**Spain Case Study: Covid-19 and Censorship during the State of Alarm**

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**Abstract**

Have the Right to Information defenses been weakened by Covid-19 during quarantines? The exceptionality that the pandemic represents has resulted in most countries invoking the Right of Emergency. The establishment of an exceptional legal framework -for example, via the declaration of a state of alarm- and its impact is an eventuality often foreseen both by the constituent and by the ordinary legislator who, pursuant to the constitutional mandate, has enacted laws containing this forecast. The exercise of the Right to Information requires that the state have an attitude of abstention and respect and, therefore, a negative position. But this *de iure* imperative contrasts *de facto* with a hyper-guaranteeist disposition that has manifested itself in attitudes that go through exercising an iron control over information. Among many others, the generalized institution of press conferences with filtered questions, the generalization of the videoconference format with delayed interventions, or the neutralization of comments critical to the management of the virus, can be cited as recurring practices. All of them put to the test the delimitation of the Right to Information, which enjoys enhanced protection but whose exercise is by no means unlimited. In this paper, this issue is analyzed in light of the constitutional coverage of both rights -the Right of Exception and the Right to Information- during the state of alarm in Spain.

**Keywords**

Right to Information; Right of Exception: State of Alarm; Covid-19; Prior Censorship

**I. Introduction**

Emergency law can be invoked by means of the declaration of the state of alarm, the first of the exceptional states regulated in article 116.2 of the Spanish Constitution (hereinafter, CE) (1).

It is a formula to face a situation of constitutional abnormality as a legal-political situation (FERNÁNDEZ DE CASADEVANTE, 2020: 9), which obliges the State to adopt extraordinary measures whose ultimate aim is to preserve its integrity and the guarantee of rights.

Given its exceptional nature, in its first section, the constitutional text provides that the state of alarm is regulated by organic law (2). Also the constitutional legal body regulates the eventual suspension of rights and freedoms (article 55) (3); among all, it is interesting to highlight the possibility of suspending the rights to Freedom of Expression, to literary, artistic, scientific and technical production and creation (art. 20.1 a) and d) and the seizure of publications, recordings or other means of information 20.5), with the timely express warning in Organic Law 4/1981, that it may not involve any type of prior censorship.

As has been pointed out, in development of the constitutional mandate contained in the second section of article 116, the Spanish legislator promulgated Organic Law 4/1981, of June 1, on States of Alarm, Exception and Siege (hereinafter, LOEAES).

The *ratio legis* of the aforementioned norm lies in the establishment of an exceptional state, which has as a factual presupposition the extraordinary impossibility of maintaining normality, in accordance with the provisions of the first paragraph of its article 1 (4).

It can be affirmed from the above that the state of alarm has its origin in serious alterations of normality (5).

The declaration of the state of alarm corresponds to the Government, by virtue of the mandate contained in article 116.2 CE and developed in articles 5 to 8 of Organic Law 4/1981.

For its part, the regulation of the effects of the state of alarm is provided for in articles 8 to 12 of LO 4/1981. The last two -articles 11 and 12- close the regulation of the state of alarm with the establishment of limitations on fundamental rights.

Based on the foregoing, it can be inferred that article 55.1 of the EC does not foresee that in the state of alarm rights can be suspended in a concrete way.

The suspension of rights is a matter closely related to the declaration of exceptional situations, which proceeds, as has been indicated, *"when extraordinary circumstances make it impossible to maintain normality through the ordinary powers of the authorities"*.

Therefore, the exceptional situations in which the suspension of rights and freedoms is allowed are, for our Constitution, the state of exception and the state of siege.

A part of the doctrine warns, however, that despite this circumstance, a complete reading of article 116 of the EC (*“An organic law will regulate the states of alarm, emergency and siege, and the corresponding powers and limitations”*) it is possible to deduce, in any case, its possible limitation (for example, REBOLLO, 2011: 288).

Thus, during the state of alarm, some accessory manifestations of fundamental rights may be proportionally limited, but the core of rights is not prohibited.

The specification of the limitations stipulated in the third section of article 11 of the Norm that develops the mandate contained in the aforementioned constitutional precept contributes to reinforcing this approach, which we fully share (6).

The limitation of fundamental rights carried out in accordance with the constitutional order has been resolved by the Constitutional Court through a consolidated body of jurisprudence (two or more resolutions issued by the same court in the same sense).

Thus, for example, STC 123/1997, of July 1, synoptically reiterates the terms of what is established in STC 26/1981, of July 17, according to which:

*“[…] When the free exercise of the rights recognized by the Constitution is restricted. The act is so serious that it needs to find a special causalization, and the fact or set of facts that justify it must be explained so that the recipients know the reasons why their right was sacrificed and the interests to which it was sacrificed. In this way, the motivation is not only an elementary courtesy, but a rigorous requirement of the act of sacrifice of rights”*. (FJ 14).

It recalls the very important Judgment 123/1997 that the limitation of fundamental rights must be carried out in accordance with the principle of proportionality. In this way:

*“[…] As a requirement of the principle of proportionality, fundamental rights can only be limited by means of a reasoned judicial decision (SSTC 86/1995 and 49/1996, with special consideration of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Strasbourg jurisprudence), that is, by means of a resolution that reviews the form of Order, in which the reasons that support such a special limitation of a fundamental right are made explicit, and in which the requirements that the aforementioned principle of proportionality requires”*. (FJ 4).

In addition, it must be taken into account in a general way that, as stated by the High Court in STC 151/1997, of September 29:

*“The limits imposed on the exercise of fundamental rights must be established, interpreted and applied in a restrictive way and, in any case, they must not be more intense than is necessary to preserve other assets or constitutionally protected rights. The limitation must be the minimum essential and, therefore, is subject to the principle of proportionality in order to avoid unnecessary or excessive sacrifices of said rights. This requires, also in this case, that the resolutions that apply the aforementioned limits have sufficient motivation to be able to control proportionality […]”*. (FJ 6).

Therefore, according to the foregoing, during the validity of the state of alarm, the fundamental rights that could be affected can only be limited, never suspended; such limitation must also be carried out in accordance with the principle of proportionality, that is, it must be the minimum essential in order to safeguard other constitutionally protected assets or rights.

**II. Nuclear Aspects of the Right to Information in Relation to the Object of Study**

Due to its inclusion in Title I, the Spanish Constitution grants the Right to Information the character of a fundamental right.

Freedom of information constitutes, by its nature, the presupposition of a free and democratic society, hence its connection with Article 1 EC, which recognizes freedom as a superior value of the legal system.

The authorized doctrine maintains that, in fact, the clearest manifestation that we are facing a preferential right is the deregulation of the informative matter, in the conviction that any regulation is limiting this right and would not be, for this same reason, justified (e.g., BALAGUER, 2016: 17).

For the constitutional doctrine, the specific object of the Right to Information involves a double facet: the freedom of active information, that is, the right to freely communicate truthful information by any means of dissemination, and the passive freedom of information or the right to receive that.

Therefore, as can be appreciated, the constitutional purpose of this right is the free flow of information, as a guarantee of an adequate functioning of the democratic society. More specifically, we can point out as specific purposes of this right the control of public representatives, the creation of a free public opinion and the maintenance of a critical conscience by the citizens (TORRES, SOUVIRÓN & ROZADOS, 2016: 52).

Undoubtedly, one of the basic presuppositions of the Social and Democratic State of Law is pluralism. And not only political pluralism, but also informational pluralism, which enjoys a broad national and international protective framework, with its corresponding regulatory development.

For the consolidated doctrine, the right to receive a plural communication implies: the existence of a plurality of public and commercial communication media; the use by the audiovisual media of various sources; truthful and diligent informative content; offer of varied content in terms of its genre and target audience, as well as the existence of national, regional and local media (for example, RODRÍGUEZ, 2019: 69 and 70).

Two are, above all, the requirements established by the Constitutional Court for the Right to Information to enjoy constitutional coverage.

In the first place, the High Court considers it essential in the exercise of this right to respect the veracity of the information disseminated (7). In other words, for the TC only truthful information is protected by the Constitution (8).

For the majority doctrine, the constitutional requirement of veracity comes to suppose that the informant has a special duty to verify the veracity of the facts that he exposes, through the appropriate inquiries and using the requirement required of a profesional (9).

However, it is not required that they be absolutely incontrovertible facts, but that the conduct of the informant be diligent in the investigation of them. Thus, STC 6/1988, of January 21 (10), highlights that:

*“The communication that the Constitution protects is the one that transmits ´true` information […]. When the Constitution requires that the information be ´truthful`, it is not so much depriving protection of information that may be erroneous - or simply not proven in court - as establishing a specific duty of diligence on the informant, to whom it can and must demand that what it transmits as ´facts` has been the object of prior contrast with objective data, thus depriving anyone of the constitutional guarantee, defrauding everyone's right to information, acting with contempt of the veracity or falsity of what is communicated”. […]*. (FJ5).

And, secondly, for the Constitutional Court the facts must also be newsworthy, that is, they must involve public relevance. On this criterion, STC 107/1988, of June 8, declares that:

*"[…] The freedom of article 20.1 d) is intended to freely communicate or receive information on events that may be considered newsworthy”.* (FJ2).

It should be remembered that the Right to Information is a fundamental right qualified by a significant institutional dimension since, through it, a true “constitutional interest” is guaranteed. That is, it contributes to the formation and existence of a free public opinion. In other words, it has democratic significance.

Indeed, it is a preferential position of this fundamental right over all other legal rights. Therefore, the restrictions that may conflict with other fundamental rights must be interpreted in such a way that their essential content is not distorted.

In the area of human rights, international law establishes that governments have an obligation to protect the right to information.

Faced with the exercise of this right, the State must have an attitude of abstention and respect and, therefore, a negative position. In this sense, the majority position of the doctrine (*e.g.*, ARAGÓN, 2011: 201; ESCOBAR DE LA SERNA, 1998: 302 and GUICHOT, 2018: 31) defends the idea of the non-neutral position of the State.

We fully share this thesis, which is aligned with the principles that run through all media legislation.

Rooted in the French tradition, whose legislation on the media has been greatly influenced by the principle of the so-called *excèption culturelle française*, our legislator has opted for a hyper-guaranteeist attitude in everything related to this sector.

When defining the content of the Right to Information and weighing its importance when it conflicts with other constitutionally protected goods (for instance, health), a fundamental element to take into account is to what extent the dissemination of a fact contributes to the formation of free public opinion; In other words, to what extent the dissemination of a news item, for example, can help the citizen to be better informed about a matter or a matter of special relevance.

As noted above, international law establishes that governments have the obligation to protect the right to freedom of expression, including the right to seek, receive and impart information of all kinds, regardless of borders. Permissible restrictions on freedom of expression for reasons of public health, for instance, cannot endanger the right itself.

They are, therefore, the governments responsible for providing the information necessary for the protection and promotion of rights. In this sense, it is considered a priority obligation to provide education and access to information regarding the main health problems in the community, including methods to prevent and combat these diseases. A human rights-friendly response to Covid-19 must ensure the universal availability and accessibility of accurate and up-to-date information about the virus, access to services, service interruptions, and other aspects of the response to the outbreak.

It should be stated that the exercise of the rights to freedom of expression and information cannot be restricted by any type of prior censorship, as expressly prohibited by the second paragraph of article 20 of the Spanish Constitution.

In effect, the promulgation of the Constitution supposes the consecration by the constituents of an absolute prohibition, since it cannot be declined in the interests of the protection of other constitutional assets.

What is the constitutional concept of prior censorship? And, above all, what does the "constitutional protection" of this figure imply? To answer these questions, it is essential to go to the doctrine of the Constitutional Court itself.

Early on, the High Court defined prior censorship as *"any measure limiting the preparation or dissemination of a work of the spirit, especially by making it depend on the prior official examination of its content"* (STC 52/1983, of June 17; FJ5).

But, What should be understood by "prior official examination"? The Court itself will clarify it two years later, considering that *“it implies the purpose of prosecuting the work in question in accordance with abstract and restrictive values ​​of freedom, in such a way that the placet is granted to the publication of the work that it is accommodated to them in the opinion of the censor and is denied otherwise”* (STC 13/1985, of January 31; FJ1).

A brief parenthesis to clarify that the terms in which the Constitutional Court is expressed regarding the prior censorship must be contextualized. Both sentences to which we have referred are handed down in the first five years of the eighties, just a few years after the constitutional text was promulgated, in which the Spanish constituent banished the previous censorship.

This practice had been widespread during the forty years that the Francoism lasted, hence probably the use of the expressions "prior official examination" and "publication of the work", since the prosecution task corresponded to the state embodied in an official and could fall on any text (be it the lyrics of a song, the script of a feature film, a theatrical libretto, etcetera).

Likewise, it must also be taken into account that article 20.2 CE that establishes the prohibition of any type of prior censorship must be related to a pre-constitutional law (Law 14/1966, of March 18, on Press and Printing) that it remains in force, although part of its articles have been repealed.

Specifically, with the third article, whose literal wording is as follows: *"The Administration may not apply prior censorship or require mandatory consultation, except in the states of exception and war expressly provided for in the laws"*.Therefore, except in these two cases, there is no prior censorship.

Regarding the relative temporal proximity in which the sentences to which we have referred are handed down -in 1983 and 1985, respectively- it can be said that it has not affected in any way the criterion of the TC, whose discursive line on prior censorship has been maintained constant ever since. This is corroborated in STC 187/1999, of October 25, which includes the same position kept in the 1983 and 1985 SSTC:

*“[…] Prior censorship should be understood as any measure limiting the elaboration or dissemination of a work of the spirit that consists of submitting its content to a prior examination by a public authority, the purpose of which is to prosecute the work in question. in accordance with abstract and restrictive values ​​of freedom, in such a way that the placet is granted to the publication of the work that accommodates them in the opinion of the censor and is denied otherwise”*. (FJ5, 2nd paragraph).

The most relevant element of the aforementioned legal-constitutional concept is the one that refers to the fact that the supervision work can only fall on the State. Furthermore, neither the self-censorship practiced by the media nor other attacks that, against freedoms of expression and information may come from citizens or other social groups, can be subsumed under this constitutional concept. This is what the highest interpreter of the Constitution emphasizes in the recently cited STC 187/1999:

“As censorship, then, we must understand in this field, regardless of other meanings of the word, the preventive intervention of public powers to prohibit or modulate the publication or broadcast of written or audiovisual messages. The pressure of citizens or groups of them to prevent this dissemination, even if it manages to obtain the same result, can become an interference in a foreign right, with criminal relevance in more than one case and from more than one aspect, but not ´censorship` in the sense that the Constitution gives it”.

Nor does it fit into this concept what has sometimes come to be called "self-censorship", used in some sectors -the cinematography or the press-, in some countries or at some times to regulate one's own activity and establish corporate limits. Even further from the constitutionally proscribed concept is the burden, with its face and reverse of right-duty, which allows and imposes on editors and directors an examination or analysis of the text and contents, before its dissemination, to check if they transfer, or no, the limits of the freedoms they exercise, with special attention to criminal ones. It is something that, to a greater or lesser degree, always precedes human behavior, reflective and aware that respect for the rights of others is the key to peaceful coexistence” (FJ5; first and second paragraphs).

**III. Brief *Exegesis* of the Statement of Alarm. Limitation or Suspension of Rights? The Thin Line between Alarm and Exception**

The official elevation to the category of pandemic on March 11, 2020 by the World Health Organization constitutes a turning point of the health emergency caused by Covid-19 at an international level.

Like the rest of the countries, Spain has not been immune to this situation. And this announcement precipitates three days after the declaration of the state of alarm by the Government via Royal Decree 463/2020, of March 14, as justified in the first paragraph of the Statement of Motives of said normative instrument:

“The rapidity in the evolution of the events, on a national and international scale, requires the adoption of immediate and effective measures to face this situation. The extraordinary circumstances that occur constitute, without a doubt, an unprecedented health crisis of enormous magnitude both due to the very high number of affected citizens and the extraordinary risk to their rights”.

The anomalous, serious and exceptional situation, with formal and substantive anchoring both in the Magna Carta and in the Organic Law that develops the constitutional mandate, made "essential the declaration of a state of alarm", as stated by the Government in the MA of RD, after underlining that:

“Within this framework, the measures provided for in this regulation are part of the Government's decisive action to protect the health and safety of citizens, contain the progression of the disease and strengthen the public health system. The temporary measures of an extraordinary nature that have already been adopted by all levels of government must now be intensified without delay to prevent and contain the virus and mitigate the health, social and economic impact” (third paragraph EM).

This after clarifying, in the fifth paragraph of the MA, that "the measures contained in this royal decree are essential to deal with the situation, are proportionate to its extreme gravity and do not imply the suspension of any fundamental right, as provided for in article 55 of the Constitution" (11).

The declaration of a state of alarm, made under the provisions of article four, sections b) and d), of the LOEAES (art. 1) affected the entire national territory (art. 2) and had a duration of 15 days natural (art. 3), as is logical given that there are cases throughout the territory.

The restrictive measures were contained in articles 7 to 11 and in the second, third and fourth additional provisions of the RD (12, 13).

As mentioned, the period of exceptional status is expeditious - 15 days. At the risk of events, the Plenary of Congress authorized on Wednesday, March 25, the extension of the state of alarm until 00:00 hours on Sunday, April 12, as requested by the Government.

On this occasion, the RD consisted of two articles, an additional provision and a final provision. The new DA added that "in accordance with the provisions of article eight, paragraph 1, of the Law on states of alarm, exception and siege, the Government will send weekly to the Congress of Deputies structured documentary information on the execution of the different measures adopted and assessment of their effectiveness to contain the Covid-19 virus and mitigate its health, economic and social impact".

Through a telematic appearance, the President of the Government announced on Sunday, March 22, the adoption of new measures (14).

Once the first extension was exhausted and, again, with prior authorization by the Congress of Deputies, Royal Decree 487/2020, of April 10, extended the state of alarm declared by Royal Decree 463/2020, of March 14, until 00:00 hours on April 26, 2020.

Ratified by Congress, the new normative Corpus was shortened even more, since it now consisted of only two precepts and a single additional provision (15).

As the health situation did not improve, the Plenary of the Congress of Deputies on Wednesday, April 22, a third extension of the state of alarm until 00:00 hours on Sunday, May 10, after the request of the Government by means of an Agreement of the Council of Ministers of April 21, 2020 (16).

Similarly, it should be recalled that Article 55 of the EC prohibits, a sensu inversely, the suspension of fundamental rights in the state of alarm; exclusively allowing limitations or restrictions on them (17).

Indeed, the only definition contained in the EC is found in the aforementioned precept and it is carried out indirectly (by reference to the deprivation of rights that may occur).

Above all, the alarm is not mentioned, and those of exception and siege can suspend articles 17 (freedom and security, with the limits and rights that they entail, although 17.3 can only be suspended in the state of siege); 18, sections 2 and 3 (inviolability of the home and secrecy of communications); 19 (choice of residence and movement, as well as entry and exit from Spain); 20 (expression, literary production, press, academic freedom, and accessories); 21 (meeting and demonstration); 28.2 (right to strike) and 37.2 (collective conflict measures).

**IV. Undercover State of Exception?: The Rise of the “Red Pencil”**

As has been proven, during a state of alarm it is not possible to suspend fundamental rights. Therefore, to determine if rights have been limited or suspended (since only the first would save the legal instrument that declares a state of alarm from a possible declaration of unconstitutionality) it is inexcusable to know what constitutes the “essential content” of fundamental rights. For this, we cannot forget that the limitation leaves the essential content of the right safe, while the suspension does not (ORELLANA, 2020).

To defend this approach, we must resort to constitutional doctrine. The High Court - recalls the aforementioned author - establishes two paths. The first - from the legal nature - would be “those powers or possibilities of action necessary for the right to be recognizable as pertinent to the type described and without which it ceases to belong to that type and has to be included in another, denaturing itself, by put it like that. All of this refers to the historical moment in each case and to the conditions inherent in democratic societies, when it comes to constitutional rights ”. The second - from the legally protected interests as the nucleus and core of subjective rights - “that part of the content of the right that is absolutely necessary so that the legally protectable interests, which give life to the right, are actually, concretely and effectively protected. In this way, the essential content is exceeded or unknown when the right is subject to limitations that make it impracticable, make it more difficult than is reasonable or deprive it of the necessary protection" (18).

However, during the validity of the state of alarm and with the confined population under the motto #QuédateEnCasa (#Estayathome) as an incentive restrictive dynamics were established that impacted -we will see to what degree- on the Right to Information.

For example, from the first day (March 14) the Government became the main issuer of official information. This practice took place in one or two daily press conferences through a videoconference system. Centralized in a single issuer the information, only five media at most, previously selected, could ask questions. To this was added as a condition sine qua non that all of them had to be referred before, that is, they were raised *ex ante*.

This approach, in which there is a previous screening of possible uncomfortable questions -a full-fledged official preliminary examination- is unusual and affects, in our opinion, the core of the right to information.

Similarly, the presence of various communication media can ensure plurality but is far from safeguarding informational pluralism, a basic assumption of the right to information. Regarding this basic budget, the TC recalls in STC 159/1986, of December 16, that article 20:

*“[…] Guarantees a constitutional interest: the formation and existence of a free and democratic public opinion. So that citizens can freely take their opinions and participate in such a way that they can weigh diverse and even opposing opinions, since the right to information not only protects an individual interest, but also implies the recognition and guarantee of a fundamental political institution, which it is public opinion, inextricably linked with political pluralism”*. (FJ 6).

And, with the establishment of press conferences through videoconferencing system, the Government was erecting itself as an information gatekeeper. That is, not only did he assume a role that corresponds only to an information professional, only giving an account of what he wanted to give and how he wanted to offer it, but he also took an active position, upsetting the principle of neutrality.

The dynamic of filtered questions, moreover, resurrects at least the specter of prior censorship, a practice banned since the enactment of the EC, which finally banishes it.

Prior to the current constitutional text, the Press and Printing Law is promulgated, a Regulation that, despite the fact that a good part of its articles is repealed, is still in force.

Four decades after the promulgation of the Magna Carta, the information practices that have taken place during the spring of 2020 in Spain are reminiscent of the times when the use of the red pencil was common.

Indeed, in pre-constitutional times, the Ministry of Information had a body of officials who were in charge of supervising the information that was published. These officials were known as censors and their main task was to examine journalistic texts, film and theater scripts, books, songs, and so on. Often all this material was returned to its author with corrections in red. And hence this exercise is known -by extension- as the "habit of the red pencil".

Press conferences with filtered questions have been followed by other practices. For example, the neutralization of comments critical to the Government through indications to the State security forces and bodies to prepare counter-information to counter the criticisms.

Other examples of restrictive measures of the right to information that can be cited are the creation of content from the government, which were assiduous, especially in the audiovisual media and on the Internet, through streaming audiovisual service platforms or the advertisement of the persecution of possible hoaxes that circulated on the network on behalf of Covid-19.

Even more. The official information on the numbers of deaths from the virus that has been provided by the Government to citizens has been - and still is - questionable. And only truthful information enjoys constitutional protection. This is what the Spanish High Court recalls when it states, in STC 168/1986, of December 22, that the right to receive truthful information is:

“[…] An essential instrument of knowledge of matters that gain importance in collective life and that, therefore, conditions the participation of all in the proper functioning of the system of democratic relations sponsored by the Constitution, as well as the effective exercise of other rights and freedoms […].

Therefore, the High Court considers that the rights recognized in article 20.1 d) are impaired:

*“Whether it is prevented from communicating or receiving truthful information or whether it is disseminated, imposed or protected the transmission of news that does not respond to the truth, as long as this means curtailing the right of the community to receive, without restrictions or deformations, those that are true”*. (FJ 2).

Another example of practices that were imposed during the quarantines was the establishment via RD of the obligation for all media (press, radio, television and video-on-demand platforms) to insert messages, announcements and communications from the authorities.

This provision is not alien to Spanish audiovisual legislation, which provides for this type of requirement (public service announcements).

And, at the international legal level, we must remember both article 19 of the International Covenant on Civil and Political Rights and article 10 of the European Convention on Human Rights establish that *"the protection of health can justify the imposition of certain conditions or restrictions to the exercise of freedom of expression, exceptionally and always respecting the principles of legality, necessity and proportionality”*.

Therefore, the question arises under what circumstances are limitations acceptable? A forecast of this nature is only acceptable as a limit to the right to information (even in the context of the state of alarm) if the following circumstances concur (cumulatively):

i) The messages are genuinely of public service because they provide necessary information to the citizen that cannot be disseminated effectively in any other way (or that requires the complementary use of this mechanism), and

ii) The messages broadcast cannot consist of mere institutional advertising, messages of a purely political or partisan nature, or pure and simple propaganda of the authority in power.

A measure closes the list of restrictive practices of the Right to Information: the paralysis of requests for the right of Access to Public Information under the protection of Law 19/2013 of December 9, on Transparency, Right of Access to Public Information and Good Governance.

This right has two aspects -one active and the other passive-, and both are connected with the right to information of citizens, which hold the active legitimation of both the right of access to public information and the right to information. And its exercise, during quarantines, more necessary than ever.

All the initiatives that came from both civil society and journalists, which have reinforced legitimacy, were paralyzed with the suspension of the procedural and administrative deadlines contained in the RD of March and their successive extensions.

**V. Conclusions**

The relevance of the Right to Information -and its corollary, for example, the Right of Access to Information- is permanent. Its exercise allows to demand a compte rendú a of the public powers and strengthens the democratic pillars on which a democratic State is built. However, the health emergency situation has dynamited these basilar means. For example, in practice, the suspension of the procedural and administrative deadlines approved by Royal Decree has resulted in a hibernation of the Right to Information.

And although we are facing a reinforced right, the right to information is by no means an unlimited right. In their interaction with other rights -*e.g.*, the Right to Health-, the circumstances in which the dynamics of each one unfold must be weighed, in order to assess which one should prevail in each specific case. During the prolongation of the quarantines, there was no evidence that the exercise of the Right to Information posed any risk to the health of citizens.

The imposition of *de iure* restrictive measures has resulted in a *de facto* suspension of the Right to Information inappropriate to a state of alarm, in which only specific limitations or restrictions are allowed. Such suspension, on the other hand, can be carried out within the framework of the right of emergency in states of exception or siege, but we are not dealing with these cases.

The implementation of restrictive dynamics of the exercise of the right to information, both ex ante and ex post, have impacted as well as in the core of fundamental right, by rescuing practices that had been banished, such as censorship.

The limitations to mobility, together with the hyper-guaranteeist spirit that the Government has exhibited during the quarantines have caused a weakening of the right that finds no justification or parallel in Spanish democratic history and anticipates the anemia of a right that had enjoyed enhanced constitutional protection.

It can be stated, based on the foregoing, that there has been a confinement of the Right to Information within the framework of a disguised Right of Exception.

The relevant thing, from now on, will be to find out the projection and scope of this impact within the framework of constitutional law, since there are far-reaching legal-substantive and legal-procedural consequences, given the nature of the Right to Information, whose content is contingent and, therefore, porous but whose effectiveness is radically horizontal and has the vocation of permanence.

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End Notes

(1) "The state of alarm will be declared by the Government by decree agreed in the Council of Ministers for a maximum period of fifteen days, reporting to the Congress of Deputies, meeting immediately for that purpose and without whose authorization said period may not be extended. The decree will determine the territorial scope to which the effects of the declaration extend”.

Therefore, the normative development of article 116 of the EC is contained in Organic Law 4/1981, of June 1, on states of alarm, exception and siege, and in articles 162 to 165 of the Regulations of the Congress of the Deputies, of February 10, 1982. The first paragraph of article 116 imposes the organic law as the normative form, in logical coherence with the requirement of this rank for laws that develop fundamental rights and public freedoms, established by article 81.1 of the EC.

Similarly, it is also necessary to mention article 5.1.f) of Law 50/1997, of November 27, of the Government, which provides that "The Council of Ministers, as a collegiate body of the Government, is responsible (…) declare the states of alarm and emergency and propose to the Congress of Deputies the declaration of the state of siege ".

Finally, the concurrence of Law 17/2015, of July 9, of the National Civil Protection System can also be cited, and even negatively insofar as it expressly provides not to apply the powers of the states now studied, Law 36/2015, of September 28, on National Security.

(2) "An organic law will regulate the states of alarm, emergency and siege, and the corresponding powers and limitations”.

(3) (Art. 55 of the EC): “The right to personal liberty and security (art. 17). […]. The right to the inviolability of the home (art. 18.2). […]. The right to secrecy of communications, especially postal, telegraphic and telephone (art. 18.3). […]. Freedom of movement and residence (art. 19). […]. The rights to freedom of expression, to literary, artistic, scientific and technical production and creation (art. 20.1 a) and d) and the seizure of publications, recordings or other means of information 20.5). The adoption of these measures - expressly warned in Organic Law 4/1981 - may not entail any type of prior censorship. The rights of assembly and demonstration (art. 21). […]. The rights to strike and to adopt collective conflict measures (arts. 28.2 and 37.2). […] ”.

(4) "The declaration of states of alarm, exception or siege will proceed when extraordinary circumstances make it impossible to maintain normality through the ordinary powers of the competent Authorities."

There are four de facto assumptions contemplated in article 4 of the LOEAES: a) catastrophes, calamities or public misfortunes, such as earthquakes, floods, urban and forest fires or large-scale accidents; b) health crises, such as epidemics and serious contamination situations; c) stoppage of essential public services for the community, when the provisions of articles twenty-eight, two, and thirty-seven, two, of the Constitution are not guaranteed, if any of the other circumstances or situations contained in this article concur, and d) situations of shortage of essential products.

(5) Part of the classical doctrine (por todos, Berdugo, 1981: 101-105) has classified these four assumptions in fact contained in the mentioned precept into two categories: a) on the one hand, a first category would include great calamities originated by natural causes or techniques, which would fit into sections a) (“catastrophes, calamities or public misfortunes, such as earthquakes, floods, urban and forest fires or major accidents”) and b) (“health crises such as epidemics and serious pollution situations ”), And b) on the other, a second category would contemplate situations that present an ambiguous nature, in which sections c) would fit (“ stoppage of essential public services for the community, when the provisions of articles twenty-eight are not guaranteed, two, and thirty-seven, two, of the Constitution, if any of the other circumstances or situations contained in this article concur ”) and d) (“ situations of shortage of basic necessities ”).

In opposition to this literal interpretation of the Norm, the constitutional text itself can be considered. Indeed, Article 30.4 of the EC stipulates that "By law the duties of citizens may be regulated in cases of serious risk, catastrophe or public calamity." It is a single category that would encompass all the budgets in fact to activate the alarm state, so the previous classification would be meaningless.

(6) Indeed, article 11.3 of the LOEAES provides that in the decree declaring the state of alarm it may be agreed: "Intervene and temporarily occupy industries, factories, workshops, farms or premises of any nature, with the exception of private homes, accounting for of this to the interested Ministries”, as well as to carry out requisitions, limit or ration the use of services or consumption of basic necessities, among other actions.

(7) STC 107/1988, of June 8, recognizes that "freedom of expression is broader than freedom of information because, in the exercise of the former, the internal limit of veracity that is applicable to it [...]". (FJ2).

(8) See, among others, STC 76/2002, of April 8: “[…] The veracity of the information should not be confused with a requirement of agreement with the incontrovertible reality of the facts, but strictly speaking only refers to a diligent search for the truth that ensures the seriousness of the information effort (SSTC 219/1992, of December 3, and 41/1994, of February 15). […]. (FJ3).

(9) *Op. Cit*. Page 204.

(10) The same thesis abounds, for example, STC 105/1990, of June 6, when it emphasizes that “what the constitutional requirement of veracity comes to suppose is that the informant has - if he wants to place himself under the protection of article 20.1 d ) - a special duty to verify the veracity of the facts that it exposes, through the appropriate inquiries, and using the diligence required of a professional ”(FJ5).

(11) RD 463/2020 is the second in Spanish democratic history. In December 2010, Royal Decree 1673/2010, of December 4, was promulgated, declaring the state of alarm for the normalization of the essential public service of air transport, as a result of the air traffic controllers' strike which led to the closure of airspace.

(12) First, a limitation is established on freedom of movement. Specifically, wandering is restricted to the bare minimum, that is, those necessary to purchase food, attend health centers, travel to the workplace, assistance to dependents, travel to financial and insurance entities, refueling at gas stations and other necessary activities. similar to the above or exceptional (art. 7). Temporary requisitions and mandatory personal benefits are also allowed by the delegated competent authorities to ensure compliance with the objectives of the RD (art. 8). Likewise, all face-to-face educational activity is suspended, maintaining the provision at a distance and online, whenever possible (art. 9). The suspension of recreational, cultural, sports and commercial activity is also agreed. In this regard, all types of centers, recreational, sports, cultural and leisure in general are closed. The opening to the public of the premises and retail establishments is suspended, except those destined to food, beverages, products and essential goods, pharmaceutical, medical, optical and orthopedic establishments, hygienic products, hairdressers, press and stationery, fuel for the automotive, tobacconists, technological and telecommunications equipment, pet food, internet, telephone or correspondence commerce, dry cleaners and laundries (art. 10). Containment measures measures designed to limit or restrict movements, activities or services extend to attendance at places of worship and civil and religious ceremonies, including funerals (art. 11). The limitations contemplated in the RD are closed by the second, third and fourth additional provisions, which establish the suspension of procedural, administrative and civil deadlines. Thus, DA 2ª provides for the suspension of procedural deadlines until the state of alarm ceases. Certain actions are exempted from this suspension, in order to avoid further damage. Specifically, in the criminal order, actions with detainees, protection orders, urgent actions regarding prison surveillance, as well as precautionary measures related to violence against women or minors.

(13) In the rest of the matters, there are exceptions in matters of protection of fundamental rights, collective conflict in the social jurisdiction, voluntary internment and provisions for the protection of minors. A closing clause allowed the judges to take any measure "to avoid irreparable damage to the rights and legitimate interests of the parties in the process" (DA 2nd in fine). For its part, the 3rd DA suspended the administrative deadlines during the alarm period, to which an exception clause similar to the previous one was added. Finally, the 4th DA also suspended the prescription and expiration periods during the alarm period.

(14) Specifically, the provision of private residences for the public network, the restrictions on flights outside the Schengen area, the reinforcement of the activities of the Armed Forces, the provision of resources so that municipalities could distribute essential goods at home for the elderly, as well as the establishment of a strategic reserve of medical supplies.

(15) The preamble, however, was more extensive on this occasion. The Emergency Law was invoked with justification of “the data provided by the National Epidemiological Surveillance Network” (eleventh paragraph), which “allow to conclude that a second extension will contribute to decisively reinforce the containment of the spread of the disease to save lives, avoid saturation of health services and maintain possible outbreaks at levels acceptable to the health system. This second extension is an essential measure to try to ensure that patients requiring hospitalization, admission to intensive care units or mechanical ventilation do not exceed the threshold that would prevent providing adequate quality of care based on the resources currently available” (paragraph thirteenth).

(16) On this occasion, the RD consisted of two articles and two DAs. As the main novelty, this third extension of the state of alarm contemplated, from Sunday April 26, the authorization of the exits of minors up to 14 years with an adult to take walks or accompany them in the essential activities allowed by Royal Decree 463/2020, of March 14.

(17) The interpretation of article 55.1 EC was echoed by the TC in STC 83/2016, of April 28, on the appeal for protection presented by a group of air traffic controllers after the declaration of the first state of alarm in the democratic history of Spain: “Unlike the states of exception and siege, the declaration of the state of alarm does not allow the suspension of any fundamental right (art. 55.1 CE *contrary sensu*), although it does allow the adoption of measures that may imply limitations or restrictions on its exercise” (FJ 8).

(18) *Art. Cit*.