demonstrators was peaceful. However, some police cars suffered considerable damages by unknown assailants, and the Prosecution is requesting long-term prison sentences for both Jordis as a consequence of these isolated incidents.

During this specific trial, the Prosecution has showed its disdain for spontaneous assemblies. However, the Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies of February 4th, 2016, establishes that “*failure to notify authorities of an assembly does not render an assembly unlawful, and consequently should not be used as a basis for dispersing the assembly. Where there has been a failure to properly notify, organizers, community or political leaders should not be subject to criminal or administrative sanctions resulting in fines or imprisonment. This applies equally in the case of spontaneous assemblies, where prior notice is otherwise impracticable or where no identifiable organizer exists. Spontaneous assemblies should be exempt from notification requirements, and law enforcement authorities should, as far as possible, protect and facilitate spontaneous assemblies as they would any other assembly*”.

And, more importantly, the Joint Report adds that “*while organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, organizers should not be held responsible for the unlawful behaviour of others*”.

A public debate on (1) when is an assembly not ‘peaceful’, and fall outside the scope of the protection of the particular right, on (2) the level of violence is required not to consider it peaceful, and (3) what the organiser’s accountability, is more necessary than ever.

Modification of Spain's Public Safety Law and of its Criminal Code

On July 1st, 2015, Spain modified its Public Safety Law (Ley Orgánica 4/2015) and its Criminal Code (Ley Orgánica 1/2015). These two reforms came to be known as 'Gag Laws'. Ever since then, authorities have disproportionately restricted the rights to freedom of expression and peaceful assembly.

These modifications were aimed at several threats, such as terrorism, but also at activists and protestors, who were very active in that period. Thusly, the reform increased the used of fines for disobeying the police, organizing demonstrations without previous notification to the authorities, climbing buildings, etc., and gave more powers to the police in order to dissolve public gatherings, among other issues.

The measures included in the 'Gag Laws' constitute, in the opinion of several NGOs who have studied them, severe restrictions on the right to freedom of peaceful assembly and could be applied arbitrarily and lead to extremely serious abuses, including the power to deny people the constitutionally recognised right to exercise the freedom to demonstrate and/or assemble.

As a consequence, a number of diverse forms of expression, including expression on the Internet, using a pretext of national security, have been notably restricted ever since then. This rise has led to self-censorship for fear of suffering repression, a fall in public debate, and a long-term threat for the strength of civil society and the ability to guarantee not just the right to freedom of expression and of assembly, but also the defense of a series of fundamental human rights.

The UN's Humans Rights Council's Resolution 19/35 "*calls upon States to avoid the abuse of criminal and civil proceedings or threats of such acts at all times*".

A public debate on (1) what sort of limitations may be placed on assemblies as far as their form, on (2) should those wishing to exercise this right be required to notify the authorities, (3) and on the limitations this right should have (if any), is extremely necessary.

Use of force

Another response to the exercise of public assembly under Article 21 is, on occasion, the use of force by law enforcement. The large number of wounded in the last ten years is evidence of the repeated use of force by the authorities, which is strictly prohibited by provisions of the Spanish Criminal Code, unless the use of force was strictly necessary during an operation to maintain public order and disperse a crowd which may cause disturbances of the peace.

However, the number of officers charged any crimes is a mere anecdote.

The aforementioned Joint Report of February 4th, 2016, concludes that "*the use of force by law enforcement officials should be exceptional, and assemblies should ordinarily be managed with no resort to force. Any use of force must comply with the principles of necessity and proportionality. The necessity requirement restricts the kind and degree of force used to the minimum necessary in the circumstances (the least harmful means available), which is a factual cause and effect assessment*". The Report also adds that "*dispersing an assembly carries the risk of violating the rights to freedom of expression and to peaceful assembly as well as the right to bodily integrity. Dispersing an assembly also risks escalating tensions between participants and law enforcement. For these reasons, it must be resorted to only when strictly unavoidable*". In other words, International law allows for dispersal of a peaceful assembly only in rarest of cases.

It is my opinion that police officers are over-protected in Spain (the recent conviction of the youngsters in Alsasua, facing 13 years imprisonment for allegedly assaulting two police officials in the Basque Country, is proof of this) and that, in too many cases, criminal investigations of police violence are prematurely closed.

As persons exercising public authority, law enforcement officers have particular responsibilities, which should be followed with more seriousness than those the general public are required to. Their main task is to protect citizens. Yet, the number and seriousness of injuries inflicted on demonstrators in the past years raise questions about the compatibility of the methods used in operations aimed at maintaining public order with due regard for these rights.

Calls for investigation on police violence are not unheard of. After the events which took place in Catalonia on October 1st, 2017 (the date of the Catalan Referendum), the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, stated the very next day *“I am very disturbed by the violence in Catalonia on Sunday. With hundreds of people reported injured, I urge the Spanish authorities to ensure thorough, independent and impartial investigations into all acts of violence. Police responses must at all times be proportionate and necessary”*.

A debate on increasing the accountability of public servants when they commit abuses is essential in order to preserve our Constitutional and International rights. There is plenty at stake here, because, like the UN's General Assembly's Human Rights Council stated in its Resolution 19/35, on April 18th 2012, *“participation in peaceful protests can be an important form of exercising the rights to freedom of peaceful assembly and of association, freedom of expression and of participation in the conduct of public affairs”* and *“encourages all States to avoid using force wherever possible during peaceful protests, and to ensure that, where force is absolutely necessary, no one is subject to excessive or indiscriminate use of force”*.

Madrid, March 7th, 2019