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2015 SPANISH PUBLIC SECURITY ACT:

THE EXPANSION OF SECURITY SOCIETY TO GOVERNING PUBLIC ORDER

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Spain's Organic Act 4/2915, of 30 March, *on the Protection of Public Security* (hereinafter, OA 4/2015), more commonly known as the "Gag Law" (*Ley mordaza)* presents us with a new turn of the screw that endangers rights. This law in principle repeals the similarly named Organic Act 1/1992 (hereinafter, OA 1/1992). However, as the present work attempts to make clear, Act 4/2015 provides continuity with the 1992 Act. Although it might be more accurate to say that in fact the new Act is a significant step forward, expanding regulatory mechanisms for controlling security with a focus on governing "public order". Consequently, the problems detected in analyses of the 1992 *Public Security Act* (Calvo-García, 1995) have been magnified as a consequence of an even more authoritarian and repressive conception which expands the spaces for preventive intervention and awakens echoes of the extinct *Law of Public Order* (Spanish: *Ley de Orden Público)* of 1959 from the Francoist Dictatorship.

The twenty-six years of application of OA 1/1992 and the three years of implementation of OA 4/2015 provide a good opportunity to take stock of the points of friction between these Laws with rights and freedoms and assess whether, as already noted, we are indeed looking at a turn of the screw that threatens rights.

The first section contains a brief reference to the type of social control in new security legislation, a model which in all other aspects is not new and was anticipated in the reform promoted in 1992 by the Socialist Party in government in Spain at that time. Then follows a summary of the main changes promoted by the 2015 reform and some initial considerations on its scope in the light of initial data on application of the new law. The third section focuses on a specific issue, crucial from the perspective of protecting guarantees and freedoms in the *security society*: the problems posed by the discretionary nature of the interventions contemplated in OA 4/2015. And finally, in conclusion, some caveats will be proposed and the need to put limits on authoritarian tendencies restrictive of rights linked to the expansion of preventive control in general and in particular, the consolidated trend towards its *administrativisation.*

1. Security policies and changes in Law: Organic Act 1/1992

Organic Act 1/1992, *on the Protection of Public Security*, was at the time part of a generalised control strategy designed to facilitate the effectiveness of police action increasing

the areas of direct intervention and police discretion. First came an increased police presence on the streets, then the Immigration Act and finally OA 1/1992.

Furthermore, this trend was very much in tune with the parallel crisis of *guaranteeism* during the 1980s. This change of direction was based on a radical change in the basis for lawfulness, where the "consensus" shaped by the party system and the mass media displaced the rights and guarantees of the rule of law. In Spain, the risk associated with terrorism and migratory phenomena promoted in gradual stages the production of polemic legislation that prioritised repressive and preventive aspects generating significant tensions with individual rights and freedoms.

In its preamble, OA 1/1992 was presented as "*the"* instrument required for the full realisation of public freedoms. However, from the very start it was widely criticised by legal experts, political organisations and non-governmental organizations because it represented a serious attack on civil liberties recognised in the Spanish Constitution and International Agreements on Human Rights signed by the Spanish State. This controversy opened a wide panorama of issues and appeals questioning the constitutionality of the Law. The subsequent ruling of the Constitutional Court 341/1993, of 18 November, confirmed the doubts over whether some articles in the 1992 *Public Security Act* complied with the Constitution, annulling one and specifying the margins of intervention in other cases. The court's decision did not, however, declare the Act unconstitutional, nor did it substantially affect the model it was promoting.

OA 1/1992 was thus part of a significant transformation of the traditional type of social control. This Act decriminalised certain spheres of social control by *adminstrativising* them and making them more flexible from the perspective of intervention in order to facilitate police effectiveness (Calvo-García 1995, 205: 93ss.). From that perspective, the 1992 *Public Security Act* extended administrative leeway for the police and government transferring social control mechanisms from the judicial sphere to sphere of public authorities. That does not mean that police action was left completely outside the opportune judicial control; however, in seeking greater flexibility to execute preventive security measures, some police action was removed from traditional crime control mechanisms, to escape the protective rigidity of criminal law principles and the institutional responsibility of some judges determined to defend them[1].

In the same line, using the political will to improve the effectiveness of the pursuit of crime (stops, raids, retentions, etc.) as sole justification, OA 1/1992 introduced significant changes to the traditional type of control by configuring stand-alone spaces for discretionary intervention by security bodies and forces --often based on significant restrictions of personal freedom, thereby devaluing or annulling the guarantees offered by the traditional system. Consequently, increasingly broader areas of security policies were *de-judicialised* and more

flexible preventive action spaces were opened up which had or could have the immediate consequence of limiting freedoms and rights.

OA 1/1992, therefore, represents a clear example of the use of law to implement preventive security policies with all the consequences that entails. To start with it has the characteristics of regulatory law as it is designed to prevent risks. Transferring the mechanisms of regulatory law to the sphere of social control has an initial obvious consequence, "administrativisation", but it also means greater penetration of the political system in the legal sphere and a considerable increase in flexibility in the design and execution of the control mechanisms thus arranged (Calvo-García 2005: 93ss.). This aspect is clearly noticeable in the increased calculated ambiguity present in the formulation of many of its provisions.

Normative resources were designed to open broad spaces for preventive police intervention that escape preliminary judicial control and will be particularly difficult to control a posteriori, precisely because of the lack of practical rules of conduct. The Act openly resorts to the use of vague concepts and considerable margins of discretion: "flagrant", "informed understanding", "record", "social alarm", "essential time" "necessary", "unlawful possession that does not constitute a criminal offence", etc.

Effectiveness, according to the above, seems to be clearly more important than individual and collective guarantees which just a few years earlier had been emphatically established in the 1978 Constitution upon the return to democracy in Spain, The limits of law became blurred as a consequence of the calculated ambiguity used to formulate the normative spaces that the flexibility of the new safety policies requires. In addition, the very orientation of the law towards pragmatic purposes determined the consequent evaluation of effectiveness according to results and opened it up to the impact of political factors and other discretionary criteria while also enhancing the authority of the expert, the police in this case, all within a discretionary framework for intervention. Thus, the tension protection of rights-effectiveness; effectiveness-guarantees; extending leeway for administrative machinery-principle of legality, among others, clearly inclined towards the loss of guarantees and the endangerment of basic civil rights.

The operational justification and legitimisation of these processes was based on the perception of social risks that facilitated the deployment of more "effective" security policies. Towards the end of the last century, terrorism, xenophobia, the rise in crime, drugs and other phenomena played a significant role in the construction of "risks" designed to legitimate the increase in State intervention[2]. The generalised, unpredictable social risk linked to "citizen insecurity" explained the emergence of a consensus favourable to measures that represent serious infringements of individual rights and freedoms. Furthermore, broad sectors of society not only accepted, but demanded state intervention in this sphere[3].

The "citizen insecurity" risk had generated the necessary social consensus for OA 1/1992 to be accepted by broad sectors of the population. However, the tensions it caused when it

came into force opened up critical debate and a wide panorama of issues and appeals that called into question the Law's constitutionality. These appeals concluded in Spain's Constitutional Court ruling 341/1993, of 18 November, which declared the unconstitutionality and consequent nullity of some articles and restricted the interpretation of another. But even so, this decision ratified the possibility of indiscriminate raids and controls, the administrative repression of the consumption of drugs, investigating or making confidential data available without judicial authorisation and under regulatory rules, among others. In any event Constitutional Court ruling 341/1993 was a clear warning on the dangers of OA 1/1992 for rights and freedoms, by restricting people's freedom and safety to facilitate effective police action, putting all citizens under suspicion and increasing police discretion. It even voided some of the law's provisions and/or restricted its interpretation

2.- 2015 Spanish Public Security Act

Organic Act 4/2015, of 30 March, *on the Protection of Public Security* underlines the currency of the model analysed in the previous section and its new features seem designed to continue along the path of restricting freedoms already begun in 1992. This new Act, which was accompanied by a significant reform of the *Criminal Code* and the *Act on Criminal Procedure*, was enacted by a fast track procedure due to the absolute majority of the governing conservative party and was challenged by all the parties of the opposition, numerous social movements, NGOs and national and international human rights bodies.

In his speech announcing the drafting of the bill to reform the Act, the Interior Minister mentioned that 20 years had elapsed since it had been enacted and so it needed revising, but there was more than just that reason for the change. This time there was no need to invoke social demand as happened in 1992, citizen safety was not one of the pressing problems for Spaniards in the situation when the reform was proposed[4]. What were the reasons for the change then? Some clues as to the *real* reasons for the reform can be found in the Interior Minister's first announcement in the Spanish parliament of the desire to reform the *Public Security Law*[5]. The minister's speech attempted to provide evidence of clear social alarm over "public disorder" linked to "urban guerrilla initiatives, violence and vandalism" which occurred in the exercise of the right to assembly and protest and whose tone was generating a serious social risk –or, *at least*, great concern for the conservative Government in Spain. In addition, there was the concern that the country was facing "a spiral of violence that begins with antisocial behaviours which are normally the gateway to crime"[6]. Consequently, the intention was to deal with those problems on the basis of the *Criminal Code* which would also be reformed with an authoritarian bent and a new *Organic Act on the Protection of Public Security*. Obviously, from the outset this approach revealed the clearly repressive disposition behind these reforms and their content.

According to the above, OA 4/2015 deepens regulatory control of "public order"[7], restricts the rights of protest and assembly, criminalises social protest in advance and acts extensively against the freedom of expression. Although it also insists on aspects related to social control like the consumption of drugs and maintains the preventive crime control mechanisms already contemplated in OA 1/1992.

In terms of controlling citizen safety linked to "public order", OA 4/2015 characterises "very serious offences " (art. 36), punishable with fines of 30,001 to 600,000 euros; "serious offences" (art. 37), punishable with fines of 601 to 30,000 euros, such as, for example, breach of the peace which is not a criminal offence in public, sports, cultural and solemn events and mass gatherings; the unlawful consumption or possession of narcotic, psychotropic substances or drugs in public establishments or on public transport, even if there is no intention to traffic the substances. And "minor offences" (Art. 37), punishable with fines up to 600 euros including for example group drinking of alcohol in public places not authorised for the consumption of alcohol or on public transport and in public establishments when it seriously disturbs citizens' peace (Art. 37.17).

The 1992 *Public Security Act* had already introduced regulatory controls to "protect the holding of meetings or protests and public events" (art. 16.1 OA 1/1992) and even gave authorisation to dissolve those events (Art. 16.2 OA 1/1992). In the event of alterations to citizen safety with weapons or other means of violent action, Security Forces could take action to "dissolve the meeting or demonstration and remove vehicles and obstacles without the need for advance warning" (Art. 17.2 OA 1/1992). Penalties were also established for breaches of regulations governing the right to assembly, provided it is not a criminal offence (Art. 23 OA 1/1992).

These provisions were apparently insufficient in 2013 from the conservative Government's perspective and it promoted reform of the 1992 Act with a new turn of the screw to control the rights to assembly and demonstration to prevent protest. Which suggests that we are faced with a clear expansion of "security" control; that is, an administrative control and without the guarantees and limits of criminal control as a means of ensuring "public order".

In relation to the above, in addition to the penalties for very serious and serious offences related to the right of assembly and demonstration, remarkably, on the basis of OA 4/2015 Art. 37.1 currently in force, 131 penalties were imposed in 2016 for a total of 19,940 euros for minor offences consisting in holding meetings or demonstrations in public thoroughfares in breach of formal aspects of the law regulating the right to assembly[8]. In this type of cases, it is evident that what is important is not citizen safety, but control of "public order" and compliance with formal requirements, something that can be identified as pre-emptive control mechanisms.

There have also been a large number of police stops under OA 4/2015[9]. These stops, although penalties are not usually applied, obviously generate concern and contribute to what

seems to be the Law's main objective: dissuading those who want to exercise their rights of assembly and demonstration. In addition, in relation to the stops, there is wide recourse (over 12,000 cases[10]) to penalties under Art. 36.6 OA 4/2015, which establishes as a serious offence "disobedience or resistance to public authorities or their agents in the exercise of their duties, when they do not constitute a criminal offence, as well as refusal to identify oneself at the request of the public authority or its agents or providing false or inaccurate data in stop proceedings". In this regard, Amnesty International in a 2017 *Report*, highlights that "some punishments have been imposed in the context of demonstrations or acts of protest in which there has been no type of violent incident or altercation, or in the exercise of the freedom of expression or to exercise the right to information"[11]

The persecution of protest and the authoritarianism of OA 4/2015 have also had a notable impact in other areas. In 2016, 19,497 penalties were imposed[12] under Art. 37.4 which fines "lack of respect or consideration towards a member of the Security Forces and Bodies in the exercise of their duties to protect safety", provided obviously that they are not criminal offences. This provision opens up a wide margin of discretion and has given rise to much abuse. But there is even more. If there is one provision that clearly expresses the potential functions of OA 4/2015 it is Art. 36.4. This article establishes that serious offences are "acts of obstruction intended to prevent any authority, public employee or official corporation the legitimate exercise of their duties, compliance or execution of administrative or court agreements or decisions". What is this provision intended to achieve? The striking thing initially is its ambiguity. A calculated ambiguity that seems designed, among other purposes, to discourage actions that have attempted to stop or delay evictions. In fact the Platforms of those affected by Mortgages (Spanish abbreviation PAH) are one of the collectives most affected by the penalties based on this provision[13]. More specifically, in 2016 many of the 355 penalties applied under the article were imposed on this collective.

In parallel to the repressive interventions against the freedom to demonstrate and assemble there is genuine persecution of the freedoms of expression and information. In fact, the Platform for the Defence of Freedom of Information (PDLI, Spanish acronym) has denounced the fact that 2017 was a very bad year for freedom of expression: "It is difficult to find in Spain's most recent democratic period a precedent similar to the degree of repression against the freedom of expression that we have achieved this year: people have been sent to prison for mere songs or a tweet."[14].

In addition the police have been repeatedly fining journalists. Under OA 4/2015 many journalists are being systematically required to identify themselves when covering information, they have problems with graphic documents showing law enforcement officers (Art. 36.23) and they also directly suffer application of the rule on disobedience or resisting authority (Art. 36.6).

Numerous cases use and abuse the Criminal Code and the Public Security Act to restrict the freedoms of expression and information and they have been widely condemned by organisations defending the freedom of expression like the Platform for the Defence of Freedom of Information (Spanish acronym: PDLI). Consequently, as a result of the complaints presented by PDLI, the Spanish Ombudsman considers that the penalties in these cases do not comply with constitutional requirements. The Ombudsman's *Suggestions* requesting the *Revocation of the decision to penalise journalists in the exercise of their profession* emphasises that "limits imposed on the exercise of basic rights must be established, interpreted and applied restrictively and must not be more intense than is required to preserve other constitutionally protected objects and rights. The limitation must be the essential minimum" and must always be reasoned and proportional Constitutional Court Rulings 151/1997; 159/1986[15].

International organisations have also denounced the fact that joint application of the *Criminal Code* and *Public Security Act* 4/2015 place enormous restrictions on the freedom of expression and access to information. The Human Rights Committee in its *Concluding observations on the sixth periodic report from Spain in 2015* stated emphatically: "The Committee is concerned about the deterrent effect that the recent adoption of the *Public Security Act* and subsequent amendments to the *Criminal Code* might have on the freedom of expression, association and peaceful assembly. In particular the Committee is concerned about the excessive use under the act of civil penalties that preclude the application of certain judicial guarantees set out in the *Covenant;* the use of vague and ambiguous terms in some provisions which could give rise to wide variations in the application of the Act; and the prohibition on the use of the personal or professional data or images of authorities or members of law enforcement agencies."[16]

Civil society organisations have also highlighted this issue. The International Press Institute, a global organisation promoting press freedom, in a *Report* published in 2015 concludes that the reforms of the *Public Security Act, Criminal Code* and *Criminal Procedure Act* seriously affect the freedom of expression and the press[17].

We are in view of the above faced with a repressive Act based on extremely flexible legal mechanisms which in addition seek a deterrent effect contrary to the Spanish Constitutional Court's clear prohibition of any "deterrent or dissuasive effect on the exercise of basic rights involved in the penalised behaviour" (STC 136/1999, of 20 July). The discretionary nature of its regulations, the presumption of the truthfulness of the testimonies of law enforcement officers, the complexity of the civil penalty procedure and court fees make it very difficult to take a stand against the repressive intervention of this Act as an instrument for maintaining "public order". A concept of public order which, in addition, is extraordinarily broad. It even extends to protecting social peace and morality. In its definition of the Law's objective, Art. 1.2 establishes that protection of public security involves maintaining "social peace". It seems

as though there is an attempt to hide the curtailment of freedom of expression and peaceful assembly under the vague umbrella of protecting "social peace".

This repressive attitude focused on maintaining public order and "peace" in the streets, ends up upholding public morals. Clearly exemplified in the persecution of prostitution under OA 4/2015. In principle the Act is worded in such a way that it appears to focus on people soliciting the services of sex workers: "Solicitation or acceptance by the person requesting paid sexual services in public thoroughfares around places intended for use by minors, such as schools, parks and leisure areas accessible to minors or if said conduct, because of where they occur may generate a risk to road safety" (Art. 36.11.1) But the application of the Act indicates otherwise. Most of the penalties imposed under this Act have fallen on sex workers so OA 4/2015 has also become an instrument for repressing prostitution (Boza-Moreno 2017). In fact, on the basis of the second paragraph in this provision, penalties for sex workers have multiplied: "Law enforcement officers shall ask people offering these services to stop doing so in said places, notifying them that breach of said requirement could constitute an offence under paragraph 6 of this article [disobedience to authority]" (Art. 36.11.2)

In other words, the Act seems to suggest that in principle the only conduct likely to be penalised would be that of people requesting sexual services, that is, the customers. Consequently, sex workers would be not be penalised at all. However, law enforcement officers have found a way of penalising sex workers through disobedient behaviour. Thus, if the person offering sexual services on the public highway continues to do so, despite police requests and here the law enforcement officers' interpretations and appreciations of facts prevail (Art. 52 OA 4/2015) they may be punished with a fine of up to 30,000 euros for committing the offence of disobedience. And this, in a completely discretionary context, may give rise to cases of arbitrariness and abuse of power by law enforcement officers or the selective persecution of prostitution.

The above examples and analyses, while not intended to be exhaustive, clearly show the potential functions of Public Security Legislation in Spain. In the analysis in the previous section we detected risks for freedom and guarantees stemming from the enactment of Organic Act 1/1992 on the Protection of Public Security. More specifically, we concluded that this law introduced "significant changes in the model of social control by shaping an 'extraordinary' repressive space of a preventive and administrativised-police nature" (Calvo García 1995). We suggested that many of those risks were related to the increased flexibility for preventive interventions introduced by the Law. Now, with the 2015 reform , the problems may be magnified with its new, more authoritarian and broader conception as the law now unequivocally focuses also on controlling public order.

Having established the above, we can conclude there are grounds for concern over implementation of the current OA 4/2015. This concern increases exponentially when taking into account the aspects framing the reform of this Law. From the tone of the speeches and

what we are discovering about the implementation of the Act, we can infer that we are looking at a step forward in all senses: both as regards security control and the extension of these control mechanisms to control *public order* and, in particular, meetings, demonstrations, hoods and flags at sports events, among others.

One of the objectives of the 1992 *Public Security Act* was to provide legal coverage for practices that were already taking place and which clashed with judicial guarantees or were difficult to justify such as the case of police "retention" without the intervention of judicial bodies[18]. The main objective of the new 2015 *Public Security Act* seems to be that of legitimising already existing practices to control and repress assemblies and social protest by providing a legal patina to that type of intervention, which can only be done by extending the increasingly flexible margins for controlling protest and the freedoms of expression and access to information.

In this regard, the presumption that a mere varnish of legality justifies any type of police intervention must be denounced. As David Dyzenhaus points out (2013: 93ss) a legitimate intervention must not only comply with the obligatory formalities, it must also be in accordance with substantive and ethical and political conditions. Something which, in many cases, the application of Spanish OA 4/2015 does not appear to do.

3. "Security society" and police discretion

In the last few decades of the 20th Century a deep crisis in the criminal system for social control became apparent and change were encouraged both within it and in what we could call the edges. The crisis of a model based on the desideratum of special prevention and social intervention can be linked to the rise in neoliberalism. Thus a type of post-keynesian control was being ushered in (O'Malley and Palmer 1996). But not only that. We are facing a new model based on the normalisation of control, within a culture where crime is assumed as "normal" (Garland 2001: 128). Pre-emptive intervention has also been highlighted, linked to risk management and actuarial prevention policies (O'Malley 1992; Feely and Simon 1992; Ericson and Haggerty 1998), as characteristic of this new model.

These changes have been studied, above all, from changes in the criminal system; but perhaps they can be better appreciated from the edges. Thus Lucia Zedner (2004) speaks of the transit from a control system based on criminal justice towards a "Security Society". The system that emerges is designed to control the "pre-offence" rather than being organised around the "post-offence" (Zedner 2004: 283ss., 296ss.) like the traditional criminal system.

Currently, the effectiveness of security policies is not only linked to expanding and hardening traditional areas of control, it is also said to require positive and negative preventive control mechanisms, that are wider ranging and more sophisticated. That requires a more flexible organisation, able to adapt rapidly to changing situations and mould itself to the

pragmatic imperatives of new preventive control strategies. In order to guarantee security more effectively and above all to prevent risks from materialising, there is a commitment to preventive intervention mechanisms that act in pre-emptively. In other words, according to current trends, the understanding is that if security policies are to be fully effective, they must implement mechanisms and intervention measures that permit preventive action against situations and behaviours that generate "risks" for social order and public security.

The mechanisms and forms of preventive control oriented at inspecting and controlling activities relevant to security are not new[19], and nor is the fact that they are generally associated with the use of the normative and bureaucratic instruments characteristic of regulatory law. In Spain, we identified this transit with the 1992 *Public Security Act* which significantly promoted the "dejudicalisation" of certain areas of criminal control (Calvo-García 1995). Consequently, raids, frisking, stops, detentions and other transitory deprivations of liberty were open to interventions directly based on criteria of timeliness and experience of State law enforcement agencies. Entry into private homes was even considered under certain circumstances to be open to mere police criterion - the famous "kick at the door" article declared unconstitutional by Spain's Constitutional Court in ruling 341/1993. In short, the effectiveness of the new regulatory law on social control was linked to broader and more flexible mechanisms able to quickly adapt to pragmatic imperatives and the intervention and protection strategies characteristic of the "Security Society" (Braithwaite 2000).

In this new security control model, the police take on a clearly leading role in the frame of "administrativised intervention" while jurisdiction becomes a secondary consideration. We are looking at a change of focus that involves new risk management practices based on preventive and more sophisticated procedures for the purposes of surveillance and repressive control. This change involves yet more leeway and flexibility for police intervention, which, as already noted, is achieved through the calculated ambiguity of normative instruments and the discretionary nature of interventions [20].

Repressive spaces of an "extraordinary" nature and calculated ambiguity do not happen by chance, they in fact the objective sought to legitimate discretionary police action with the immediate consequence of limiting people's rights and freedoms. For that purpose spaces of power and force are opened that can be used flexibly -with expert criteria, it is assumed, by the State law enforcement agencies following the directives of respective governments. Consideration of the police as the "expert" in carrying out security policies will confer it with a broad margin for action and indirectly, through a de facto route, institutional respect, when it comes to administering what is "reasonable" and what is not.

The transfer of this model to the control of public order transfers that leeway and flexibility of police intervention to repression of public protest and control over the freedom of expression and information. The restriction of rights gains shape in this context, not by considering the police as expert, but by giving them incontestable authority. OA 4/2015,

Article 52 emphatically establishes the probative value of law enforcement officers' statements which "shall constitute sufficient basis for adopting the appropriate decision"[21]. That is, administrative actions are presumed legitimate and the competent authorities on matters of security and control of public order are granted a privileged position allocating their actions a presumption of certainty which obviously clashes against the limits that any restriction of rights should have and favours the scanty justification of the proportionality and constitutionality of the actions limiting the rights at stake[22].

The problems of police discretion become more acute when, as a consequence expanding "security" control to control public order, the leeway for discretionary and authoritarian action is transferred to areas that directly affect people's freedom to move about, apart from crime control, and the freedoms of peaceful assembly and expression. As shown above, selective interventions when considerable leeway is given to the exercise of police control can give rise to abuse and discrimination.

4. Conclusions

The panorama created after the enactment of OA 4/2015 is deeply restrictive of rights. All the opposition parties, numerous social movements and NGOs and national and international human rights bodies have challenged this Act. In fact, various Appeals of unconstitutionality[23] are still awaiting a decision and various draft laws[24] in progress will probably be unblocked with the change in government as a result of the no confidence vote in June 2018 from the conservative government to a socialist government.

Everything seems to indicate that the situation will loosen up and there will be significant changes in the Act currently in force while these lines are being written. In that regard, in view of this analysis, one thing must be clear. The solution is not to return to OA 1/1992. The mere repeal of Organic Act 4/2015 would resurrect Organic Act 1/1992 and that would not be the most appropriate solution either.

Of course, there is no room to for discussion over the legitimacy in a democratic society of certain restrictions of rights to ensure security in exceptional situations, clearly defined by the appropriate legal mechanisms. But those restrictions must always occur within the constitutional framework and substantively respecting civil liberties. It is also evident that certain activities have to be regulated through preventive mechanisms of positive control. There must, however, always be a distinction between what should be an intervention to protect the safety and rights of people who might be affected by them and the rights of the people participating in those activities. In any event, extreme caution must be exercised to avoid the unlawful use of those regulatory mechanisms of a preventive nature designed to protect security to restrict rights and freedoms. Our rapid review of the application of OA 4/2015 suggests that those limits and cautions are not being respected. Perhaps because

beyond the rhetoric what is being protected are not individual rights and freedoms but rather mere control of "public order" which could only be justified in terms of "governability" and control over protest.

In other words, obviously there is room for preventive intervention mechanisms designed to protect security; provided the limits are clear and there is awareness that preventive intervention, especially if it has been dejudicialised, may endanger rights and freedoms and in particular, devalue the principle of the presumption of innocence and other civil guarantees and rights[25]. The broad margins of intervention which these mechanisms may facilitate generate such wide spaces for discretionary action that they may give rise to discriminatory or arbitrary action. That is why extreme caution must be exercised when drafting and applying that regulation.

In relation to the last issues mentioned, a two-fold concern arises. First, over what the step forward moving from protecting public security to controlling public order involves. Secondly, because that step would incorporate extraordinarily flexible possibilities for restrictive intervention in civil rights, which multiplies the risk of arbitrary action designed to dissuade citizens. It must be remembered that we are looking at the transfer of purely administrative mechanisms which in principle can be used to cases linked to the avoidance of a crime or an offence or recognising and pursuing an offender to penalise them with the proportionality and due guarantees (Constitutional Court ruling 341/1993, ftos. jcos. 5º y 6º)-- *to issues related to demonstrations, hoods or drinking in unauthorised places.*

Protecting public security is connected to social defence requirements and even then must be justified on the basis of constitutionally defined legal limits. Now, by extending "security" control mechanisms to "public order " issues, the demand for these preventive interventions to be limited to actions designed to defend society may end up being diluted. Furthermore, it must be remembered we are talking about preventive interventions that are pre-emptive, based on a diffuse appreciation of risks and "administrativised". Obviously the consequence of all that is the ineffectiveness of the principle of the presumption of innocence and associated guarantees associated which are diluted in the administrative mechanisms of security control If, in addition, the general principle for construction, handed down by the Constitutional Court, limiting police interventions that restrict freedom of movement to prevention of a crime or offence or pursuit of an offender, always proportionally and with the due guarantees the challenge arises when public security protection mechanisms are used to protect "public order".

The issue of the limits, in view of the above, becomes a core element. In particular, it is absolutely vital to have a limit equivalent to the presumption of innocence. In the context of a wider speech, Lucía Zedner (2009: 171) made an interesting proposal. It consists in reformulating the presumption of innocence principle for preventive it would be meaningless by definition, replacing it with "the presumption of acting in the interventions where ace of a

serious threat" and obviously a threat that was unlawful. That principle has subsequently been reformulated as the "right to the presumption of being free from detrimental or dangerous intent" (Zedner 2012: 221Ss.), also considering criminal pre-emptive prevention. We believe it is essential to transfer this principle to the problem posed by Spain's *Public Security Laws*. In any event, the need to organise clear limits to defend rights and freedoms is fundamental to balance the restrictions on rights and freedoms that all preventive control mechanisms entail, reaching beyond the debate on the justification or need for them.

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NOTES:

[1] See, in this regard, the words of Interior Minister, José Luis Corcuera, who promoted the Act, in the parliamentary debate on the Public Security Act, *Diario de Sesiones del Congreso de los Diputados*, IVª Legislatura, nº 137 (10/XII/1991), p. 6607.

[2] Around 1992, statistics and the mass media generated a collective sensation of insecurity linked to delinquency, drugs and immigration.

[3] According to a macro-survey --27,000 interviewees answering a questionnaire--conducted by CIS (Spain's sociological research centre) in late 1992 and with a view to the imminent general elections, drugs and delinquency were the problems that most concerned Spaniards after unemployment and the economic crisis respectively. In the same survey, 57% of interviewees considered that citizen safety has got worse", whereas only 16% considered it had improved. This opinion substantially coincides with the figures provided at that moment in the bleak statistics on rising crime in Spain (Calvo-García 1995). These data highlight the "construction of a sensation of risk" which would legitimate advances in State intervention on social control even at the cost of seriously limiting freedom and citizens' legal certainty.

[4] At that time, 2013-2015, only 2.8% of people in Spain considered citizen security to be a serious issue. See CIS. *Three major problems currently in Spain.* En: http://www.cis.es/cis/export/sites/default/-Archivos/Indicadores/documentos_html/TresProblemas.html

[5] These words from the Minister were in answer to the question formulated by Ms María Ángeles Esteller Ruedas, member of the Popular Party (conservative) Parliamentary Group.: What measures does the Government intend to take to preserve citizen safety against the acts of vandalism that are causing so much concern in Spanish society?" *Diario de Sesiones del Congreso de los Diputados. Pleno y Diputación Permanente*, Año 2012 X Legislatura Núm. 25, p. 14.

[6] That tone of alarm can already be appreciated in the tone of the question from his colleague in the party, *ibídem*, p. 13.

[7] A terminology resorted to initially despite the clear echoes of *francoism* inevitably associated with its use in Spain. In fact, the first draft bill expressly mentioned "public order" in the preamble, although it disappeared only to return again in the Bill presented to the Parliament for approval. The use of punishment under administrative law to ensure "public order" was already present in the 1992 *Public Security Act* and had already been criticised by experts in administrative law (Barcelona Llop 1993).

[8] Ministry of the Interior Statistical yearbook, *Anuario estadístico del Ministerio del Interior 2016*, Bilbao, 2017 [http://www.interior.gob.es/web/archivos-y-documentacion/anuario-estadistico-de-2016], p. 489.

[9] Amnistía Internacional in its report *España: activistas sociales y el derecho a la información, en el punto de mira. Análisis sobre la Ley de Protección de Seguridad Ciudadana,* (2017) [https://www.es.amnesty.org/] p. 6, quotes Sara López, a legal advisor at Legal Sol, "mass stops carried out by the police during demonstrations or concentrations, even if they do not end in fines, serve to demobilise normal, everyday people who are afraid of being fined". In addition "the intrinsic difficulty of the administrative penalty procedure, the presumption of truthfulness enjoyed by the police in this type of proceedings (some people told Amnesty International that even lawyers told them there was little chance of success if "there are no witnesses"), the added costs of legal assistance from counsel and court representative to appeal against the fine, the payment of court fees, in addition to losing the reduction in the penalty amount if it is not paid during the voluntary period, mean that in the end people decide to pay the fine, even if it is a penalty on the legitimate exercise of human rights (p. 6).

[10] Ministry of the Interior, Statistical Yearbook *Anuario estadístico del Ministerio del Interior 2016*, Bilbao, 2017 [http://www.interior.gob.es/web/archivos-y-documentacion/anuario-estadistico-de-2016], p. 490.

[11] See Amnistía Internacional, *España: activistas sociales*, cit., p. 5.

[12] Ministery of the Interior, Statistical yearbook, *Anuario estadístico del Ministerio del Interior 2016*, Bilbao, 2017 [http://www.interior.gob.es/web/archivos-y-documentacion/anuario-estadistico-de-2016], p. 490.

[13] Ibídem, p. 10. The report quotes Celia, from the PAH in Valencia: "We tried to go to the closing meeting of Rajoy's campaign. We were with our children. It is true that at some point we wanted to unfold a banner demanding the right to housing, but we weren't wearing any shirts or anything to identify ourselves. As we tried to approach, the police came towards us and intercepted us long before we reached the place where the meeting was being held. They told us we could not go in because they knew we were going to cause a disturbance and they identified all of us. We were detained in a car park, they looked through our bags, backpacks and everything we had with us. I asked them to let me at least take my purse and keys. They confiscated everything and some people had to wait until the end of the meeting to get back their things. Other people like me had to go to the police station to pick them up days later".

[14] See Plataforma en Defensa de la Libertad de Información (PDLI): http://libertadinformacion.cc/2017-el-ano-de-los-delitos-de-opinion/.

[15] Suggestion of 23/10/2017 to the Government Delegation in the Community of Madrid [https://www.defensordelpueblo.es/resoluciones/aplicacion-de-la-ley-organica-de-seguridad-ciudadana-2/].

[16] UN-Comité de Derechos Humanos, *Observaciones finales sobre el sexto informe periódico de España* [CCPR/C/ESP/CO/6], 2015, pfo. 25. Earlier, the experts Maina Kiai, Special Rapporteur on the rights to peaceful assembly and association; David Kaye, *Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression*; Ben Emmerson, Special *Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terror*ism; and Michel Forst, *Special Rapporteur on the situation of human rights defenders*, had drawn attention to the fact that the reforms of the *Public Security Act* and the *Criminal Code* "unnecessarily and disproportionately restrict basic freedoms like the collective exercise of the right to freedom of opinion and expression in Spain". UN: "Two legal reform projects undermine the rights of assembly and expression in Spain". See http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597&LangID=S.

[17] Referring to the *Public Security Act*, in particular they highlight two especially serious provisions in OA 4/2015: the "unauthorised use of personal images or data" and "lack of respect and consideration towards a member of law enforcement agencies" Vid. International Press Institute (IPI), *España: La libertad de prensa en un momento de cambio Informe de la misión internacional de alto nivel sobre la libertad de prensa en España de junio de 2015* [https://ipi.media/espana-la-libertad-de-prensa-en-un-momento-de-cambio/].- This Report presents the findings and conclusions of a high level international mission in Spain conducted by the International Press Institute (IPI) in June 2015. The mission's objective was determined by concerns over freedom of the press and of expression as a result of the legislative changes taking place in Spain that year: the *Public Security Act* and the *Criminal Code*.

[18] An issue that is still present (Martín Ríos 2018)

[19] Some, like the control of weapons and explosives or accommodation, commercial access to telephone and telematic services, security locks and others can even be considered "traditional". Others are newer, like financial regulations, establishing certain measures to prevent money laundering, and the developing regulatory provisions, or the rules on the manufacture, distribution, prescription and dispensing of psychotropic preparations. These cases are known as "financial regulation" in the strict sense, with the only exception that positive and negative control over its implementation is linked in this case to police bureaucracies previously furnished with the experts required to implement this type of rule, which include highly specialised scientific and technical or economic know-how.

[20] The growing areas of discretion in new security policies means that we are facing something that is more than just a mere hermeneutic or scientific and legal problem (Lacey 1992; Calvo García 2005). Police discretion is not an invention of public security legislation. It forms part of the police culture (Cockcroft 2013, 47-ss; Archbold 2013, 402-ss.) and has been highlighted as one of the main characteristics of police intervention. Since the seminal works by Davis (1975) and Williams (1984) investigations into police discretion have elaborated the theory and began to point out that police discretion even if comprehensive and technical in nature could give rise to selective or unauthorised interventions.

[21] Art. 52 OA 4/2015: "In the penalty procedures instituted on matters within the scope of this Act, reports, witness statements and documents formulated by law enforcement officers in the exercise of their duties who were present at the events, upon ratification in the case of having been denied by the defendants will constitute sufficient basis to adopt the appropriate decision, unless there is proof to the contrary, without prejudice to those who must contribute all available probative elements available to the case." The prevalence of "informations (sic) contributed by law enforcement officers" was already established in OA 1/1992 Art. 37. Consequently, it was established that these "informations" [...]"will constitute sufficient basis for adopting the appropriate decision, unless proved otherwise". Which no longer only concerns their nature as experts, but also their authority.

[22] See *supra* the reference to Ombudsman's Suggestion of 23/10/2017 to the Government Delegation in the Community of Madrid [https://www.defensordelpueblo.es/resoluciones/aplicacion-de-la-ley-organica-de-seguridad-ciudadana-2/].

[23] In that regard two Appeals of unconstitutionality have been presented. The first promoted by more than fifty members of Socialist Parliamentary Groups, IU, ICV-EUIA, CHA, Izquierda Plural, UPyD and the Parliamentary Mixed Group (Spain's Official Gazette-BOE no. 143, of 16 June 2015, p. 50083); and the second, promoted by the parliament of Catalonia (Spain's Official Gazette-BOE no. 177, of 25 June 2015, p. 62855).

[24] *Proposición de Ley Orgánica sobre Protección de la Seguridad Ciudadana y derogación de la Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana*, presented by the Socialist Parliamentary Group. Granted leave to proceed on 13 December 2016 (BOCG) Congreso de los Diputados (XII Legislatura) Serie B: Proposiciones de Ley, 16 de diciembre de 2016, núm. 65-1 Pág. 1); y *Proposición de Ley de reforma de la Ley Orgánica 4/2015, de 30 de marzo, de protección de la Seguridad Ciudadana (Orgánica)*, presented by the Basque Parliamentary Group (EAJ-PNV). Granted leave to proceed on 26 January 2017. (BOCG. Congreso de los Diputados (XII Legislatura) Serie B: Proposiciones de Ley, 30 de enero de 2017, núm. 79-1, pág. 1).

[25] For an interesting consideration of the principles that should operate as limits to the "Security Society" see Zedner (2009, 167-ss.).

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