

## **Recommendations to the Parliamentary Groups for the reform of the Organic Law 4/2015, on the Protection of Citizen Security.**

The Organic Law 4/2015, on the Protection of Citizen Security (hereinafter, Law 4/2015) in force is a problematic legislation, which has been harshly criticized by both civil society and international organizations.

The first to speak out against the approval of Law 4/2015 was the former United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association in his 2013 report,<sup>1</sup> in which he stated that he was “*deeply concerned about the disproportionate and excessive restrictions on the right to peaceful assembly*” that the draft Law on the Protection of Citizen Security involved.

In February 2015, four United Nations Special Rapporteurs (on the right to peaceful assembly, on the promotion and protection of the right to freedom of expression, on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and on the situation of human rights defenders) also made a joint statement against the approval of Law 4/2015.<sup>2</sup> They stated that “*The so-called ‘gag law’ violates the very essence of the right to assembly since it penalizes a wide range of actions and behaviours that are essential for the exercise of this fundamental right, thus sharply limiting its exercise*”. They also criticized the fact that “*this project of reform unnecessarily and disproportionately restricts basic freedoms such as the collective exercise of the right to freedom of opinion and expression in Spain*”.

In June 2015, the UN Special Rapporteur on the right to peaceful assembly said, “*he lamented that despite his joint action with other independent UN experts urging Spain to reject*” the Citizen Security Draft Bill, “*the country has adopted very limited amendments*”. In the same report, he insisted that “*he is seriously concerned about the broad and imprecise definitions which may lead to self-censorship, one of the most regressive social practices for effective enjoyment of fundamental rights and freedoms*”.<sup>3</sup>

In his most recent report (2018) the new Special Rapporteur on the right to assembly has also expressed concern on “*legislative amendments or reforms that*

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<sup>1</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/26/29/Add.1, June 10, 2013, para. 419.

<sup>2</sup> <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597&LangID=S>

<sup>3</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/29/25/Add.3, June 10, 2015, para. 451.

were adopted to increase fines and criminalize breaches of the regulations regarding the organization of and participation in peaceful assemblies”, referring specifically to the Spanish Law on Citizen Security.<sup>4</sup>

Rights International Spain was very critical of the Draft Bill.<sup>5</sup> During the legislative process, we requested the reform not to be approved<sup>6</sup> and, since then, we have maintained that Law 4/2015 should be repealed.

However, the reform process already initiated is a good opportunity to adapt the law to international standards, removing provisions that violate fundamental rights and verifying that all its provisions completely respect legal certainty and the principle of legality.

The following recommendations are based on international standards that must be respected by Spanish legislators. We have limited our recommendations to the protection of the rights to freedom of peaceful assembly and freedom of expression. This limitation does not imply, in any way whatsoever, that we consider that the remaining articles of Law 4/2015 do not infringe other fundamental rights.<sup>7</sup>

### **1.- Limitations to the restriction of rights and the concept of citizen security**

The State, and therefore the legislative power, have the obligation to respect, protect and secure human rights recognized under international treaties to which it is a party. While these instruments permit the restriction of some rights, said restriction must cumulatively meet the following conditions:<sup>8</sup>

- **Legality:** the legality test requires that laws imposing limitations on the exercise of rights must be accessible, foreseeable and precise. Vague or imprecise sanctioning regulations, that allow too wide a margin of interpretation, and therefore risk arbitrary application, are incompatible with the principle of legality.
- **Justification:** the State must justify limitations by referring to the specific grounds expressly provided for in the law. Such grounds must be interpreted strictly and on the basis of the presumption favourable to the exercise of the right at issue.
- **Necessity:** in order to be legitimate, any restriction of rights must be considered necessary in a democratic society. This requires balancing between individual rights and those of the State or society.
- **Proportionality:** any limitation of rights must be proportional to the aims it pursues and the reasons that motivate it. There cannot be less restrictive

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<sup>4</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/38/34, June 13, 2018, para. 38 and footnote no. 21.

<sup>5</sup> <http://rightsinternationalspain.org/uploads/publicacion/1615e270a19ef72e4fddced6a1d2810ec54ed1f5.pdf>

<sup>6</sup> <http://www.rightsinternationalspain.org/en/campanias/15/no-a-la-ley-mordaza/42/comunicaciones-con-las-autoridades-espanolas>

<sup>7</sup> See the joint communication to the Ombudsperson signed by various organizations, including Rights International Spain, requesting the lodging of a constitutional appeal against Law 4/2015:

<http://www.rightsinternationalspain.org/uploads/publicacion/4a6f9256b874041725955e2c1ca1e7fa71f75493.pdf>

<sup>8</sup> Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4 (1984).

ways of achieving the aim, and it cannot destroy the very essence of the right concerned.

- **Non-discrimination:** limitations of rights may never be based on racial, ethnic, religious, sexual orientation or nationality grounds. Any restriction that is unreasonable, unjustified and disproportionate will be considered discriminatory.

During the reform process of Law 4/2015, legislators must pay particular attention to achieve a balance between the rights and values in conflict, ensuring that any unjustified or disproportionate restriction included in the current text is corrected.

Legislators must also make an effort when drafting the provisions, making sure that the numerous **unclear concepts and vague expressions in the current text are removed.**

Public safety is included among the legitimate grounds for limiting the exercise of certain human rights.<sup>9</sup> Public safety is defined as “*protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property,*” and such means “*cannot be used for imposing vague or arbitrary limitations [of rights]*”.<sup>10</sup>

It is this definition of citizen safety or security that should guide the legislator in the reform of Law 4/2015. In the revision of the provisions that may entail a limitation of fundamental rights, it should consider that aims such as “the tranquility of citizens” (art. 1.2 of Law 4/2015) do not constitute a legitimate ground for the restriction of fundamental rights, such as freedom of peaceful assembly or freedom of expression.

**It is therefore recommended that the reference to the "tranquility of citizens" in Article 1.2 be deleted.**

**It is also recommended that the amendment included in the Draft Bill of the Basque Parliamentary Group EAJ-PNV (section 1 of the single article) to introduce a reference to the preservation of tranquility in article 3.b, should not be approved either.**

Similarly, the revision of paragraph 1, Article 16.1 is recommended so as to include greater safeguards concerning the use of police stops and searches, in order to avoid arbitrary actions by the police. The existence of a **real and reasonable suspicion or prima facie evidence** of participation in a crime should be expressly required.<sup>11</sup>

Likewise, legislators are urged to ensure full respect for the principle of non-discrimination. Accordingly, and as it has been already recommended by international<sup>12</sup> and national<sup>13</sup> bodies, the law should include an **explicit prohibition of the use of ethnic profiling by the police** (where the determining factor for police activity relies on race, ethnicity, religion, national origin, colour or belief). The clause included in article 16. 1, paragraph 3 of Law 14/2015, which

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<sup>9</sup> See art. 10.2 and 11.2 of the European Convention on Human Rights and art. 19.3 and 21 of the International Covenant on Civil and Political Rights.

<sup>10</sup> Siracusa Principles, above mentioned, para. 33 and 34.

<sup>11</sup> Judgement of the European Court of Human Rights in the case *Goussinski v. Rusia*, Application no. 70276/01, May 19, 2004, para. 54.

<sup>12</sup> Report of the Special Rapporteur on racism, A/HRC/23/56/Add.2, June 6, 2013, para. 51-52.

<sup>13</sup> Annual Report of the Ombudsman for 2013, p. 225-226.

provides that “in the practice of police identity checks, the principles of proportionality, equal treatment and non-discrimination shall be strictly respected”, is insufficient to eliminate the risk of bias-based profiling.

**It is therefore recommended to include a definition and a clear prohibition of ethnic profiling in article 16.1, paragraph 3.**

## **2.- Right to freedom of assembly**

The right to freedom of assembly is an essential pillar in any democratic society. It is one of the ways citizens have to exercise their right to participate in public affairs. Therefore, States have a positive obligation to protect it. This positive obligation is twofold: (i) it requires the broad interpretation of the content of the right itself and, (ii) limitations on this right must be minimal and always rigorously justified and proportionate.

Law 4/2015 includes provisions which affect the right to freedom of peaceful assembly and which must be reviewed in accordance with international standards in this matter.

### *a) Spontaneous demonstrations and assemblies and the requirement of prior notification*

Several international bodies have stressed the fundamental nature of the presumption in favour of holding peaceful assemblies, insisting that it must be “clearly and explicitly established in law”.<sup>14</sup>

This favourable presumption, and the correlative duty of the State and its agents to protect should apply to those assemblies or demonstrations that have not complied with the requirement of prior notification.<sup>15</sup> With respect to spontaneous assemblies, the United Nations Special Rapporteur on the right to assembly recommends that they should explicitly be “recognized in law”.<sup>16</sup>

**It is therefore recommended that article 35.1 be repealed.**

### *b) Responsible parties*

The concept of “organizer” of an unnotified assembly or demonstration provided in Article 30.3 is too broad. To determine who is or are the organizer(s) or promoter(s) of an assembly or demonstration by taking for reference imprecise and ambiguous factors such as “the oral or written statements propagated therein, slogans, flags or other signs displayed or any other facts or circumstances” is totally unjustified and ungrounded. This excessively broad definition of the figure of organizer of an assembly may result in disproportionate and undue restrictions of the right to freedom of assembly, as it allows mere participants to be considered as organizers.

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<sup>14</sup> Guidelines on Freedom of Peaceful Assembly, OSCE-ODIHR and Venice Commission, second edition 2012, Guiding Principle 2.1.

<sup>15</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/20/27, May 21, 2012, para. 28.

<sup>16</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/20/27, May 21, 2012, para. 91.

The reform of this article proposed by the Basque Parliamentary Group EAJ-PNV (single article, section thirteen of the Draft Bill) shares the same defects, thus its adoption is not recommended.

**It is therefore recommended that article 30.3 should be repealed without the need to replace it with any alternative wording.**

It should be noted that, as the Special Rapporteur on the right to assembly points out in his recommendations to States: *“should the organizers fail to notify the authorities (...) it should not be subject to criminal sanctions, or administrative sanctions resulting in fines or imprisonment”*.<sup>17</sup>

The State has a positive obligation to actively protect peaceful assemblies. Thus, as recognized by both the Special Rapporteur on the right to assembly<sup>18</sup> and the Organization for Security and Cooperation in Europe in their Guidelines on Freedom of Peaceful Assembly<sup>19</sup>, organizers should not assume this obligation.

**It is therefore recommended that article 37.1 be repealed.**

*c) Other administrative infractions included in the law which imply an unjustified restriction of the right to freedom of peaceful assembly*

As stated above, in a democratic society, any limitation of a fundamental right must be justified, necessary and proportionate. The following provisions of Law 4/2015 do not comply with these standards, they constitute unlawful restrictions to the right to freedom of peaceful assembly and therefore should be removed.

**The repeal of Article 36.2 is recommended.**<sup>20</sup> This provision lacks any kind of legitimate justification. There is no reason that justifies a specific penalization of a conduct exclusively because it takes place in front of the Congress, Senate or autonomous assembly, or because it happens, specifically “on the occasion of an assembly or demonstration”. Indeed, the reference to the exercise of the fundamental right to freedom of assembly requires more rigour from the legislator in order to justify the need for this provision, to prevent undue limitations of the right. It should be noted that, given the symbolic value of parliaments and other public buildings, States should particularly protect the exercise of the right to assembly in front of or in the immediate vicinity of these buildings<sup>21</sup>.

**It is recommended that Article 36.4 be repealed.**<sup>22</sup> The wording of this

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<sup>17</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/20/27, May 21, 2012, para. 29.

<sup>18</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/20/27, May 21, 2012, para.33.

<sup>19</sup> Guidelines on Freedom of Peaceful Assembly, OSCE-ODIHR and Venice Commission, second edition of 2012, Guiding Principle 5.7.

<sup>20</sup> “Grave disruption of public security that occurs during gatherings or demonstrations in front of the headquarters of the Congress of Deputies, the Senate and the legislative assemblies of the autonomous communities, even if they are not in session, when it does not constitute a criminal offence”.

<sup>21</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly to the Human Rights Council, UN Doc. A/HRC/23/39, April 24, 2013, para. 66.

<sup>22</sup> “Acts of obstruction intended to prevent any authority, public employee or official corporation from legitimately exercising its functions, complying with or enforcing administrative or judicial agreements or decisions, provided that they occur outside the legally

provision is deficient, the expression “acts of obstruction” may cover a wide range of conducts; from negotiation, to mediation or a completely peaceful assembly. It is not clear what is the legal value it is intended to protect, but it is clear that its application can result in sanctions for perfectly peaceful and legitimate conducts in a democratic society. The alternative wording included in the Basque Parliamentary Group EAJ-PNV Draft Bill (single article, paragraph 22) shares the same defects, thus its adoption is not recommended.

**It is recommended that Article 37.3 be repealed.**<sup>23</sup> “Minor disturbances” during a demonstration, assembly or public event may in no case constitute sufficient justification for the limitation of the fundamental right to freedom of peaceful assembly. A minor disturbance does not pose a serious danger to people or property that can render the sanction proportionate.

**It is recommended that Article 37.7 be repealed.**<sup>24</sup> The term “occupation” is not defined, so it is not clear if the mere simultaneous and completely peaceful presence of several people is sufficient. No reason is given to indicate the dangers to people or property that the occupation of such places may pose; or if there are risks that could ground a legitimate objective for the provision. The reference to the “holder of another right” over any of the spaces listed (properties, houses, buildings, public space) is excessively vague for the purpose of determining conflicting interests.

The second paragraph of the section 7 deserves the same criticism (“occupation of the public space”). The wording is extremely deficient. This generic reference to “the law”, without further clarification, is insufficient to provide any legitimacy to the provision. On the contrary, it abounds in its lack of justification.

### **3.- Right to freedom of expression**

The following provisions of Law 4/2015 constitute unjustified, disproportionate and unnecessary restrictions on the right to freedom of expression in a democratic society. They should therefore be removed.

**It is recommended that the last paragraph of Article 16.1 be repealed.**<sup>25</sup> This paragraph is unnecessary and involves an unacceptable risk of arbitrariness. The sole fact of wearing a garment, even if it partially or completely conceals the face, is not, in the absence of other factors, a reason for police identity checks. Dress is a legitimate form of exercising freedom of expression.<sup>26</sup> Certainly, it cannot be interpreted as an indication of the commission of an offence, nor is it a valid reason

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established procedures and do not constitute a crime”.

<sup>23</sup> “Failure to comply with the restrictions to pedestrian circulation or the itinerary of a public event, assembly or demonstration, if minor disturbances are provoked”.

<sup>24</sup> “The occupation of any property, house or building, or presence in it, against the will of the owner, tenant or holder of another right over it, when they do not constitute a criminal offence. Likewise, the occupation of the public space in breach of the provisions of the Law or against a decision adopted by the competent authority to apply the Law. The occupation of the public space for unauthorised itinerant sale is also included”.

<sup>25</sup> “In these cases, officers may carry out the necessary searches on the public space or at the place where the request was made, including the identification of people whose faces may not be entirely visible due to the use of any type of garment or object that covers them, preventing or hindering identification, when necessary for the purposes indicated”.

<sup>26</sup> See Human Rights Committee, General Comment no. 34 to article 19 (freedom of expression) of the International Covenant on Civil and Political Rights, para. 11; UN Doc. CCPR/C/GC/34, September 12, 2011.

for preventive identity checks.

**It is recommended that Article 36.23 be repealed.**<sup>27</sup> This provision lacks any kind of justification. Sanctioning the taking and dissemination of images of public officials in the exercise of their functions constitutes a violation of the right to freedom of expression and information.

If the legislator's resolve is to protect the safety and honour of those who exercise public functions, this provision is unnecessary, since there are already sufficient legal instruments, both in criminal and civil law, to pursue these aims.<sup>28</sup>

**It is recommended that Article 37.4 be repealed.**<sup>29</sup> This provision is unnecessary and could lead to disproportionate restrictions of the right to freedom of expression. Any opinion, disagreement or expression of repulsion voiced by an individual may be subject to a fine. In a democratic society, the State and its agents must prove special tolerance towards criticism, even if it is expressed in insulting terms, as ruled by the European Court of Human Rights.<sup>30</sup>

#### **4.- Amount of the sanctions**

The amendment of Article 39 is recommended. The amounts of the sanctions in the current text are disproportionately high.

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<sup>27</sup> "Unauthorized use of images or personal or professional data of the authorities or law enforcement officers which may entail a danger for the personal or family safety of the officers, protected buildings or the success of an operation, with respect for the fundamental right to information".

<sup>28</sup> Article 8.2 of Organic Law 1/1982 of May 5, on the civil protection of honour, personal and family privacy and self-image, includes an exception which refers specifically to the taking, reproduction or publication of images of those who hold public offices or professions of notoriety or public exposure, taken during any public event or public space. In this respect, see also: Judgement of the Supreme Court 241/2003, March 14, 3<sup>rd</sup> legal basis and Constitutional Court Judgement 72/2007, April 16, 5<sup>th</sup> legal basis.

<sup>29</sup> "The lack of respect and consideration towards law enforcement officers while carrying out their duties, when these conducts do not constitute a criminal offence".

<sup>30</sup> Judgment of the European Court of Human Rights in the case *Thorgeir Thorgeirsson v. Iceland*, Application no. 13778/88, June 25, 1992; para. 66, in which the Court concluded that insults towards the police officers constituted a perfectly legitimate exercise of the right to freedom of expression.