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The Rights to Freedom of Expression, Peaceful Assembly and Association with Others of Herri Batasuna, Euskal Herritarrok and Batasuna (As Enshrined in the European Convention)

Abstract

On the 17th March 2003, the Spanish Supreme Court outlawed three political parties: *Herri Batasuna*, *Euskal Herritarrok* and *Batasuna*. According to the Court, "the three parties were the extension of terrorism into politics".

The political situation in the Basque Country and the consequent violence all over Spain have always been a worrying issue in the State. According to the majority of the Spanish political forces, the responsibility of politically oriented violence in the country is imputable to an illegal nationalist armed organisation, *Euskadi Ta Askatasuna* (ETA).

The dissolution of the three political parties implies that more than 10% of the voters in the Basque Country are not represented anymore in the political scene. The argument brought forward in the present thesis is that such measure violates the rights to freedom of expression, peaceful assembly and association with others, as provided by the European Convention.

Besides, the peace process in Northern Ireland led to a consistent improvement of the political situation in the region, reason for which the author concludes that, in order to resolve the violent political conflict in the Basque Country, the dissolution of the three political parties was not necessary in a democratic society.

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Introduction

On the 17th March 2003, the Spanish Supreme Court outlawed three political parties: *Herri Batasuna*, *Euskal Herritarrok* and *Batasuna*.[1] The effects of the decision got in force eleven days later and set an historical precedent in the country, for no other political party was outlawed since the end of Franco's regime. According to the Court, the three parties were the "extension of terrorism into politics"[2] and therefore their dissolution was necessary in a democratic society.

The political situation in the Basque Country *(Euskal Herria* or *Euskadi)*[3] and the consequent violence in Spain have always been a worrying issue in the State. According to the majority of the Spanish political forces, the responsibility of politically oriented violence in the country is to be found mainly in the activities of an illegal nationalist armed organisation, *Euskadi Ta Askatasuna* (ETA).[4] Born in 1959 as a wide political and social organisation, ETA fights for the independence of the Basque Country (in which it includes Navarre and the Basque region under French sovereignty) by targeting symbols of Spain and France or adverse political forces. Although ETA is a quite important political actor, it is just one aspect of the widespread and socially organised Basque nationalism.

Among the other political and social forces of the Basque nationalist constellation, Herri Batasuna (HB), Euskal Herritarrok (EH) and Batasuna were the most important nationalist voices with a strong Marxist accent. Because of their historical and sociological roots, the three parties had always been labelled by the public opinion as, *de facto*, the *political arm* of ETA. As explained in Chapter One, the State had

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[1] The names of the mentioned parties could be translated in English as "Popular Unity", "Basque Citizens" and "Unity" respectively.

[2] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna (27 March 2003), the facts as presented by the State Attorney General, translated from Spanish at

http://wwww.poderjudicial.es/tribunalsupremo/.

All quotes of the Judgement are translated from Spanish.

[3] Unless specified otherwise, the terms "Basque Country", "Euskal Herria" or "Euskadi" refer to the legally recognised Autonomous Region under Spanish sovereignty.

[4] The name of the armed organisation could be translated in English as "Basque Country and Freedom".

unsuccessfully tried to delete Herri Batasuna from the legal political arena since 1983: to prove *de jure* the close relationship between the three parties and ETA was the pending issue that had to be resolved through a new strategy.

This strategy was two-fold: on the one hand, there was a main political initiative and, on the other hand, a subsidiary judicial process.

The political initiative started in February 2002 and was brought up jointly by the governing party, the *Partido Popular* (PP), and the main party in the opposition, the *Partido Socialista Obrero Español* (PSOE).[5] Their strong commitment in erasing nationalist violence from the country was supported by the great majority of the State's political actors. The result of such effort was the adoption of the Law on Political Parties (LOPP),[6] approved by the State's Parliament with 95% of votes in favour.[7]

The judicial process was carried out by Judge Baltasar Garzón. In a gigantic brief of 375 pages,[8] he gathered information that suggested the existence of a macro-organisation, connecting all sorts of commercial, financial, social and political sub-organisations under ETA's leadership. Garzón instructed the enquiry and argued that Batasuna was included in this framework. As we shall discuss in Chapter One, Garzón's inquiry played an important role in the whole process.

Democracy is considered to be the best-known form of government that respects human rights and, as the European Court of Human Rights (ECHR) has pointed out, "political parties are a form of association essential to the proper functioning of democracy".[9] In the present case, the dissolution of Herri Batasuna, Euskal Herritarrok

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[5] The names of the mentioned parties could be translated in English as "Popular Party" and "Spanish Socialist Workers' Party" respectively.

[6] "Ley Orgánica 6/2002 de Partidos Políticos", published in the "Boletín Oficial del Estado" (BOE) of the 28th June 2002. The text of the law is also at
http://www.el-mundo.es/documentos/2002/06/dictamen.pdf

[7] Parties that voted in favour: PP, PSOE, *Coalición Canaria* and *Partido* Andalucista; against: *Partido Nacionalista Vasco* (PNV), *Iniciativa per Catalunya, Eusko Alkartasuna* (EA), *Esquerra Republicana de Catalunya*; abstained: *Convergència i Unió*, *Izquierda Unida (IU)*, *Bloque Nacionalista Gallego* and *Chunta Aragonesista* (http://www.el-mundo.es/especiales/2002/08/espana/batasuna/partidos.html).

[8] The order, issued the 27th August 2002, is at
http://www.el-mundo.es/especiales/2002/08espana/batasuna/integro.pdf

[9] ECHR, Case of United Communist Party and Others v. Turkey (133/1996/752/951), paragraph 25.

and Batasuna implied that more than 10% of the voters in the Basque Country[10] are not represented anymore in the political scene. Such a drastic measure can be tolerated only if necessary for the survival of democracy itself and applied in the respect of the legal instruments for the protection of human rights.

Spain has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms ("The European Convention"). Its Article 11 provides that

> [e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. [...]

According to the European Court on Human Rights, political parties are a form of association essential to the proper functioning of democracy. Therefore, in view of the importance of democracy in the European Convention system, there can be no doubt that political parties come within the scope of Article 11.[11] Furthermore, the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association. Accordingly, Article 11 must also be considered in the light of Article 10:[12]

> [e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...]

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[10] During the last Regional Elections (2001), Batasuna received more than 140.000 votes (data from http://wwww.euskadi.net).

[11] ECHR, Case of United Communist Party and Others v. Turkey, cited above, paragraph 25. See also: ECHR, Case of Socialist Party and Others v. Turkey (20/1997/804/1007), paragraph 29; ECHR, Case of Refah Partisi (The Welfare Party) and Others v. Turkey (41340/98, 41342/98, 41343/98 and 41344/98), paragraph 44.

[12] ECHR: Case of United Communist Party and Others v. Turkey, cited above, paragraph 42; ECHR, Case of Socialist Party and Others v. Turkey, cited above, paragraph 41; ECHR, Case of Freedom and Democracy Party (ÖSDEP) v. Turkey (23885/94), paragraph 37; ECHR, Case of Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 44; Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey (22723/93, 22724/93 and 22725/93), paragraph 46.

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Should Herri Batasuna, Euskal Herritarrok or Batasuna file a complaint against Spain with the European Court of Human Rights, the Spanish Government will have to prove that the restrictions imposed "to protect democracy and pluralism"[13] were allowed by the mentioned provisions.

Aim of the present thesis is to check whether the judgement of the Spanish Supreme Court violates the rights to freedom of expression, peaceful assembly and association with others, as provided by the European Convention.

[13] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, the facts as presented by the State Attorney General.

Chapter One

Herri Batasuna, Euskal Herritarrok and Batasuna

According to the Supreme Court, the evolution and development of Herri Batasuna, Euskal Herritarrok and Batasuna are a description "of a certain reality, dimension and way to be" outlining their authentic characters.[14] Therefore, before any considerations about the outlawing of the three political parties, it is necessary to study their history and ideology throughout the relevant events in Spain since the second half of the 20th Century.

1.1 The Origins

Arnaldo Otegi Mondragón, leader of Batasuna and a member of the three parties, reminds that Herri Batasuna did not appear in the Basque society in a sudden way: modern left wing Basque nationalism developed "during Franco's regime as a sociological, political and popular pole, organised around a political project brought up by ETA."[15]

ETA was formed to fight, on the political, social, cultural and military front the dictator's repressive policies in the Basque Country.[16] The organisation, which soon gathered a growing support from the Basque working class, became the left wing nationalist expression, distinguishing itself from the nationalist *bourgeoisie*,[17] organised since the 19th Century and primarily represented by the *Partido Nacionalista Vasco*.[18]

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[14] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamentos de Derecho Cuarto".

[15] Interview with Arnaldo Otegi Mondragón in Gasteiz (20 March 2003). The text of the interview is attached and translated from Spanish.

[16] According to "The Guardian", "[...] under the fascist Franco dictatorship [...] the Basque language was banned, its culture suppressed, and intellectuals imprisoned and tortured for their political and cultural beliefs." The full article is at
http://www.guardian.co.uk/theissues/article/0,6512,780872,00.htm.

[17] M. IBARZ, *Breu Història d'ETA 1959-1979*, Barcelona, La Magrana, 1981, pp. 55-56.

[18] The name of the "Partido Nacionalista Vasco" could be translated in English as "Basque Nationalist Party".

From 1966 to 1967, ETA organised its "Fifth Assembly", during which important events took place. After the expulsion of a minority sector, that invited the Basque workers to vote in the elections for the Spanish trade unions, and the resignation of other members, who did not agree on the predominance of the military activity, ETA declared itself as "a Basque revolutionary and socialist national liberation movement". During this stage, the armed organisation consolidated the indissoluble link between the national and the class struggles.[19]

On the 10th December 1973, ETA organised a spectacular attack that killed Luis Carrero Blanco, Spanish Prime Minister and probable successor of the dictator. This historical event resulted in a profound debate on the very structure of ETA's "Military Front". These were the two positions in the debate: as Basque working class nationalism was already strong and present in many sectors of the Basque society, *ETA Militar* (ETAm) argued that ETA had to be a genuinely military organisation until the political conditions of the State would change with the end of the military regime. On the opposite front, *ETA Político-Militar* (ETApm) wished to capitalise and agglutinate all the political, social and cultural contents that the armed group had gathered throughout its existence in order to destabilise the regime.[20] In 1974, the internal confrontation resulted in a separation between the two fronts, which nevertheless remained in close contacts.

Franco's death in 1975 set a slow but well organised phase of democratisation. During this stage, the two factions of the armed organisation became even more polarised. On the one hand, ETApm organised a political party -*Euskadiko Ezkerra* (EE)[21]- to develop and represent its nationalist political project *within* the State's institutional framework. On the other hand, ETAm strongly opposed the reforms of Adolfo Suárez and, on the 27th April 1978, supported the creation of the multi-party coalition Herri Batasuna.[22]

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[19] J.L. DAVANT, *Historia del Pueblo Vasco*, Donostia, Elkar, 1980, pp. 118-122.

[20] M. IBARZ, *Op. Cit*, pp. 103-107.

[21] The name of the party means "Basque Left Wing".

[22] F. LETAMENDÍA BELSUNCE ("ORTZI"), *Historia del Nacionalismo Vasco y de E.T.A.*, Donostia, R&B Ediciones, vol. II, 1994, p. 128.

1.2 The Role of the Nationalists in the Transition to Democracy

HB soon became the unquestionable political reference of the radical, left wing nationalism, consolidated around "ETA Militar".[23] Otegi specifies that, since the very beginning, "Herri Batasuna sought a democratic rupture against Franco's regime, [the establishment of] democratic conditions for our People and the exercise of fundamental human rights, above all the right to self-determination. Since the beginning, [HB] renounced the armed struggle in order to concentrate on political, institutional and mobilising activities."[24]

After a referendum, Spain approved its Constitution on the 6th December 1978, but Basque nationalism in Spain was successfully united in not doing the same.[25] The major issue that irreversibly divided the radical voices in Basque nationalism during the institutional construction of Euskal Herria was the approval of the Regional Statute. Euskadiko Ezkerra considered that the rejection of the Constitution provided an opportunity to include Basques' self-determination claim in the Statute. Herri Batasuna refused to accept any Regional Statute that derived from the Spanish Constitution[26] and concentrated its political effort in urging the Basques to "fight against repression".[27]

Ultimately, the *Statute of Gernika* was finally approved by the Spanish Parliament on the 21st July 1979. Its "Additional Provision" highlights that the acceptance of the Regional Statute does not imply that the Basque People renounce its historical rights and the same Statute can be revised according to the relevant legal provisions.

This provision was the result of a compromise between the Spanish State and the PNV. In a general state of tension, the final approval of the Statute was left to the Basques, who voted on a referendum the 25th October of the same year. HB had asked its electorate to abstain, as the proposed Statute was "bourgeois and anti-national".[28]

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[23] In the General Elections of 1979, HB obtained more than 15% of the Basques' preferences, while EE obtained around 8% (data from http://www.euskadi.net).

[24] Interview with Arnaldo Otegi Mondragón.

[25] More than half of the electorate did not vote in the Referendum. 70% of those who voted were in favour of the Constitution (data from http://www.euskadi.net).

[26] F. LETAMENDÍA BELSUNCE, *Op. Cit.*, p. 221.

[27] *Ibid.*, p. 242.

[28] *Ibid.*, p. 337.

About 60% of the Basque population voted, and 90% of that number approved the Statute.[29]

While Euskadiko Ezkerra propitiated the dissolution of "ETA Político-Militar" in 1984,[30] Herri Batasuna and "ETA Militar" were considered by the Spanish public opinion to be practically members of the same organisation.[31] In 1983, HB had asked to be included in the State's list of political parties, but the Ministry of Interior opposed the request, alleging "rational evidence of criminal illegality"[32] in the party. Nevertheless, after three years of a series of judicial proceedings, the Supreme Court issued a decision holding that Herri Batasuna was a legal political party.[33] According to Letamendía Belsunce, although some sectors of HB supported violence and armed response, this does not mean that the "epic and heroic image of ETA" implied any personal link between these sectors and the armed group.[34]

1.3 Towards the identification of Herri Batasuna with ETA

The Supreme Court's decision did not preclude the State from intensifying its campaign of harassment against HB. Since May 1988, the Spanish Government has wanted to outlaw the radical nationalist party and began to accuse HB as a direct responsible for ETA's attacks. Demonstrations and protests were organised not only against ETA, but also against Herri Batasuna.[35]

In 1996, HB sent a videotape to public and private televisions to be broadcast during the time granted to the party for its political campaign. In the video, three people, purportedly members of ETA, appeared with covered faces and guns placed in front of them. With a visible notice saying "Vote for Herri Batasuna" behind them, they declared that,

> [i]n order to resolve the armed conflict between the Basque Country and the Spanish State, the agreement [between the two parties] should be based on the following conditions: on the one hand,

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[29] *Ibid.*, p. 343.

[30] F. LETAMENDÍA BELSUNCE, *Op. Cit.*, vol. III, p. 38-45.

[31] Cf. F. LETAMENDÍA BELSUNCE, *Op. Cit.*, vol. II, p. 352: "[By the end of 1979] Herri Batasuna considered itself confined [...] by the State to the criminal sphere."

[32] "La Vanguardia", Barcelona, 27 August 2002, p. 14 (translated from Spanish).

[33] "Repertorio de jurisprudencia 1986", vol. II, Pamplona, Aranzadi, judgement No. 2921.

[34] F. LETAMENDÍA BELSUNCE, *Op. Cit.*, vol. II, p. 351.

[35] *Ibid.*, p. 223.

the recognition of the right to self-determination of the Basque Country in its territorial integrity; on the other hand, the respect of the democratic process that has to take place in Euskal Herria, regardless of the outcome.

Furthermore, they added that a

general amnesty is necessary and unavoidable, and that the Spanish armed forces should not have any influence in the process. [...] In case the Spanish State agrees on the points to establish a democratic process in the Basque Country, ETA will announce the cease-fire. [36]

Garzón forbade the broadcast of the tape and arrested the HB's executive board (*Mesa Nacional*).[37] On the 29th November 1997, the Supreme Court issued a decision confirming the conviction of all the members of the Mesa Nacional for co-operation with an armed organisation, but two years later the Constitutional Court overruled the judgement because the rights in the criminal proceeding of the accused had not been respected.

Two points should be noted. First, the military organisation's clear support towards the political party was, until the judgement of the Constitutional Court, the best evidence the State had to conclude that Herri Batasuna was at least co-operative with the "terrorist organisation".[38] Second, HB alleged that it was their responsibility "to transmit to the Basque and the Spanish citizens, involved in this confrontation and its consequences, the only existing proposal to start the transition from this violent struggle towards a new democratic situation."[39]

According to the Constitutional Court, the video did not prove that Herri Batasuna and ETA were co-operating in terms foreseen in the criminal law. It seems that the State not only refused any negotiations that could imply a territorial redefinition according to "the outcome of the democratic process", but was also taking away from an illegal armed organisation any legitimacy to present to the public opinion a peace-process

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[36] As quoted in the judgement of the Constitutional Court (translated from Spanish). BOE, 18 August 1999.

[37] http://www.el-mundo.es/eta/entorno_batasuna.html.

[38] In the mentioned judgement of the Constitutional Court, ETA is described as an "armed terrorist organisation that seeks to destabilise and subvert the institutional and social order to obtain the independence of the Basque Country".

[39] Statement of Herri Batasuna (20 February 1996), as reported in the mentioned judgement of the Constitutional Court (translated from Spanish).

proposal. Furthermore, Herri Batasuna, sympathetic with ETA's objectives (not necessarily with its strategy), has acted as a messenger for an organisation with little access to mass media. As a last point, the video they passed might have been in the sincere spirit to seek a solution for the conflict. If this is the case, it should never be confused with co-operation with an armed organisation.

As mentioned in the Introduction, the main political forces of the Spanish State and public opinion blame ETA and Herri Batasuna for politically motivated violence in the country and do not recognise any *conflictive* political situation. Since the Basques were not given the possibility to decide on their own future during the Spanish transition to democracy, the political and social activities in Euskal Herria are seriously affected by this "original sin". According to Ruiz Vieytez, a constitutional law scholar, not recognising the fundamental right to self-determination is actually the main political cause of the conflictive situation in Euskadi.[40] Basque nationalists fail to understand why the fundamental right to self-determination should not be granted to their People.[41] Therefore, far from being a mere problem of violence, the issue in the Basque Country is also of a political nature.[42]

1.4 The Lizarra Agreement and the Euskal Herritarrok Experience

In another attempt of establishing a peace process, Herri Batasuna met with a great number of political forces (among them the PNV, EA and IU[43]) and other social organisations in Euskal Herria. Signed on the 12th September 1998, the resulting "Lizarra Agreement" *(Acuerdo de Lizarra)* analysed the peace process in Northern Ireland *(Good Friday Agreement)* in order to apply its characteristics to resolve the Basque conflict.[44] According to Otegi, "the Irish People has always been a reference for us: there are a lot of similarities between the diagnostics of both conflicts and the ways

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[40] E. J. RUIZ VIEYTEZ, *Estudio Comparado de otros conflictos nacionales*, in X. ETXEBERRIA and Others, "Derecho de autodeterminación y realidad vasca", Vitoria-Gasteiz, Gobierno Vasco, 2002, p. 258.

[41] Otegi clarifies: "what we are proposing as a solution to the conflict is the full respect of all [human] rights of the Basques, regulated by the United Nations and ratified by [France and Spain]" (interview with Arnaldo Otegi Mondragón).

[42] E. J. RUIZ VIEYTEZ, "National Identity Conflict and Self-Government Arrangements in the Basque Country", 27-28 February 2002, at http://www.peaceproject.at/PPdocs/BasqueCountryENG.pdf.

[43] The name of "Izquierda Unida" can be translated in English as "United Left Wing".

towards peace".[45] The document promoted the political resolution of the conflict through a process of "open dialogue and negotiation, without excluding any political actor and with the participation of the Basque society". It also warned that "such process had to take place under conditions of complete absence of all violent expressions of the conflict".

The 18th September 1998 ETA, a violent expression of the conflict, issued a communiqué in which it stated that the Lizarra Agreement meant a "unique opportunity to walk towards the independence of the Basque Country" and declared an indefinite cease-fire.[46] Meanwhile a new political party, Euskal Herritarrok, appeared in the political arena. Although many of the politicians of EH were also in HB, the exact relationship between the two political parties is not very clear. According to Batasuna's lawyers, "EH was born out of a spontaneous gathering of electors in which HB was not the only participating organisation; therefore, Euskal Herritarrok was not a substitute of Herri Batasuna."[47] Otegi himself has given a slightly different explanation of the process: "HB constituted Euskal Herritarrok in a particular political situation, when we were already foreseeing the outlawing of HB and ETA was announcing its cease-fire".[48]

It seems reasonable to believe that HB felt, in that stage, the need to extend its political basis. Probably, the favourable situation established by the "Lizarra Agreement" and ETA's cease-fire facilitated the gathering of minor organisations around the "core group" Herri Batasuna as to run together in the elections for the Basque Parliament in October 1998, during which EH obtained most satisfactory results. While in 1994 HB had eleven deputies, after these elections EH obtained fourteen.[49] A new coalition government was established by the PNV and EA, which later benefited from the support of Euskal Herritarrok.

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[44] Translated from Spanish. The text of the *Acuerdo de Lizarra* and other related information are found at http://www.lizarra-garazi.org.

[45] Interview with Arnaldo Otegi Mondragón.

[46] Translated from Spanish. The full text of the ETA's cease-fire declaration is at http://www.el-mundo.es/nacional/eta/tregua/textocompleto.html.

[47] Reported in the Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna. Although Euskal Herritarrok is not a real *party* but a coalition of different political forces, it shall be considered as such in the present thesis.

[48] Interview with Arnaldo Otegi Mondragón.

[49] Data from: http://www.euskadi.net.

During the summer of 1999, the nationalist "honey-moon" started to experience problems: while the regional governing forces were asking EH to condemn more severely the urban riots in the Basque Country,[50] HB was blaming the PNV and EA for their excessive timidity in breaking the institutional bonds with the State. Even ETA noticed that the process that started in Lizarra was excessively weak and could soon fall apart.[51] As the peace process became stuck, the armed organisation declared the end of the cease-fire on the 28th November.[52] The day after, Otegi read a communiqué in which Herri Batasuna agreed with ETA in ascribing the failure of the process to the governing nationalist forces.[53]

The political effects of ETA's return to the armed struggle represented a "divorce" between PNV-EA and EH. Additionally, Euskal Herritarrok lost in the elections for the Basque Parliament in 2001. According to Otegi, "it is undeniable that ETA's decision to break the cease-fire had a strong influence on the electoral results of the left nationalists. During the suspension of the hostilities, we were the second political force of Euskal Herria. Once the cease-fire ended, we dropped to the fourth position".[54]

1.5 Batasuna and the "Hot Summer" 2002

In June 2001 the core party of EH, Herri Batasuna, joined Batasuna. Again, the exact relationship between HB and Batasuna is difficult to evaluate. According to the

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[50] *Jarrai* is one of the radical youth organisations, considered by many to be integrated in Batasuna's structure. B. GARZA ("New Repression of Basques in Spain: End of 'Separation of Powers' Illusion", 26 August 2002) reports the following statement from Spain's National Police chief Juan Cotino: "These youths start by throwing stones, then they move on throwing Molotov cocktails and finally end up picking up a gun or placing a car-bomb". The complete article is at
http://www.ehj-navarre.org/news/n_conpol_bg082602.html.
According to Otegi, "we do not have any youth organisations inside our party" (interview with Arnaldo Otegi Mondragón).

[51] I. ZUBERO BEASKOETXEA, *El debate sobre el derecho de autodeterminación en Euskadi*, in "Derecho de autodeterminación...", *Op. Cit.*, p. 68.

[52] The full text of ETA's statement is at
http://www.el-mundo.es/nacional/eta/tregua/ruptura/comunicado.html.

[53] The full text of Herri Batasuna's communiqué is at
http://www.el-mundo.es/nacional/eta/tregua/ruptura/comunicadoeh.html.

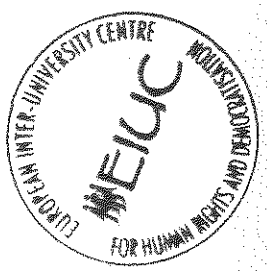
[54] Interview with Arnaldo Otegi Mondragón. Actually, the number of deputies of EH in the Basque Parliament dropped from fourteen to seven (10,12% of the expressed votes). Both the State's governing force (PP) and the coalition PNV-EA increased the number of their deputies (http://www.euskadi.net).

Spanish newspaper "El Mundo", the reason of this "re-foundation" was to emancipate HB from ETA, but the process was undermined by the predominance of the most violent sectors inside the party and it led to "a parody of Herri Batasuna".[55]

Batasuna's lawyers give a very different explanation: the party's origins are to be found in "a debate among different sectors of the nationalist left wing which took place in spring 2000" and was also a "spontaneous consequence of the meeting between several ideological sectors".[56]

Although it is obvious that the failure of the Lizarra Agreement resulted in a profound introspection by the radical nationalists, it is quite difficult to evaluate to what extent the influence of those who support the armed strategy were actually playing in the political and ideological track of the new party. Anyway, the mentioned debate did not change what has always been "an identity sign"[57] of the radical nationalist movement: neither HB, EH or Batasuna had ever condemned the murders of ETA. According to Otegi, "[we do not] justify, or protect, or condemn, or support ETA's armed struggle": "[our analysis] is that the existence of an armed struggle in our Country is the result of the existence of a political conflict". Furthermore, "we remind the other political forces that, even though they had condemned ETA's armed initiative for the last 25 years, the issue has not been resolved at all."[58]

On the 4th August 2002 the armed group killed a young girl and a man in a bomb attack in Santa Pola against the barracks of the *Guardia Civil*. As usual, Batasuna failed to condemn the killings. Otegi stated that "these two last deaths, like all the others due to the political conflict, should have been avoided and can be avoided if we all are able



[55] http://el-mundo.es/eta/entorno_batasuna.html.

[56] Reported in the Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Oposición a los hechos" as presented by the State Attorney General *(Fiscal General del Estado)*.

[57] Statement of Anton Morcillo, Batasuna's Member of the Basque Parliament, mentioned in the Report of the State Attorney General to the Supreme Court for the dissolution of the political parties Herri Batasuna, Euskal Herritarrok and Batasuna (2 September 2002). The Report is at http://www.elmundo.es/especiales/2002/08/espana/batasuna/fiscalia.doc.

[58] Interview with Arnaldo Otegi Mondragón.

to build an alternative without winners or losers. An alternative that would re-establish the democratic co-ordinates in our Country".[59]

Batasuna's comments regarding the killings of Santa Pola offered the State the perfect *casus belli* to apply the Law on Political Parties. PP and PSOE presented to the Parliament a resolution that formally asked the Government to report HB, EH and Batasuna to the Supreme Court for violation of the LOPP. A large majority approved the resolution[60] and the Government presented its report to the Supreme Court.[61] The State Attorney General also presented a report to the Supreme Court alleging the same violation.[62]

1.6 The Suspension of Batasuna

On the same day in which the Parliament approved the resolution, the aforementioned judicial process by Judge Garzón culminated with an order to close all premises that belonged to HB, EH or Batasuna and to suspend all activities of the three political parties.[63] It is not unanimously accepted that Garzón acted within his mandate: Pérez Royo, a constitutional law scholar, states that the preliminary suspension of a party can only be applied if there is a criminal proceeding against people that, according to the statute, represent the will of the party. In Garzón's brief, no member of Batasuna's executive board had actually been accused of any crime.[64]

Under the judicial order, Batasuna was also prohibited from organising demonstrations. At the end of August 2002 two people, who were not activists of the

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[59] Statement pronounced in the press conference the day after the attack (5 August 2002). The full text is at
http://www.batasuna.org/prentsa/2002/08/g_pa0501.htm.

[60] The "Report on the Parliamentary Debate" (26 August 2002) is at
http//:www.izquierda-unida.es/iualdia/2002/agosto/27/PL_182-debateparlamentarioilegalizacionHB.pdf

[61] The Government's Report (3 September) is at http://elmundo.es/documentos/2002/09/demanda.doc.

[62] Report of the State Attorney General to the Supreme Court for the dissolution of the political parties Herri Batasuna, Euskal Herritarrok and Batasuna, cited above.

[63] "La Vanguardia", 27 August 2002, p. 10-11. See Annexes, pictures 2, 3 and 4. When the Supreme Court later admitted the Report from the Government and from the State Attorney General, it also asked Garzón to modify his order so as to allow Batasuna the necessary juridical personality to be represented during the proceeding for its outlawing.

[64] J. PÉREZ ROYO, "La vía penal de ilegalización de Batasuna", 29 August 2002, at
http://basque-red.net/cas/oculto/ejemplo/ag2002/ag023.htm#tres.

party, asked the Basque Government to allow a demonstration in Bilbao, which slogan was "Long Live the Basque Country" and planned for the coming 14 September. The Basque Government allowed the demonstration, but Garzón *believed* that the organisers were somehow related to ETA. Therefore, he addressed a written request to the Basque Government asking it to deny the request for permission to hold this demonstration.[65]

Although the Basque Government finally obeyed the order and did not allow the demonstration, 40.000 people marched in Bilbao[66] with the participation of Otegi. He stated that

> the leaders of Batasuna made sure that no disturbing incidents would happen and then dissolved the massive demonstration. During the police brutal punishment against the demonstration, Joseba Permach asked the demonstrators to sit down and then I personally asked them to disperse.[67]

This last action by Garzón, requesting the denial of the permission to demonstrate, was probably even more controversial. Pérez Royo has stated this action was an abuse of power and argued that the Spanish laws do not give Judge Garzón any competence whatsoever to decide on the right to peaceful demonstration, even in the case that the demonstration was officially organised by the executive board of Batasuna. According to the constitutional law scholar, the Basque Government is the only institution that can decide on the matter, and this decision can only be appealed to the judicial body that has competence on the case.[68]

López Garrido, a socialist member of the Spanish Parliament, analysed the issue in a slightly different way, but reached similar conclusions. He did not discuss the limits of Garzón's mandate, but he considered that the demonstration had to be allowed if the promoters did not belong to the executive board of Batasuna and there was no evidence to prove that the demonstration was an *activity* of the suspended party.[69] The fundamental freedom of expression and peaceful assembly of any private citizen,

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[65] 12 September 2002. The complete text is at:
http://www.derechos.org/nizkor/espana/doc/garzonbat3.html.

[66] "El País", Madrid, 15 September 2002, pp. 22-23. See Annexes, picture 5.

[67] Joseba Permach is another important representative of Batasuna. Interview with Arnaldo Otegi Mondragón. See Annexes, picture 6.

[68] J. PÉREZ ROYO, "La suspensión judicial de Batasuna y el derecho de manifestación in "El País", 22 September 2002, pp. 16-17.

[69] D. LÓPEZ GARRIDO, "Estrépito procesal, estrépito político" in "El País", 22 September 2002, p. 16.

willing to demonstrate for the independence of Euskal Herria, was not subject to any limitations contained in Garzón's judicial order. Even before the demonstration actually took place, Amnesty International stated that the order could lead to the repression of any demonstration somehow related to the suspension of Batasuna. The international organisation issued a communiqué in which it warned that

> the judicial order of the 2nd September can be interpreted as a prohibition to organise any pacific demonstration against the different initiatives aimed to ban Batasuna. If this is the case, there is no doubt that it implies a breach to fundamental human rights to freedom of expression and pacific demonstration.[70]

Elkarri, an organisation whose aim is a solution to the Basque conflict through a system of dialogue and consultation with all the political forces in the Basque Country, expressed similar worries.[71] According to its slogan, the demonstration in Bilbao did not have any relation with the suspension of Batasuna, but it had been repressed just the same.

Shortly after the demonstration, Batasuna's home page was no longer accessible and the only premises the party can presently use are the ones in the Basque Country under French sovereignty, where the party is still legal.[72] At last, the judgement of the Spanish Supreme Court finally transformed the suspension of activities into an illegalisation of the party itself.

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[70] Amnesty International, "España: Debe respetarse el derecho a la protesta pacífica en el País Vasco", 12 September 2002, Translated from Spanish. The communiqué is at http://www.a-i.es/com/2002/com_12sep02.shtm.

[71] "Elkarri defiende el derecho de manifestación como elemento básico de un sistema democrático", 13 September 2002, at http://elkarri.org/intervenciones/object.php?o=728.

[72] "La Vanguardia", 29 August 2002, p.11.

Chapter Two

The Law on Political Parties and the Judgement of the Supreme Court

The Committee on Constitutional Affairs of the Spanish Parliament stated that the previous law on political parties, approved in 1978, had become "incomplete and fragmented" for the needs "of a mature and consolidated democracy".[73] According to the Committee, the present Law on Political Parties is designed to provide, in addition to the existing mechanisms in Criminal Law, a judicial process "to outlaw a party that is actively supporting violence or terrorism."[74] As mentioned in the Introduction, the Law on Political Parties has been approved by a wide majority of the Parliament.

The LOPP is composed of 13 Articles. The following analysis is focused on Article 9, "Activities", which contains the most controversial provisions of the Law. The Supreme Court illegalised Herri Batasuna, Euskal Herritarrok and Batasuna precisely under this article.

Before analysing the conduct that, according to the Supreme Court, constitute "a political complement to the terrorist strategy",[75] it is important to underline that the LOPP requires that such behaviour be "repetitive and serious".[76]

In order to undertake an analysis in a consistent manner, the evidence presented by the Supreme Court is grouped according to the pertinent provisions of the LOPP and to the kind of argument the Court has based its judgement on.

2.1 Giving Express or Tacit Support to Terrorism

Article 9.3.a of the LOPP states that a party can be outlawed if it gives

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[73] "Ley Orgánica 6/2002 de Partidos Políticos", Report of the Committee on Constitutional Affairs, I.

[74] *Ibid.*

[75] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II.

[76] LOPP, Art. 9.2.

> express or tacit political support to terrorism by legitimising the terrorist actions - which pursue political aims by non-pacific and anti-democratic ways - or by minimising and justifying their significance and the violation of fundamental rights they entail.[77]

Such provision has been criticised by Amnesty International, which asked the Parliament to revise it. The international organisation stated that the definition of "tacit political support" is unclear. Therefore, such provision could seriously threaten the rights to freedom of thought, expression, association or assembly.[78]

Amnesty International raised a good point: as there is no internationally accepted definition of *terrorism* that sets aside all politically biased analysis of the phenomenon, it is problematic indeed to provide the necessary juridical certainty to distinguish between freedom of expression and "a tacit support to terrorism".

This issue did not seem to worry the Supreme Court: according to the judges, HB, EH and Batasuna had

> always maintained an attitude of political support and ideological justification to everything related to ETA. The statements the main representatives of the three political parties [had] made after every single terrorist attack constitute solid evidence of this. They repeatedly misinformed the citizens by saying that these attacks were nothing else than the consequences of the lack of democratic solutions to a political conflict, of which the responsibility [was imputed to] the Spanish Government for its denial to apply the right to self-determination to Euskal Herria.[79]

As we shall discuss in paragraph 2.1.3, the worrying aspect of the Supreme Court's position is that any political analysis of violence could be considered equivalent to a legitimisation of its resort.

The following is an analysis and comment on the Supreme Court's interpretation and applications of Art. 9.3.a of the LOPP.

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[77] Translated from Spanish.

[78] Amnesty International, "AI pide al Parlamento que revise las conductas estipuladas para la ilegalización de partidos políticos en la nueva ley de partidos", 3 June 2002, at http://www.a-i.es/com/2002/com_03jun02.shtm.
Translated from Spanish.

[79] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II.

2.1.1 Deliberately and Misleadingly Confusing the Terms "Political Refugee" and "Political Prisoner"

The Supreme Court cited two cases that illustrate this common policy of HB, EH and Batasuna.

The first one refers to the extradition to Spain of some members of ETA living in Venezuela. The mayor and a councillor of the town hall of Lezo, both members of Batasuna, organised a demonstration (13 July 2002) in favour of the rights of those "political refugees", for whom they were asking amnesty.[80]

The second case refers to the extradition to Spain of another member of ETA incarcerated in France. During a press conference (2 August 2002), the mayor and a councillor of the town hall of Ondarroa, again members of Batasuna, stated that the extradition was another example of the repressive policy against the left wing nationalists.[81]

The Supreme Court stated that such examples are to be assessed within Batasuna's general policy of support towards Basques who are accused of terrorism or are serving a prison term in French or Spanish prisons; therefore, due to the repetitive character of such policy, the judges ruled that the mentioned facts were in breach of Article 9.3.a.[82]

Whether these Basques in Venezuela actually obtained their refugee status for political persecution, or those in French prisons were to be considered as "political prisoners", the worse we could blame the mayors and the councillors for is a misleading use of the terms "political refugee"[83] and "political prisoner"[84]; at best, we could legitimately be disturbed by a deliberate, and *repeated*, distortion of reality. But this could be a common feature in the most modern and peaceful democracies. Deliberately

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[80] *Ibid.*, ref. 4.

[81] *Ibid.*, ref. 8.

[82] *Ibid.*

[83] According to Art. 1 (2) of the Convention Relating to the Status of Refugees (28 July 1951), a *political refugee* has "a well-founded fear of being persecuted for reasons of [...] political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". The Convention is at http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/1951leng.htm.

[84] According to Amnesty International, a political prisoner is "anyone whose imprisonment is politically motivated" (http://www.amnestyusa.org/activist_toolkit/aw_faq.html).

confusing a violent political activist and a person who suffers from political persecution is morally reprehensible, but granting freedom of expression even to the parties which ideology strongly distorts the meaning of political persecution is necessary in a democratic society, as long as the rights and freedoms of others are not being affected.

2.1.2 Attitudes of Batasuna's Leaders During a Demonstration in Donostia

The Supreme Court criticised Arnaldo Otegi, Joseba Permach and Joseba Álvarez for their attitude during a demonstration on the 11th August 2002 in Donostia. According to the judges, the three representatives did not react against the slogans of the crowd, which directly supported ETA and its armed strategy. Because the nationalist leaders had shown, in the previously mentioned demonstration in Bilbao,[85] that they could actually control the behaviour of the demonstrators, the fact that they did not publicly turn down the crowd's support to ETA proves that they were tacitly accepting or even approving it. Furthermore, as the media repeatedly covered such facts, the public opinion could have concluded that ETA was actually supported by a legal party.[86]

In short, the Supreme Court has judged the leaders of Batasuna for the slogans that have been shouted by the crowd during a demonstration. It is true that if a party representative would had pronounced such slogans and the other leaders of the same party would not have taken any disciplinary measure against him/her, it would have been legitimate to conclude that the party itself was actually approving the slogans. But the slogans had been pronounced by the crowd and not by the representatives of the party. Therefore, it does not seem fair to blame the whole party for the attitude of unidentified individuals during a demonstration. Furthermore: even though an intervention of a representative of Batasuna against the exaltation of ETA would have been *morally* welcome, their attitude does not automatically prove that the party agreed with the slogans of their supporters.

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[85] See paragraph 1.6.

[86] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 11.

2.1.3 "A Political Conflict"

The Supreme Court mentioned two examples that are supposed to correspond to a calculated strategy of ideological justification and diffusion of ETA's thesis on the "armed struggle", or a support to terrorism.

The first example was an interview to the spokesman of EH, Jose Petrikonea, published in the web site of Euskal Herritarrok. He stated that the denial of France and Spain to grant the democratic rights to Euskadi are the causes of "the political conflict in all its harshness", and that ETA's armed struggle constitutes the best evidence of the existence of such conflict.[87]

The second example the Court mentioned was the interview to Josu Urrutikoetxea ("Josu Ternera"), published by "Euskaldunon Egunkaria" on the 23rd August 2002. He stated that the President of the Basque Country, because he agreed to enforce Garzón's order, was co-operating with the "destructive strategy" of the Spanish Prime Minister. He also stated that "ETA [was] a political actor [that had] its own strategy and aims", and that the armed organisation resorted to "all means it consider[ed] necessary to fight against the State". According to the Supreme Court, Urrutikoetxea took advantage of the interview to diffuse "Batasuna's policy of situating ETA's activity in the context of a *political conflict*".[88]

The analysis that ETA's existence and strategy are the main evidence of a conflictive political situation does not seem consistent, because the presence of the armed organisation in the Basque scene is just an aspect of a much greater political confrontation. But the Supreme Court precisely sanctioned the statements about the existence of the political conflict, which are considered by the judges as an ideological justification of violence. In other words, the Supreme Court has ideologically distorted reality like Batasuna's representatives did when they considered ETA's murderers as "political refugees".

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[87] *Ibid.*, ref. 13.

[88] *Ibid.*, ref. 15.

Amnesty International was aware that such provision could be illegitimately applied to a party that provides its own explanation for the existence politically motivated violence,[89] but the Spanish Parliament did not revise the provision.

In a democratic society, a representative of a party should be free to interpret reality according to her/his ideological analysis of a particular fact. But the judiciary, because of its mandatory impartiality, should not confuse between a justification of violence and an analysis of the reasons that could explain its existence as a political phenomenon.

Although a comparison between the Basque and the Palestinian situation does not have any relevance for the purposes of the present study, Otegi makes an interesting and convincing analysis of the situation in Israel and in the Palestinian occupied territories:

> the Supreme Court [...] says that we tacitly support terrorism because we affirm that the armed struggle in our country is the consequence of the existence of a political conflict. But this is the same analysis that the European public opinion is making about the attacks of certain members of the Palestinian resistance. Why do Palestinian men and women blow up themselves to kill as many people they can? We cannot answer this question if we do not acknowledge the existence of a profound conflict between the Palestinian People and the State of Israel. To say that this conflict exists does not mean to approve the suicidal attacks: it is just presenting a diagnosis that facilitates the solution to the conflict, which is actually what Batasuna is doing for the case of Euskal Herria.[90]

2.1.4 A Statement from Arnaldo Otegi

The Supreme Court reports the words Otegi pronounced during a press conference on the 21st August 2002. The representative considered the suspension of Batasuna by Garzón a part of the "strategy of genocide" by which the Spanish State was "annihilating the radical nationalists" and "all identity signs of the Basque People".[91]

According to the judges, such statement was not an isolated example of support to ETA but a part of the general or repeated policy of the party, which

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[89] Amnesty International, "Comentarios de la sección española de Amnistía Internacional al proyecto de ley orgánica de partidos políticos", 31st May 2002, p. 8. Translated from Spanish.

[90] Interview with Arnaldo Otegi Mondragón.

[91] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 14.

> provides a conceptual justification and an ideological coverage of ETA's terrorism that creates, in certain sectors of the Basque society, a climate of legitimisation of terrorist actions as an acceptable instrument to fight against [the State].[92]

It is difficult to believe that Otegi really thinks that the Spanish State is actually planning or executing an "ethnic cleansing" to eliminate the Basques. More probably, it seems that his skills as a politician include the use of shocking words to describe what he considered to be repeated harassment of HB, EH or Batasuna and of what they represented. Again, we are describing a good example of distortion of reality: morally reprehensible, but politically acceptable in tolerant democracies.

2.1.5 HB, EH and Batasuna's Position on Violence

In several cases HB, EH and Batasuna had failed to prove a clear rejection of ETA's strategy. The Supreme Court argued that, although "democracy implies pluralism, protects discrepancies and the ways to express them",

> a political party's strategically and systematically repeated silence about the terrorist activity can only be interpreted [...] as a clear sign of *acceptance by omission* or *implicit acceptance* of such activity, which entails an alignment to the thesis of those who perpetrate violence and a tacit consent to its resort as a mean to reach objectives that, in constitutional order [of Spain], can only be attained by peaceful means.[93]

The following are the examples the Supreme Court considered to be sufficient evidence to prove that Batasuna was either "accepting by omission" or "implicitly accepting" violence against those who did not agree with the parties' ideology.

2.1.5.1 Acceptance by Omission of Terrorism

The first evidence relates to Batasuna's failure to condemn the threats against the councillors of the *Partido Socialista de Euskadi-Euskadiko Ezkerra*.[94]

The second, widely covered by the media, relates to the previously mentioned attack in Santa Pola.[95] All the political parties in the Basque Parliament, with the exception of Batasuna, issued a joint condemnation of ETA's attack. Antton Morcillo, a

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[92] *Ibid.*

[93] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II.

[94] *Ibid.* ref. 4.

[95] See paragraph 1.5.

member of Batasuna in the Basque Parliament, stated that the party "regretted" the deaths in Santa Pola and expressed its "solidarity" with the victims, their relatives and friends,[96] but he did not condemn the killings. Instead, Batasuna proposed an alternative statement:

> all the parliamentary groups assume the duty to take the necessary steps to put forward the suitable democratic mechanisms to stop these regrettable facts, which cause so much pain and grief to our people.[97]

The Supreme Court considered that regretting the deaths and expressing solidarity to the victims' relatives and friends was not equivalent to a clear and unambiguous condemnation of violence. Furthermore, the repetitive character of HB, EH and Batasuna's policy not to condemn violence constituted a violation of Art. 9.3.a of the LOPP.[98]

As mentioned in Chapter One, it is undeniable that not condemning ETA's threats and attacks had always been a common "identity sign" of HB, EH and Batasuna. Of course, it is morally sad and blameworthy not to make clear and unambiguous statements to condemn the killing or intimidation of a human being, but democracy also allows a political party to freely analyse an issue and adopt its opinion on the matter. As previously underlined, because no representative of the three parties had ever explicitly praised the resort to violence, the Supreme Court did not have any evidence to prove that they actually support ETA. Therefore, the judges are speculating on the political significance of not condemning violence as to make it fit with an "implicit acceptance" of ETA's strategy. Besides, it is not clear why the party stated the will to stop those "regrettable facts" if it was tacitly approving the use of violence or the threat to resort to such strategy.

The third evidence is the mentioned interview of Josu Urrutikoetxea,[99] which allowed the Supreme Court to argue that Batasuna had justified "ETA's criminal activity and avoid[ed] any reproach to [its members] for the attacks they carry out". As previously mentioned, the representative of the party had stated that "ETA [was] a

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[96] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 4.

[97] *Ibid.*, ref. 9.

[98] *Ibid.*

[99] *Ibid.*, ref. 15. Such evidence has been analysed in paragraph 2.1.3.

political actor with its own strategy and goals", that included all means the armed organisation considered "necessary to fight against the State". It seems that Urrutikoetxea is blamed because, in his socio-political analysis, he stated that ETA does not avoid the use of violence to reach its goals. The representative of Batasuna actually brought forward a realistic analysis of the facts, without implying any acceptance by omission of the strategy of ETA.

2.1.5.2 Implicit Acceptance of Terrorism

The first evidence is Batasuna's refusal to appoint representatives in the Committee of the Basque Parliament to prepare a report on "the situation and needs of the victims of terrorism" (3 July 2002). The Supreme Court argued that, although it is acceptable that a political party does not agree on initiatives coming from other parties, such refusal was part of a global strategy of minimising ETA's repeated violations of fundamental rights and exonerating its members from their responsibilities.[100]

It is frankly difficult to conceive a substantial democracy that forces a political party to work for a particular sector of society, like the victims of terrorism. A party, by definition, is the political expression of those it represents and should be free to choose the causes it wants to fight for, within the limits of democracy itself. Of course, Batasuna can legitimately be blamed for a certain cynical attitude towards the distress of that social group, but it does not automatically mean that the political party is minimising ETA's criminal activity or exonerating its members from their responsibility.

The second evidence the Court mentioned is the statement from José Enrique Bert, spokesman of Batasuna in the town hall of Gasteiz. On the 19th July 2002, he said that "Batasuna's aim [was] not that ETA stop killing people, but the disappearance of any kind of violence and those who are responsible for it". According to the judges, such statement clearly proved that Batasuna approved ETA's violence as a response to the "actions from the State's security forces and Courts".[101]

The judges seemed to ignore any other interpretation of such sentence. Actually, another sense of such thought could just be that Batasuna did not specifically fight

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[100] *Ibid.*, ref. 1.

[101] *Ibid.*, ref. 6.

against the violence of ETA, but against violence in general, in which Bert might have included the denial of the right to self-determination to Euskal Herria.

2.2 A Culture of Civil Confrontation and Fear

Article 9.3.b of the LOPP provides that a party can be outlawed if it

> [accompanies] violent acts with programs and attitudes that support a culture of civil [...] confrontation relating to terrorist activities, or if it intimidates, inhibits, neutralises or socially isolates those who are against such terrorist activities, by forcing them to a daily life of coercion, fear, exclusion or basic deprivation of freedoms, in particular freedom of thought and to freely and democratically participate in public affairs.[102]

According to the Supreme Court, this provision is aimed to sanction a political party whose representatives act or behave in the context "of a planned strategy, framed in ETA's activities", to "subject the wills" through concrete actions "to intimidate not only the population, but also especially those who are appointed in different Institutions" in Spain.[103]

As for Article 9.3.a, Amnesty International expressed its concerns. The international organisation considered that the concept of "civil confrontation" is "too vague and allows the inclusion of every program that might generate social tensions".[104]

The following statements and attitudes are, according to the Supreme Court, examples of that "planned strategy".

2.2.1 Statements

The Supreme Court mentioned statements pronounced by Arnaldo Otegi and Josetxo Ibazeta, spokesman of Batasuna in the town hall of Donostia.

During two press conferences (3 July and 21 August 2002), Otegi had declared that Garzón was a "puppet at the service of the State to annihilate the left wing nationalists" and that "this fascist Spaniard" was generating "a serious and antidemocratic situation". Therefore, Otegi had asked for "a severe response" from the Basque People against this "new aggression" and "to organise and fight" against measures that French or Spanish

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[102] Translated from Spanish.

[103] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II.

[104] Amnesty International, "Comentarios...", *op. cit.*, p. 8. Translated from Spanish.

judges may adopt on questions that "only concern the Basque Country". Furthermore, the representative of Batasuna had warned the Basque Government that if it applied "the mechanisms provided by the State in order to strike Batasuna", it would provoke an "unwanted scenery". [105]

According to the Supreme Court, the first reason to mention these statements is that not only was there a clear denial of any authority of Garzón and of the Spanish judiciary system, but also that Otegi had deliberately treated the judge as a "fascist" in order to discredit his "totalitarian" decision.[106]

In the representative's words, there was an obvious contempt towards decisions taken by Spanish institutions, which he considered to be illegitimate in Euskadi. It is a clear political strategy that could, in some occasions, amount to an offence in many countries but its gravity could never be considered sufficient as to outlaw a political party. In addition, the statement did not entail any other major criminal offence.

Secondly, the judges considered that the statements about "the annihilation of the left nationalists" and the generation of "a serious and antidemocratic situation" had been widely covered by the media and could have provoked social tensions and violence.[107] But democracy allows any opinion on judicial decisions as long as the effects of such decisions are being respected. In addition, no invitation to violent response could reasonably be deduced from these particular statements.

The Supreme Court also underlined the relevance of Otegi's invitation to "severely" respond against the judicial measure[108] and warning addressed to the Basque Government. The judges consider both statements as "incitement to [...] violence as an alternative to [Garzón's order]", and a "clear threat" against the judge himself.[109] But it is not easy to read in such sentences any implicit incitement to violence or threats against Garzón. For instance, a massive, legal and peaceful demonstration could also be described as a severe (but legitimate) response to the judicial order, which could

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[105] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 2 and 14.

[106] *Ibid.*, ref. 14.

[107] *Ibid.*, ref. 2.

[108] The same statement was made by Joseba Permach during a meeting of Batasuna on the 23rd August 2002. *Ibid.*, ref. 16.

[109] *Ibid.*, ref. 2.

possibly represent an unwanted political scenery for the interests of the political parties in charge of the Basque Government.

Ibazeta intervened during a demonstration in front of the Navy Headquarters in Donostia (16 July 2002) and stated that the assembly was organised in that particular place as to show the State authorities that they could not "walk through Euskal Herria with impunity".[110]

The Supreme Court ruled that such statement represented an "implicit but clear instigation to violence". As it was creating "a climate of fear and exclusion for all the people who disagree" with Batasuna, it was also preventing "their free and democratic participation in the administration of public affairs".[111]

Although the use of the word "impunity" in Ibazeta's statement might imply the will to *punish* the State authorities, it does not constitute *per se* an actual instigation to violence. Possibly, the very fact that the demonstration was taking place in front of the Navy Headquarters could have actually corresponded to a *political punishment* of the Spanish militaries' presence in Donostia.

2.2.2 Attitudes

The Supreme Court mentioned two examples of attitudes that are aimed to persecute the non-nationalist parties and create a climate of civil confrontation.[112]

The first relates to events that took place in Gasteiz on the 4th August 2002. Some members of Batasuna hindered the normal start of the "Virgen Blanca" festivity by organising an alternative opening to the one officially established by the town hall. The mayor needed the public security forces to protect him from the aggressions perpetrated by Batasuna's supporters.[113]

The second relates to the events in Lasarte on the 29th June 2002, when the mayor presided over the opening of the festivities in the town. She was prevented from appearing on the balcony of the town hall because some demonstrators were shouting

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[110] *Ibid.*, ref. 5.

[111] *Ibid.*

[112] *Ibid.*, ref. 18.

[113] As in the Report of the State Attorney General to the Supreme Court for the dissolution of the political parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Hechos", V.

slogans in support to ETA's prisoners and Batasuna. Contrarily, Batasuna's councillors could easily appear and supported the demonstrators.[114]

According to the Supreme Court, such repeated provocation from Batasuna's representatives had created a permanent climate of civil confrontation and a social hindering of those who oppose the thesis of the "violent nationalists".[115]

In the first case, the sense of hindering the official opening of the festivities is purely political and the incident cannot be reasonably defined as a persecution against non-nationalist parties. It could surely be considered as a civil confrontation but, as Amnesty International warned, a substantial democracy must tolerate attitudes that can entail a certain social tension, as long as the rights and freedoms of others are respected. An alternative opening of a festivity does not imply *per se* a violent civil confrontation.

In the second case, the responsibility of this persecution against representatives of non-nationalist parties is imputable to the demonstrators and, as for the mentioned demonstration in Donostia,[116] a party cannot be held responsible for the behaviour of unidentified individuals.

2.3 Terrorists in a Political Party

Article 9.3.c of the LOPP provides the possibility to outlaw a party if it

> regularly includes in its executive board, or in the electoral lists, people who have been condemned for terrorist offences and have not publicly rejected the terrorist aims and strategy, or if [in the party] there is a great number of representatives who are also members of organisations [...] connected to terrorist [...] groups, except if the party has taken actions to expel such representatives.[117]

The Report of the State Attorney General to the Supreme Court for the dissolution of the political parties Herri Batasuna, Euskal Herritarrok and Batasuna mentioned many cases that could easily constitute evidence to dissolve the parties under the mentioned provision. For instance, Arnaldo Otegi had been condemned by the Spanish Criminal Court (27 November 1990) for "illegal detention". Josu Urrutikoetxea had

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[114] *Ibid.*, XIII.

[115] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 18.

[116] See paragraph 2.1.2.

[117] Translated from Spanish.

been found guilty in France (26 February 1990) for "participation in a gang of malefactors of terrorist kind", "possession of ammunitions or first category weapon", "falsification of administrative documents" and "use of false administrative document".[118]

The Supreme Court did not consider article 9.3.c, and it would be interesting to discuss the possible reasons for such a choice.

Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that

> no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

The provision in article 9.3.c of the LOPP obviously implies that the parties would abstain from including in their executive board or electoral lists people who have been found guilty of offences related to the activities of an illegal armed organisation and fail to show any repentance, even if they have served the sentence for their criminal offence. Unless the judgements of guilt for the mentioned offences also included a definitive suspension of the political rights of those who committed them, the restriction provided by article 9.3.c of the LOPP would entail a heavier penalty than the one foreseen in the judgements. Therefore, this provision is not respecting the principle of non-retroactivity of the law, as enshrined in article 7 of the Convention.

Furthermore, no substantial democracy should force anyone to reject the aims of a violent group, which they can legitimately and democratically support: if a politician agrees with ETA in seeking the Basque independence, democracy should respect such aim if it is peacefully pursued and within the limits of democracy itself.

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[118] As in the Report of the State Attorney General to the Supreme Court for the dissolution of the political parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Hechos", II.

2.4 Using Symbols, Messages or Other Elements that Represent Terrorism

Article 9.3.d of the LOPP states that a party can be outlawed if it uses

> symbols, messages or other elements that represent [...] terrorism, violence or other related conducts -in addition to or in substitution of its own- as instruments for the purpose of the party's activities.[119]

Again Amnesty International criticised such provision because it would allow the dissolution of parties that may agree with ETA's aim, like the independence of the Basque Country, but have not praised the resort to violence.[120]

The following are the evidences the Supreme Court consider valid to prove that HB, EH and Batasuna are in breach of this provision.

2.4.1 The Content of the Web Sites of Euskal Herritarrok and Batasuna

According to the Supreme Court, the web pages of the two political parties were identical and included a video of demonstrators who were shouting slogans in support of ETA and its armed strategy. The judges also mentioned that in the video people with covered faces appeared while they were burning the French and the Spanish flags. According to the Court, these elements in the audio-visual document prove that the political parties explicitly supported terrorist activities.[121] Furthermore, the Court also includes in the same argument the mentioned interview to Jose Petrikonea.[122]

As for the demonstration in Donostia on the 11th August 2002,[123] the Supreme Court has condemned the leaders of Batasuna for the slogans and attitudes of unidentified demonstrators. Also, the judges automatically discarded the possibility that the video had a purely informative purpose. Furthermore, they were excessively severe in sanctioning the burning of the flags, a symbolic act that most modern democracies easily tolerate and cannot be reasonably considered as violent opposition against the mentioned States.

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[119] Translated from Spanish.

[120] http://www.a-i.es/com/2002/com_03jun02.shtm

[121] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 13.

[122] See paragraph 2.1.3

[123] See paragraph 2.1.2.

There is nothing new to add about the interview to Petrikonea: the factual existence of a political conflict, which recognition does not prove any support to ETA's activities, has been exhaustively discussed.

2.4.2 Presenting ETA's Prisoners as "Political Prisoners"

The Supreme Court mentioned again the statements about ETA's activists in Venezuela and France to prove that Batasuna executed a policy of the armed organisation, by transmitting to the public opinion the idea that ETA's prisoners are "political prisoners".[124]

It is not clear why should this message automatically correspond to a strategy designed by ETA and not a simple, possibly genuine, opinion of Batasuna's representatives.

2.4.3 Portraits of Terrorists on the Walls of Town Halls

Posters and pictures of ETA prisoners were hung on the walls of the town halls of Oiartzun, Hernani, Ondarroa, Lekeitio and Elorrio. The mayors of the mentioned towns all belonged to Batasuna until the elections held on the 25th May 2003. Such notices were complemented by the sentence "Basque Prisoners in Euskal Herria". According to the Supreme Court, this campaign had to be situated in the general strategy of ETA, HB, EH and Batasuna to instruct the public opinion that such prisoners are "political prisoners that defend the legitimate aim of independence of Euskal Herria and for this they are repressed by the State".[125]

It seems that the judges repeatedly interpreted in the same way any statement or policy in favour of ETA's prisoners. But in this case it seems even clearer that the Supreme Court analysed the facts with a politically biased approach. Actually, the mentioned campaign[126] is against the Spanish policy to house ETA's prisoners all over the country, far from homes and families, and aims to encourage their relocation to Euskal Herria.[127]

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[124] See paragraph 2.1.1.

[125] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 12.

[126] "Euskal Presoak, Euskal Herrira" at http://www.etxera.org.

[127] In the mentioned campaign, "Euskal Herria" comprehends Navarre and the Basque region under French sovereignty.

In addition to several other legal provisions that are contrary to such policy, the judge Joaquín Navarro Estevan stated that

> the [prisoner's] social reinsertion has to be done in order to prepare [her/him] for the return to the family and the society to which she/he belongs. And it does not seem reasonable or fair that the members of the family or friends of the prisoners have to be punished with them, like in the Middle Age. The prisoners [should not] bear an additional punishment for the uprooting from their familiar or social context. Article 3 of the Penitentiary Law provides that the prisoners' human personality, of which their familiar and social core is an inseparable part, always has to be respected.[128]

Furthermore, the town halls that had the picture of prisoners on their walls not only belonged to Batasuna: the PNV and EA also support prisoner relocation to Euskadi. Ezker Batua (the Basque section of IU), in its Electoral Program for the Regional Elections of the 13th May 2001, clearly insisted on the need for

> a humanisation of the [Basque] conflict, by a clear support to the victims of terrorism and violence from persecution. A humanisation that also implies the unconditional defence of the imprisoned people's rights, including their approach to their place of residence.[129]

2.4.4 Signs and Notices that Incite Violence against the State

The Supreme Court also noticed that in towns where Batasuna was governing there was a clear tolerance for graffiti's, signs and notices that incite to "fight against the State, those who represent its main powers and the other political parties, as well as their members". The judges considered these messages as an implicit incitement to use violence against them and note that such facts, far from being irrelevant, were actually expression of the general policy of Batasuna. Therefore, they constituted relevant evidence to outlaw the party.[130]

Again, such facts do not seem to imply an automatic incitement to violence. Even in its Spanish acceptation, to fight *(luchar)* not only refers to the use of violence, but could also mean a peaceful, therefore legitimate, response against the Institutions, political parties or the people that represent them.

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[128] http://www.basque-red.net/cas/oculto2/enero00/enero1.htm

[129] Ezker Batua-Izquierda Unida, "Programa Electoral para las Elecciones Autonómicas 13-V-2001", p. 5.

[130] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 19.

2.4.5 Using the Symbol of "Gestoras Proamnistía"

"Gestoras Proamnistía" was an organisation that advocated in favour of ETA's prisoners, for whom it was asking amnesty. Garzón declared its suspension on the 19th December 2001, but no final judgement on the matter has been pronounced yet. According to the Court, after the suspension of "Gestoras Proamnistía" Batasuna continued to spread the confusing message of identifying ETA's prisoners as "Basque prisoners", by using the symbol of the organisation in the activities of the town halls ruled by the political party, in its web site and, occasionally, in public acts.[131]

The Supreme Court did not seem to be disturbed by the use of the (provisionally) banned organisation's symbol itself, but rather by the continuation of the advocacy by Batasuna that was once carried out by "Gestoras Proamnistía". The warning of Amnesty International about the risk, and the illegitimacy, to outlaw a party for its ideology was more than justified: according to the Supreme Court, Batasuna was guilty of sharing the aims of a suspended organisation, and therefore had to be outlawed.

2.5 Co-operating with Entities that Protect Terrorists

Article 9.3.f of the LOPP provides that a party can be outlawed if it

> habitually co-operates with entities and groups that systematically act in line with a violent or terrorist organisation, protects or supports terrorism or terrorists.[132]

The Supreme Court referred to the cases discussed in paragraph 2.4 to conclude that the party was habitually co-operating with "Gestoras Proamnistía".[133] Although Batasuna might have agreed with the aims of "Gestoras Proamnistía", it does not automatically imply any habitual co-operation between them. Therefore, such sympathetic attitude of Batasuna towards the "Basque prisoners" is not a legitimate reason to outlaw the party.

2.6 Celebrating Terrorism

Article 9.3.h of the LOPP allows the outlawing of a party that

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[131] *Ibid..*, ref. 10.

[132] Translated from Spanish.

[133] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 10, 12 and 19.

promotes, covers or participates in activities meant to reward, celebrate or honour terrorism or violent acts, or those that perpetrate or co-operate with such acts.[134]

In addition to the fact that no internationally accepted definition of what constitutes a terrorist act exists, the provision does not even provide an example of the kind of attitude from a party representative that would be in its scope. Again, the terms of the article are excessively vague and do not provide the sufficient juridical certainty. For instance, a literal reading and pedantic application of the provision would imply the ban of any political party that considers the dissolution of Batasuna was carried out in violation of its right to peaceful assembly and association, for such opinion could amount to an implicit "promotion" of those who supposedly co-operate with terrorism.

Let us analyse the evidence that the judges consider to prove a breach of this ambiguous article of the Law on Political Parties.

2.6.1 Supporting and Honouring ETA's Members

The Supreme Court made reference to the previously mentioned demonstration against the extradition of some ETA activists in Venezuela and press conference in support of ETA's prisoners in France.[135] According to the judges, such acts correspond to a clear "support from these representative of Batasuna to the members of [...] ETA".[136]

For the case of the demonstration, the Court considered that the representatives had honoured these offenders in particular and not other criminals that had been condemned for minor offences. Therefore, they had transformed the public acts they attended into celebrations for those ETA's members.[137]

For the case of the press conference about the prisoners in France, the Court believed that the very "presence and intervention" of the mayor and a councillor of Ondarroa implied an "explicit political support" and tribute to the activists.[138]

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[134] Translated from Spanish.

[135] See paragraph 2.1.1.

[136] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II, ref. 4.

[137] *Ibid.*

[138] *Ibid.*, ref. 8.

The Supreme Court also referred to a public homage paid to a member of the armed organisation who died while he was working on the construction of an explosive device. The town hall of Zaldibia, at that time governed by Batasuna, declared the activist "favourite son" of the village and covered the costs of the funeral service.[139]

The first two examples are clear evidence of the vagueness of the mentioned provision. For instance, it is not clear why demonstrating or organising a press conference against the extradition of ETA's members to Spain automatically means supporting or honouring them. A demonstration could be organised against such extradition as to prevent the ill treatment these members suffer in case they are housed in Spanish penitentiaries a long way from their usual familiar or social context. As previously discussed, this is the usual practice the State applies to ETA's incarcerated activists.

The last evidence seems to be the only one that clearly proves a breach of article 9.3.h. But it still has to be clarified if honouring violent activists could be considered as an implicit acceptance of violence. Probably not, because it is legitimate to support, or even honour, the aims of an illegal armed organisation's member if violence itself is not glorified.

After having analysed the Law on Political Parties and the arguments of the Supreme Court, it is possible to conclude that the dissolution of HB, EH and Batasuna may have occurred in breach of Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Nevertheless, in order to dispel any doubt about a possible violation of the mentioned articles, a meticulous study on the relevant jurisprudence of the European Court on Human Rights is of paramount importance.

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[139] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Cuarto", II.

Chapter Three

The Jurisprudence of the European Court on Human Rights

According to Arnaldo Otegi, HB, EH and Batasuna's lawyers "will file [...] a complaint with the European Court on Human Rights, where we think there are sufficient reasons to win the case".[140] An analysis of two cases of political parties that had been outlawed in Europe and later filed a complaint in Strasbourg may be helpful to evaluate the chances for the three Basque political parties to prevail in a case against the Spanish Government.

3.1 Case of Yazar, Karatas, Aksoy and the Halkin Emek Partisi (People's Labour Party) v. Turkey (9 July 2002).

On the 14th July 1993, the Turkish Constitutional Court ordered the dissolution of the Halkin Emek Partisi (HEP),[141] because it represented "a threat to the territorial integrity and national unity of Turkey".[142]

Since its foundation in 1990,[143] the People's Labour Party advocated for the right to self-determination for the Kurds. It considered the illegal armed organisation PKK (Kurdish Workers' Party) as "freedom fighters", involved in an "international armed conflict". Furthermore, the HEP declared that the State's security forces, instead of fighting against the illegal organisation, were in fact massively exterminating the Kurdish People. According to the Constitutional Court, the HEP was threatening the territorial integrity of the State and its aims "presented similarities with those of the terrorists". The Turkish judges ruled that the statements the representatives repeatedly and provocatively issued were false, pronounced in an accusatory and aggressive manner and of a kind that "implied tolerance for the acts of terror, gave reason to the perpetrators and favoured" the Kurdish armed organisation.[144]

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[140] Interview with Arnaldo Otegi Mondragón.

[141] ECHR, Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, cited above, paragraph 16. All following quotes on this case are translated from French.

[142] *Ibid.*, paragraph 24.

[143] *Ibid.*, paragraph 10.

[144] *Ibid.*, paragraph 22.

The People's Labour Party filed a complaint against Turkey, alleging, *inter alia*, violations of Articles 10[145] and 11[146] of the Convention. Both the applicants and the Government agreed that the dissolution was prescribed by law,[147] but Turkey alleged that the interference with the rights to freedom of expression, peaceful assembly and association with others were legitimate and lawful aims to ensure territorial integrity and, therefore, "national security".[148]

The European Court on Human Rights agreed on the legitimacy of the Government's aims[149] and proceeded to study whether the interference with Article 11 was proportionate with the aims pursued by the Turkish Constitutional Court.

The applicants disagreed with the alleged reasons to dissolve the party. They argued that pluralism in democracy requires freedom to express all opinions,[150] and also stated that the representatives of the HEP,

> in their public speeches, had only highlighted the existence in Turkey of a "Kurdish" issue and proposed a democratic and peaceful solution to that problem, within the norms provided by international instruments on political freedoms. They have never supported the secession of a part of the Turkish territory, [as this] is anyway sanctioned by the Turkish law, and no representative of the HEP had ever been condemned for that offence before the party was dissolved.[151]

The Turkish Government maintained that the dissolution was appropriate. It argued that

> [i]n a time when terrorism is threatening territorial integrity of the State, the representatives of a political party must not formulate statements of support to terrorists, repeat their thesis or defend them. [Therefore,] the dissolution of the HEP was necessary in a democratic society and met the pressing social need to protect public order and the rights of others.[152]

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[145] *Ibid.*, paragraph 62.

[146] *Ibid.*, paragraph 29.

[147] *Ibid.*, paragraph 35.

[148] *Ibid.*, paragraph 36.

[149] *Ibid.*, paragraph 39.

[150] *Ibid.*, paragraph 40.

[151] *Ibid.*, paragraph 41.

[152] *Ibid.*, paragraph 44.

The European Court on Human Rights stated that Article 10 allows the expression of ideas that offend, shock or disturb.[153] It did not find any evidence that the HEP supported or implicitly accepted politically motivated violence,[154] or any other element to prove that the party's activity was against the principles of democracy.[155] Therefore, it could not be reasonably argued that the dissolution of the HEP met "a pressing social need".[156]

Consequently, the European Court found that Turkey was in breach of Article 11 of the European Convention.[157] As for the alleged violation of Article 10, the Court considered that the arguments the applicants brought forward were the same as for the alleged violation of Article 11; therefore, they did not require a further analysis.[158]

3.2 Case of Refah Partisi (The Welfare Party) and Others v. Turkey (13 February 2003).

On the 16th January 1998 the Turkish Constitutional Court ordered the dissolution of the Refah Partisi (RP), on the ground that it had become a "centre of activities contrary to the principle of secularism".[159]

Since its foundation, the RP was advocating for the abolition of secularism in Turkey. The party, after it had obtained growing support in the country, became a governing force in 1996.[160]

According to Refah Partisi party leader, Necmettin Erbakan, the main goal of the party was:

> [The people of Turkey] shall live in a manner compatible with [their] beliefs. We want despotism to be abolished. There must be several legal systems. The citizen must be able to choose for himself which legal system is most appropriate for him, within a framework of general principles. Moreover, that has always been the case throughout our history. In our history there have been

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[153] *Ibid.*, paragraph 46. See also ECHR, Case of United Communist Party and Others v. Turkey, cited above, paragraph 50.

[154] *Ibid.*, paragraph 55.

[155] *Ibid.*, paragraph 56.

[156] *Ibid.*, paragraph 60.

[157] *Ibid.*, paragraph 61.

[158] *Ibid.*, paragraph 62.

[159] ECHR, Case of Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 22.

[160] *Ibid.*, paragraph 10.

various religious movements. Everyone lived according to the legal rules of his own organisation, and so everyone lived in peace. Why, then, should I be obliged to live according to another's rules? [...] The right to choose one's own legal system is an integral part of the freedom of religion.[161]

As for the means to attain such goal, the following summary of the party representatives' statements may be particularly relevant for the purposes of the present study. For instance, a member of the party in the Turkish Parliament declared to the journalists that "he personally wanted blood to flow so that democracy could be installed in the country", "that he would have struck back against anyone who attacked him and that he would have fought to the end for the introduction of the *sharia* (Islamic law)".[162] More worrying were the positions of Erbakan: after having considered the possibility to resort to a *jihad* (Holy War) in order to establish the supremacy of the Koran,[163] he gave a speech which included the following statements:

> Refah will come to power and a just [social] order will be established. The question we must ask ourselves is whether this change will be violent or peaceful; whether it will entail bloodshed. I would have preferred not to use those terms, but in the face of all that, in the face of terrorism, and so that everyone can clearly see the true situation, I feel obliged to do so. Today Turkey must take a decision. The Welfare Party will establish a just order, that is certain. [But] will the transition be peaceful or violent; will it be achieved harmoniously or by bloodshed? The sixty million [citizens] must make up their minds on that point.[164]

The Refah Partisi filed a complaint against Turkey, alleging the violation, *inter alia*, of Articles 10[165] and 11[166] of the Convention. Both the applicants and the Government agreed that the dissolution was prescribed by law,[167] but Turkey alleged that the interference with the rights to freedom of expression, peaceful assembly and association with others pursued several legitimate aims, namely protection of public safety, national security and the rights and freedoms of others and the prevention of crime.[168]

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[161] *Ibid.*, paragraph 25.

[162] *Ibid.*, paragraph 11.

[163] *Ibid.*

[164] *Ibid.*, paragraph 25.

[165] *Ibid.*, paragraph 34.

[166] *Ibid.*, paragraph 85.

[167] *Ibid.*, paragraphs 37-38.

[168] *Ibid.*, paragraph 40.

The European Court on Human Rights acknowledged the importance of the principle of secularism for the democratic system in Turkey and agreed on the legitimacy of Turkey's interference with Article 11.[169] Therefore, it proceeded to study whether it was proportionate with the aims pursued by the Turkish Constitutional Court.

The applicants disagreed with the alleged reasons to dissolve the party. They claimed that they did not challenge the vital importance of the principle of secularism for the Republic of Turkey and Turkish society as a whole. They also observed that this principle was explicitly set out in Refah's programme. In addition, they alleged that the Government had cited party leaders' isolated remarks, which were taken out of their context.[170]

The Turkish Government of course maintained that the dissolution was appropriate. Among the arguments it brought forward, the following is particularly interesting: the Refah Partisi had "an actively aggressive and belligerent attitude to the established order" and was making "a concerted attempt to prevent it from functioning properly" so that it could then destroy it. The offending speeches were calls to a popular uprising and the use of force and contained elements of incitement to the most generalised and absolute violence that characterises a *jihad*. That being the case, the Government claimed that the party's dissolution had been a preventive measure to protect democracy.[171]

Even though it stated again that Article 10 also allows the expression of ideas that offend, shock or disturb,[172] the European Court on Human Rights agreed with the Turkish Government. It ruled that the establishment of a plurality of legal systems is not compatible with the Convention system[173] and that the *sharia*, for its dogmatic character, cannot exist in a pluralist society.[174] More importantly, the Court also observed that the Refah Partisi was dissolved on account of the declarations and policy statements made by its chairman and its members. The constitution and programme of the RP did not have any part to play in the decision. Therefore, like the national

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[169] *Ibid.*, paragraph 42.

[170] *Ibid.*, paragraph 54.

[171] *Ibid.*, paragraph 63.

[172] *Ibid.*, paragraph 44.

[173] *Ibid.*, paragraph 70.

[174] *Ibid.*, paragraph 72.

authorities, the Court had based its analysis on the necessity of the interference complained of, precisely on the same declarations and policy statements.[175]

Such declaration and statements, according to the Court, revealed objectives and intentions of the Refah Partisi which were not set out in its statute.[176] The leaders of the party did not take prompt practical steps to distance themselves from the members who had publicly approved the possibility of using force against political opponents politicians. In other words, they did not dispel the ambiguity of the statements on the possibility to resort to violence aimed to gain power and retain it. The Court concluded that the possibility to resort to violence was an implicit policy of the whole party.[177]

The Court considered that the penalty imposed on the applicants met the "pressing social need" to maintain civil peace and the country's democratic regime. [178] Considering that the suspension of the party did not prevent most MPs of the Refah Partisi to continue their normal political activity, the interference with Article 11 was proportionate to the aims of the Government.[179]

In conclusion, the European Court did not find any violation of Article 11 of the European Convention.[180] As for the alleged violation of Article 10, the Court considered that the arguments the applicants brought forward were the same as for the alleged violation of Article 11; therefore, they did not require a further analysis.[181]

3.3 A Comment on the Judgements of the European Court on Human Rights.

The two cases that have been analysed are particularly emblematic to evaluate what *may* be the final decision of the ECHR in the (hypothetical) case "Herri Batasuna, Euskal Herritarrok and Batasuna v. Spain".

The two Turkish parties had been accused of an apologetic position on the resort to violence as an instrument for political aims. As the Spanish Government would surely try to prove the involvement of HB, EH and Batasuna in violent political activities, we

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[175] *Ibid.*, paragraph 67.

[176] *Ibid.*, paragraph 80.

[177] *Ibid.*, paragraph 74.

[178] *Ibid.*, paragraph 81.

[179] *Ibid.*, paragraph 82.

[180] *Ibid.*, paragraph 84.

[181] *Ibid.*, paragraph 85.

should carefully analyse the line of reasoning of the European Court regarding this particular issue.

In the case of the Halkin Emek Partisi, the Court was not convinced that the party supported violence. To advocate for the (internal) self determination of a minority, categorise a particular political situation as "a conflict" or consider the members of an illegal armed organisation as "freedom fighters" might be all ideas "that offend, shock or disturb", but they cannot be reasonably considered as "giving reason to terrorists". Even though the Basque parties had never publicly called ETA members "freedom fighters", the Spanish Supreme Court, in one of its strongest arguments, considered that an analysis of the situation in Euskal Herria as "a political conflict" was equivalent to an ideological justification of violence. The Spanish Government should not underestimate the importance of the European Court's case law.

To the contrary, the European Court judged that the Refah Partisi was actually advocating the possibility to resort to violence. Not surprisingly indeed, because the statements of the representatives were unambiguously supporting a Holy War (this means violence) as a mean to gain power. As no representative of HB, EH or Batasuna had ever pronounced a statement or behaved in a way which entailed clear and explicit threats to resort to violence, the European Court on Human Rights may find that the decision to illegalise the Basque Parties as unlawful.

Chapter Four

Herri Batasuna, Euskal Herritarrok and Batasuna v. Spain.

Bearing in mind the previously mentioned case law at the European Court on Human Rights, the following is a picture of the possible arguments of the parties and judgement of the Court in a case involving the illegalisation of Herri Batasuna, Euskal Herritarrok and Batasuna in Spain. It is assumed that the Court considers the case admissible[182] and follows the relevant jurisprudence on the matter.

4.1 "The Facts"

4.1.1 The Circumstances of the Case

As for the circumstances of the Case, reference is made to the illustrative evolution and development of the three Basque Parties prior to the approval of the Law on Political Parties and to the evidence and information on which the Supreme Court has based its judgement.

4.1.2 Relevant Domestic Law.

In addition to the LOPP, the European Court on Human Rights will refer to the Spanish Constitution (SC). The fundamental legal document of the Kingdom of Spain promotes political pluralism as a superior value[183] and considers the political parties to be an expression of such pluralism.[184] Therefore, their freedom of creation and activity are respected, within the limits of the Constitution itself and of the law.[185] Further, the Constitution also recognises the relevant instruments for the protection of human rights[186] and guarantees freedoms of thought, worship and cult (with no other restriction on their exercise than those necessary for the protection of public order),[187] freedom of expression[188] and peaceful assembly (that can be prohibited by the public authority in

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[182] The admissibility requirements are provided by Articles 34 and 35 of the European Convention.

[183] Art. 1 (1) SC.

[184] Art. 6 SC.

[185] *Ibid.*

[186] Art. 10 (2) SP.

[187] Art. 16 (1) SC.

[188] Art. 20 (1) SC.

case of well founded fear of being a danger for people or goods).[189] In addition, the Constitution provides freedom of association (as long as its means or aims are peaceful and not criminal, it is publicly registered and that only a motivated judicial order can suspend or dissolve it).[190] Ultimately, the citizens' participation in public affairs is also guaranteed.[191]

In its judgement, pronounced on the 12th March 2003, the Spanish Constitutional Court certified that the Law on Political Parties is compatible with the Constitution.[192]

4.2 "The Law".

4.2.1 Alleged Violation of Article 11 of the European Convention.

The applicants would allege that the dissolution of the political parties Herri Batasuna, Euskal Herritarrok and Batasuna had infringed their right to freedom of peaceful assembly and association with others, guaranteed by Article 11 of the Convention.

A. Whether there was an interference

The parties would accept that dissolution of the political parties amounted to an interference with the applicants' exercise of their right to freedom of peaceful assembly and association with others. The Court would normally take the same view.

B. Whether the interference was justified

Such an interference would constitute a breach of Article 11 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" for the achievement of those aims.[193]

[189] Art. 21 SC.

[190] Art. 22 SC.

[191] Art. 23 (1) SC.

[192] BOE, 17 May 2003. The judgement of the Constitutional Court is also at: http://www.tribunalconstitucional.es/JC.htm.

[193] Argument based on the Court's judgement on the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 36.

1. "Prescribed by law"

The applicants, even though they should not contest that the possibility of dissolution of a political party was provided both by Article 22 of the Spanish Constitution and by the Law on Political Parties, should challenge the Supreme Court ruling that HB, EH and Batasuna were "the extension of terrorism into politics". The applicants should allege that the Law on Political Parties, on which the Supreme Court had based its judgement, is often vague and imprecise, like Amnesty International pointed out. Therefore, the application of the LOPP could entail interpretative problems in determining which activities or statements of a political leader can be considered to dissolve her/his party. The applicants should illustrate their argument by observing that a literal reading of Article 9.3.a could imply the dissolution of any political party that agrees on the aims of a terrorist group but does not support the violent strategy; that Article 9.3.b includes the concept of "civil confrontation", which excessive vagueness allows the inclusion of every program that might generate social tensions and, ultimately, that Article 9.3.d could be used to dissolve, for instance, a party which message coincides with the one transmitted by a terrorist organisation.[194]

The Government would submit that the LOPP was meant as a protection against terrorism and, while trying to comprehend all possible individual or social support to violence, it nevertheless provides a party leader the sufficient clearness about the juridical consequences of her/his conducts.[195]

The European Court often stated that a norm cannot be regarded as a "law" within the meaning of Article 11 (2) unless it is formulated with sufficient precision to enable the party representatives to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable under the circumstances, the consequences which a given action may entail. Such consequences need not to be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.

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[194] Amnesty International, "Comentarios...", *Op. Cit.*, p. 8.

[195] Judgement of the Supreme Court on the outlaw of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna, "Fundamento de Derecho Quinto", 3rd paragraph.

Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[196]

As the drastic measure of dissolving HB, EH and Batasuna is the only precedent in the Spanish democracy, the Court may assert that there is not enough *practice* to settle that the Law on Political Parties was applied in a reasonable and careful way, or in good faith. The Court would acknowledge that the political situation in Spain, of which ETA is an important factor, requires the adoption of adequate laws as part of the necessary instruments to fight against the existence of politically motivated violence. Nevertheless, the Court would probably agree with Amnesty International's analysis about the provisions contained in the LOPP.

For the mentioned reasons, the Court would find that, as a part of the relevant domestic law did not present the necessary quality requirements, the dissolution of Herri Batasuna, Euskal Herritarrok and Batasuna was not "prescribed by law". But, in the case the Court considers the LOPP sufficiently precise to enable the party representatives to regulate their conduct, it is necessary to continue the study on the legitimate aims and proportionality of the Supreme Court's judgement.

2. Legitimate aim

The Government would presumably submit that the interference with the applicants' exercise of the right to freedom of peaceful assembly and association with others pursued several legitimate aims, namely protection of public safety, the rights and freedoms of others and the prevention of crime.

The applicants should accept in principle that protection of public safety and the rights and freedoms of others may imply the approval of laws to prevent terrorism and safeguard the normal political activities in a democratic system.

The Court would most probably note the importance of political pluralism in any substantial democracy, which cannot coexist with politically motivated violence. It should then consider that the dissolution of the political groups pursued a number of the legitimate aims listed in Article 11, namely protection of public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

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[196] See, *mutatis mutandis*: ECHR, Case of Hertel v. Switzerland (59/1997/843/1049), paragraph 35; ECHR, Case of Wingrove v. the United Kingdom (19/1995/525/611), paragraph 40.

3. "Necessary in a democratic society"

(a) General principles

The European Convention on the Protection of Human Rights and Fundamental Freedoms must be understood and interpreted as a whole. Human rights form an integrated system for the protection of human dignity. In that connection, democracy and the rule of law have a key role to play.[197]

Democracy requires that the people should be given a role. Only institutions created by and for the people may be vested with the powers and authority of the State, or of any other autonomous territorial authority. There can be no democracy where political parties act as representatives of an illegal armed organisation, even if such parties are democratically appointed to represent their voters.[198]

In order to ensure pluralism and the proper functioning of democracy, the rule of law must provide the necessary instruments as to distinguish between terrorist groups, that seek political objectives through the resort to violence, and political parties that seek the same political aims, but through peaceful means. Article 11 is precisely conceived as to permit these normal activities of political parties.

The Court often stated that, notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.[199]

There can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.[200]

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[197] Argument based on the Court's judgement on the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 43.

[198] *Idem.*

[199] *Idem.*, paragraph 44.

[200] ECHR, Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, cited above, paragraph 46.

As to the links between democracy and the Convention, the Court has made the following observations.

> Democracy is without doubt a fundamental feature of the 'European public order' [...]. That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights [...] The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention [...]; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society [...].
>
> In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights can only be allowed if 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from "democratic society". Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.[201]

The Court has also determined the limits within which political parties may conduct their activities while enjoying the protection of the Convention's provisions:

> [...] one of the principal characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.[202]

The Court should underline that a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that political parties, which leaders incite recourse to violence, or propose a policy

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[201] Argument based on the Court's judgement on the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 45 (the Court quotes the Case of the United Communist Party and Others v. Turkey, cited above, paragraph 45).

[202] *Idem,* paragraph 46 (the Court quotes the Case of the United Communist Party and Others v. Turkey, cited above, paragraph 57).

which does not comply with one or more of the rules of democracy, or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy, cannot lay claim to the protection of the Convention against penalties imposed for those reasons.[203]

According to the Court, a political party or the statements of its leaders may conceal instruments, strategies and objectives different from those they can proclaim. To verify that they do not, the content of the programme or statements must be compared with the actions of the party and its leaders and the positions they defend taken as a whole.[204]

Also, the Court has often held that, for the purpose of determining whether an interference is necessary in a democratic society, the adjective "necessary", within the meaning of Article 11 (2), implies the existence of a "pressing social need".[205]

The European Court on Human Rights has repeatedly stated that its task is not to take the place of the competent national authorities but rather to review under Article 11 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it is "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify such interference are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.[206]

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[203] *Idem,* paragraph 47 (the Court refers to, *inter alia*, the Case of the Socialist Party and Others v. Turkey, cited above, paragraphs 46 and 47).

[204] *Idem,* paragraph 48 (the Court refers to the Cases of the United Communist Party and Others v. Turkey, cited above, paragraph 58 and of the Socialist Party and Others v. Turkey, cited above, paragraph 48).

[205] Cf. ECHR, Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 53 and ECHR, Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, cited above, paragraph 51.

[206] Argument based on the Court's judgement on the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 53.

(b) Application to the present case.

(i) Arguments of those appearing before the Court.

The applicants.

The applicants should allege that, at its inception in 1978, Herri Batasuna had sought a democratic rupture against the harsh dictatorship of Franco, the establishment of democratic conditions for the Basque People and the exercise of fundamental human rights, above all the right to self-determination. They should also affirm that, since the beginning, HB had renounced the armed struggle in order to concentrate on political, institutional and mobilising activities. Therefore, no evidence of support to terrorism can be found either in the statute and program of the party, or in the statements of its leaders.

The applicants should argue that the Spanish Parliament approved the Law on Political Parties because it provided a juridical instrument to outlaw their political parties without the need to prove, in terms of the criminal law, a personal involvement of the representatives of HB, EH and Batasuna in the activities of the illegal armed organisation ETA. Therefore, the LOPP illegitimately sanctions opinions and not acts.

Then, it may be strategically useful to point out the Court that Herri Batasuna and Euskal Herritarrok had tried to put forward twice, in 1996 and in 1998 respectively,[207] what they considered to be the viable paths towards peace in the Basque Country. In addition, they should clearly state that the disappearance of all kinds of violence and of those who perpetrate it was one of the most important political aims of the three parties.

The applicants should strongly oppose the arguments of the Spanish Supreme Court. They should argue that, as a result of the uncertainties of the LOPP, the Court misjudged the statements and attitudes of legitimately elected politicians, as to match the prejudice that HB, EH and Batasuna were forming part of ETA.

The applicants should also argue that not only had the Supreme Court based its judgement on the statements and attitudes of their politicians, but also on the behaviour of unidentified demonstrators. Even if these people presumably were supporters of the

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[207] Reference is made to the broadcast of the video of ETA and to the Lizarra Agreement (see Chapter 1, paragraphs 1.3 and 1.4 respectively).

parties, their behaviour cannot be reasonably considered as emanating from the parties themselves.

In conclusion, the applicants should affirm that, due to inconsistency of the theses held by the Supreme Court, the dissolution of Herri Batasuna, Euskal Herritarrok and Batasuna was not necessary in a democratic society.

The Government.

The Spanish Government would allege that, since their creation, Herri Batasuna, Euskal Herritarrok and Batasuna have always maintained an attitude of political support and ideological justification to everything related to ETA. Part of this policy was the application of a strategy, precisely designed by the armed organisation, to intimidate the population in general and, especially, the people who are appointed in the different Institutions throughout Spain. The Government would also observe that HB, EH and Batasuna had never expressed a clear condemnation of ETA's terrorism and, in addition, the Supreme Court had found other evidence to prove that the parties were acting as the political arm of ETA.

As to the lack of criminal conviction against the representatives of the three political parties, the Government should point out that the dissolution of a party does not necessarily have any relation with criminal law, but is meant as a preventive instrument to protect democracy. Therefore, even the activities and statements from political leaders that are not punished by Criminal Law could nevertheless constitute a sufficient reason to outlaw their political party.[208]

The Government should also allege that in times when terrorism is threatening public safety and jeopardising the rights and freedoms of others, a political party should abstain from pronouncing statements supporting terrorists, justifying their thesis or creating a climate of civil confrontation in relation to the terrorist activities.[209]

The Government should insist on the fact that such climate of civil confrontation is particularly tangible during the demonstrations organised by the three parties, during which the crowd had pronounced slogans clearly in favour of ETA and its violent

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[208] Argument based on the Court's judgement on the Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, cited above, paragraph 43.

[209] *Idem*, paragraph 44.

strategy. As no representative of the parties had ever made any clear statement against the slogans from supporters of the parties, it can reasonably be concluded that Herri Batasuna, Euskal Herritarrok and Batasuna actually agree with such slogans.

The Government should point out that not only the representatives did not turn down the crowd's support to violence, but have also kept an actively aggressive and belligerent attitude to the established order and were making a concerted attempt to prevent it from functioning properly, so that they could then destroy it. For instance, the offending speeches against the measures taken by the French and Spanish Courts were actually calls to a popular uprising and use of force, and contained elements of incitement to the most generalised and absolute violence.[210]

Ultimately, the Government should allege that in those circumstances, the dissolution of the three political parties have to be regarded as a pressing social need for the survival of democracy.

(ii) The Court's assessment.

In this stage, the Court's task would be to assess whether the dissolution of Herri Batasuna, Euskal Herritarrok and Batasuna met a "pressing social need" and whether the measure was "proportionate to the legitimate aims pursued".[211]

The Court would observe that Herri Batasuna, Euskal Herritarrok and Batasuna were dissolved on account of the declarations and policy statements made by their members. Its constitution and programme did not have any part to play in the decision. Like the national authorities, the Court would therefore base its assessment on the necessity of the interference complained of on those declarations and policy statements.[212]

To determine if HB, EH and Batasuna brought forward their political activity by legal and democratic means, or if their leaders were supporting violence as a political instrument, the Supreme Court stated that HB, EH and Batasuna always maintained an

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[210] Argument based on the Court's judgement on the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 63.

[211] Argument based on the Court's judgement on the Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, cited above, paragraph 64.

[212] Argument based on the Court's judgement on the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 67.

attitude of "political support and ideological justification" to everything related to ETA and that the three political parties applied a strategy, precisely designed by the armed organisation, to intimidate the population in general and also especially the people who are appointed in the different Institutions throughout Spain. These observations would be the same as the ones held by the Spanish Government in front of the European Court to prove that HB, EH and Batasuna were seeking political aims through violence.[213]

The Court has to find if such observations can be considered on an acceptable appreciation of the relevant facts. It could first observe there is no evidence that HB, EH and Batasuna have ever explicitly supported the resort to violence to reach political objectives. It would be desirable to observe that a party, acting in a democratic framework, should clearly condemn any form of political violence. Nevertheless, the Court would not consider the non-condemnation of terrorist acts as a clear support to terrorism. Besides, the Court could point out that terrorism, or its apology, are illegal in Spain and no condemnation of the three political parties' representatives is pending of atonement.[214]

The Court would accept that the political statements and attitudes of the three parties' leaders are not, *per* se, against the fundamental principles of democracy. It could also state that if a political party and an illegal armed organisation analyse a politically conflictive situation in similar terms and propose the same solutions, the dissolution of the political party would reduce the possibility to discuss the relevant issues in a democratic debate. In addition, such measure could also give a wider opportunity for the illegal armed organisation to monopolise the response against what it considers to be an unfavourable political situation. Such result would strongly contradict the spirit of Article 11 and the democratic principles on which it is founded.[215]

Also, the Court could note that even if statements or attitudes of party representatives may disturb the Government's political line or the public opinion, the good functioning of democracy requires freedom of expression (as enshrined in Article

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[213] Argument based on the Court's judgement on the Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, cited above, paragraph 54.

[214] *Idem*, paragraph 55.

[215] *Idem*, paragraph 57.

10) for the political leaders, so as to allow their contribution in a public debate to seek durable solutions that would resolve conflictive situations.[216]

The Court could make clear that such debate, in the political framework of the Basque Country, may reach peaks of civil confrontation. But it could also state that democracy precisely allows, and encourages when necessary, peaceful confrontations in order to resolve major issues.

The Court could state that party leaders should prevent such confrontations from becoming violent and should feel the political responsibility to prevent their supporters to rise up arms against their political enemy. The Court could acknowledge that the leaders of Herri Batasuna, Euskal Herritarrok and Batasuna did not, in their statements, call for the use of force and violence as a political weapon. The Court could also mention that, even if the representatives did not take prompt practical steps to distance themselves from those people who, during the demonstrations of the parties, had publicly referred with approval to ETA and its violent strategy,[217] the slogans of unidentified people do not constitute the ideological line of the political party they support.

The Court could also note that political leaders' severe and hostile criticisms against the measures taken by the State to fight against terrorism cannot constitute sufficient evidence, *per se*, to assimilate HB, EH and Batasuna to ETA. Besides, the Court could underline that the limits of the admissible criticism are wider when it is the State that is being criticised and not a private citizen. In a democratic system, the actions or omissions of the Government or judges are to be placed under the attentive supervision of the press and the public opinion,[218] as to support the publicity of politically relevant decisions.

Consequently, the Court would find that the penalty imposed on the applicants may not reasonably be considered to have met a "pressing social need". It could take the view that, even though a narrow margin of appreciation is left to States where the

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[216] *Idem*, paragraph 58.

[217] Argument based on the Court's judgement on the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 74.

[218] Argument based on the Court's judgement on the Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, cited above, paragraph 59.

dissolution of political parties is concerned, since the pluralism of ideas and parties is itself an inherent part of democracy,[219] the Spanish State may reasonably propose active policies aimed to find a solution, with the participation of all parties involved, to a long lasting and harsh political conflict within its citizens.

Therefore, the Court would find that a measure as drastic as the permanent dissolution of Herri Batasuna, Euskal Herritarrok and Batasuna is disproportionate to the aim pursued and consequently unnecessary in a democratic society.[220]

It follows that the measure would have infringed Article 11 of the Convention.

4.2.2 Alleged Violation of Article 10 of the European Convention.

The applicants would presumably also allege the violation of Article 10 of the Convention. As their complaints would concern the same facts as those examined under Article 11, the Court would consider that it is not necessary to examine them separately.[221]

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[219] Argument based on the Court's judgement on the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 81.

[220] Formula based on the Court's judgement on the Case of United Communist Party and Others v. Turkey, cited above, paragraph 61.

[221] Formula based on the Court's judgement on the Case of Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, cited above, paragraph 62.

necessary and provided that this does not impose an excessive and disproportionate burden on individuals or a sector of the population. This could be formulated the other way round, that is that the individual exercising his civil liberties cannot be allowed to impose a disproportionate burden on the community. What we mean when we talk about the margin of appreciation is essentially that the Convention guarantees are applied in a context defined by the democratic society in which they function. This is just common sense. Human rights cannot be and should not be divorced from the practical day-to-day functioning of society and this is why they are best secured by the national courts.[222]

The European Court has also clarified that "the margin of appreciation left to States must be a narrow one where the dissolution of political parties is concerned, since the pluralism of ideas and parties is itself an inherent part of democracy".[223] In the present case, the European Court should not allow Spain a wider margin of appreciation than the one settled by its jurisprudence, for the Supreme Court's decision to dissolve HB, EH and Batasuna was not required for the "practical day-to-day functioning" of the Spanish society.

The evolution of the political conflict in Northern Ireland could provide stronger evidence to argue that the Spanish Supreme Court's decision was not justified. In 1991, the European Commission on Human Rights had accepted a judgement of the Irish Supreme Court, which considered the Provisional IRA "an illegal terrorist organisation which, by both its avowed aims and its record of criminal violence, [was] shown to be committed to, amongst other things, the dismantling by violent and unlawful means of the organs of State established by the Constitution". Also, the Irish Supreme Court stated that the Sinn Fein, a legal political party, was "an integral and dependent part of the apparatus of the Provisional IRA."

The now defunct European Commission ruled that the lawfulness of the Sinn Fein was "a matter of policy", which was for the Irish Government to determine.[224] In other words, the European Commission considered that Sinn Fein's legal and active political participation in the Irish democratic system failed within the Government's margin of

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[222] L. WILDHABER, "Balancing Necessity and Human Rights in Response to Terrorism", address in the 10th International Judicial Conference in Strasbourg (23-24 May 2002). (http://www.coe.int)

[223] ECHR, Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, cited above, paragraph 81.

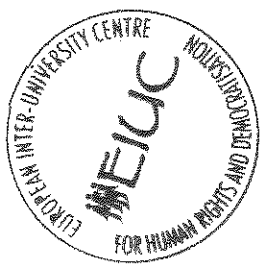
[224] ECHR, Case of Purcell and Others v. Ireland (15404/89).

appreciation to decide on the most adequate policies to protect public safety and rights and freedoms of others, and to prevent crime.

Seven years after the European Commission had made clear that the legality of the Sinn Fein was "a matter of policy", the mentioned "Good Friday Agreement", in which the Sinn Fein was one of the most important political forces involved, set the base for the peace process in Northern Ireland. The also mentioned "Lizarra Agreement" acknowledged that in the peace process in Northern Ireland "all the political projects have been afforded the same chance of success, without any limitation other than the backing of the democratic majority". Consequently, "the political resolution of the [Basque] conflict will become a reality only through a process of dialogue and open negotiation. There will be no exclusions as to who will be involved in the discussions and these will have the participation of all sectors of Basque society". [225]

If the European Court on Human Rights acknowledges that the Good Friday Agreement resulted in a consistent improvement of the political situation in Northern Ireland and consequent reduction of violence among the parties involved in the conflict, it would also implicitly hold that the measure taken by the Spanish Supreme Court was not proportionate to the aim of securing "the practical day-to-day functioning" of the Spanish and Basque societies.

In conclusion, the "Good Friday Agreement" should settle an historical precedent for all European societies divided by violent political conflicts. The European Court on Human Rights should accordingly rule that, in order to resolve a violent political conflict, the dissolution of political parties is not necessary in a democratic society.



[225] http://www.euskadi.net/pakea/indicel_i.htm

Annexes

Annex 1: Interview with Arnaldo Otegi in Gasteiz, 20th March 2002.

What are the origins of Herri Batasuna and what was its political project?

To understand the origins of Herri Batasuna it is necessary to recall the birth of the Basque independentist left wing around the middle of the last Century. The left wing independentism started to organise during the Spanish Civil War, when *Acción Nacionalista Vasca* separated from the *Partido Nacionalista Vasco*. But the modern independentist left wing originated during Franco's regime as a sociological, political and popular pole, organised around a political project brought up by ETA. In other words it is ETA's armed struggle that generated this sociological pole. After Franco's death, this sociological pole organised a political body. That was the date of birth. Since then, Herri Batasuna sought a democratic rupture against Franco's regime, [the establishment of] democratic conditions for our People and the exercise of fundamental human rights, above all the right to self-determination. Since the beginning, [HB] renounced the armed struggle in order to concentrate on political, institutional and mobilising activities.

How did it become a political party?

When Franco died, Herri Batasuna was organised as wide popular unity. It was an electoral coalition that sought an alternative of minimal democratic requirements for Euskal Herria, among them the right to self-determination of the Basque People. It later became a political party, defined as a popular unity, which gathered all sorts of popular political sectors, like social democrats, communists, Christians and marxist-leninists.

How did Euskal Herritarrok come into play?

HB constituted Euskal Herritarrok in a particular political situation, when we were already foreseeing the outlawing of HB and ETA was announcing its cease-fire. In that stage, HB considered necessary to propose the Basque national left wing a new project and an electoral coalition, in order to participate in the elections held in a particular political situation.

Were HB, EH and Batasuna linked to Jarrai?

In spite of all the things that have been said on the matter, we have always firmly thought that it is important that the youth movements or trade unions do not have any organic relationship with Batasuna. In other words, they are part of the popular unity, at the level of popular assemblies in villages and districts of greater cities, but they do not have any organic participation in the party. Therefore, it is not exact to say that Jarrai is the youth organisation of HB, EH or Batasuna. We do not have any youth organisations inside our party. But there is an autonomous youth organisation that agrees with the political project of Herri Batasuna and Batasuna and maintains a dialectic relationship with the popular unity.

Did HB, EH and Batasuna have any international support?

We look for international support in the sectors of the world's left wing. For instance, we actively participate in the World's Social Forum. In addition to other activities, we also participate in the congress of the South African Communist Party, an important branch of the African National Congress. Furthermore, we even officially participate in the congress of the Sinn Fein.

According to Article 9.3.a of the Law on Political Parties, a political party can be dissolved if it gives "express or tacit political support to terrorism by legitimising the terrorist actions - which pursue political aims by non-pacific and anti-democratic ways- or by minimising and justifying their significance and the violation of fundamental rights they entail". Were HB, EH or Batasuna giving "express or tacit political support to terrorism"?

Certainly not. In addition, we have made public statements in the opposite sense. We have stated that Batasuna does not justify, or protect, or condemn, or support ETA's armed struggle. This is our position, which we reaffirmed during Batasuna's press conference after the attack in Santa Pola. Actually, the Supreme Court ruled that we tacitly support terrorism because we affirm that the armed struggle in our country is the consequence of the existence of a political conflict. But this is the same analysis that the European public opinion is making about the attacks of certain members of the Palestinian resistance. Why do Palestinian men and women blow up themselves to kill as many people they can? We cannot answer this question if we do not acknowledge the existence of a profound conflict between the Palestinian People and the State of

Israel. To say that this conflict exists does not mean to approve the suicidal attacks: it is just presenting a diagnosis that facilitates the solution to the conflict, which is actually what Batasuna is doing for the case of Euskal Herria.

The Supreme Court has included the following statements, considered "significant to outlaw Batasuna". The first is from José Enrique Bert, pronounced on the 19th July 2002. He said that "Batasuna's aim [was] not that ETA stop killing people, but the disappearance of any kind of violence and those who are responsible for it". Could you explain such statement?

Our aim, which has been publicly made clear, is the disappearance of death as an instrument in Basque politics. This is our aim. But after having studied the history of our Country and all the armed uprising that permanently took place in these last centuries, we also think that, in order to eliminate death from the Basque political arena, the main political problems that affect the relationship between the Basque People and the Spanish State have to be resolved.

What was the influence of ETA's cease-fire in the electoral results?

It is undeniable that ETA's decision to break the cease-fire had a strong influence on the electoral results of the left nationalists. During the suspension of the hostilities, we were the second political force of Euskal Herria. Once the cease-fire ended, we dropped to the fourth position.

The second statement is yours. On the 3rd July and 21st August 2002 you asked the Basque People for "a severe response" against the "new aggression" from Judge Garzón and "to organise and fight" against the measures that French or Spanish judges may adopt on questions that "only concern the Basque Country". Where you calling for urban riots?

Certainly not. Besides, if you check the newspapers since the date in which I pronounced such statement, there have not been any relevant cases of urban riots. Nevertheless, that was the interpretation of the State Attorney General, which is completely subjective. Against such interpretation, I would like to point out that during the demonstration in Bilbao, the leaders of Batasuna made sure that no disturbing incidents would happen and then dissolved the massive demonstration. During the police brutal punishment against the demonstration, Joseba Permach asked the demonstrators to sit down and then I personally asked them to disperse. In conclusion,

either the State Attorney General misunderstood my statements, or the supporters of Batasuna do not pay much attention to me.

In another statement you have made, which has not been taken in consideration by the Supreme Court, you considered Aznar, Prime Minister of Spain, directly responsible for what is taking place nowadays and what could happen in the future. In what sense is Aznar responsible?

He has a great responsibility indeed. We do not elude our responsibility in the issue, but we are also proposing the solution. He knows that this conflict could be easily and democratically resolved, but he does not do anything about it. Spain and France have signed, among other instruments for the protection of human rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. In both Treaties, the first provision is the right to self-determination. What we are proposing as a solution to the conflict is the full respect of all [human] rights of the Basques, regulated by the United Nations and ratified by the two Countries. It is not an extreme solution, or an independentist program. We, as a nation and a people, want to have the juridical personality to decide the kind of relationship we want with Spain and France, the role we want to play in Europe and the model of territorial organisation. To deny these rights is to be responsible of the continuation of the conflict. How can the Spanish Prime Minister not be responsible of this long lasting conflict when he has the key to the peaceful solution, like the British Prime Minister Tony Blair had to resolve the conflict in Northern Ireland?

On the 7th August 2002, Antton Morcillo declared to the press that Batasuna does not condemn ETA's attacks because that policy was "an identity sign" of the party. What is the difference between this identity sign and a justification to the use of violence for political aims?

We remind the other political forces that, even though they had condemned ETA's armed initiative for the last 25 years, the issue has not been resolved at all. What is the use in condemning ETA's activity? It is absolutely useless. The only time when a cease-fire was declared, it was because it had been facilitated, conditioned, generated and constructed from our political position. If we want an efficient peace and substantial changes, our position has to be respected and considered.

The Vice-president of the Basque Government, Idoia Zenarruzabeitia, announced that the Institution may file a complaint with the European Court on Human Rights for the dissolution of Herri Batasuna, Euskal Herritarrok and Batasuna. In the case the Court would admit such complaint, are you planning to join the Basque Government in its initiative?

I think that the initiative of the Basque Government is correct, although I would like to underline that the Basque Government does not always assume its responsibility for the situation. We have always made clear that filing a complaint is the task of a lawyer, but those in charge of the Government have the one to respect, protect and fulfil the rights of the Basques. In any case, our lawyers will file, by their own, a complaint with the European Court on Human Rights, where we think there are sufficient reasons to win the case.

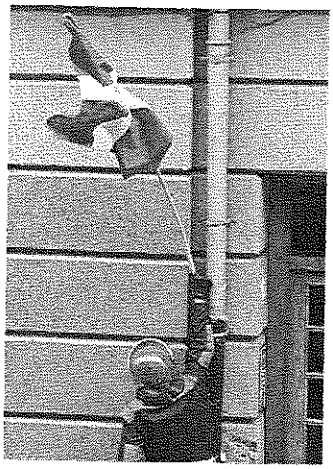
The second paragraph of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms specifies that the dissolution of a political party is allowed only if it is "necessary in a democratic society". Previously, you referred to Tony Blair and the "Good Friday Agreement" of 1998. The Sinn Fein has never been dissolved and its contribution was fundamental in the peace process in Northern Ireland. Do you think that such historical precedent stands as evidence to prove that the dissolution of Batasuna was not necessary in a democratic society?

For us this is crystal clear. The problem is that in Spain, a "democratic society" does not exist. This is the main problem. Someone attempts to annihilate and remove a party, considered in the Basque Country as a key element to resolve the conflict, from the political arena and, instead of resolving the conflict, seeks victory by crushing his enemy. This is the difference between Great Britain and Spain. In the United Kingdom, everybody knew that the dissolution of the Sinn Fein would have meant building up more obstacles towards the possible solution and that, sooner or later, the party would have been considered as a legitimate interlocutor in the negotiations to change the situation. The Irish People has always been a reference for us: there are a lot of similarities between the diagnostics of both conflicts and the ways towards peace. Batasuna has been outlawed because they do not want any change in the situation and because the solutions we propose are disturbing the annihilation policy of the Spanish Government.

Annex 2: Pictures

1. Bilbao, 23 August 2002.

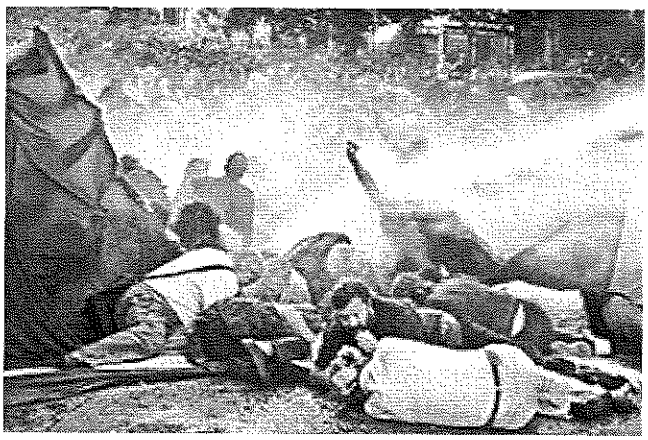
2. Arnaldo Otegi. Bilbao, 27 August 2002.



3. Gasteiz, 27 August 2002.

4. Gasteiz, 27 August 2002.

5. Bilbao, 14 September 2002.



6. Bilbao, 14 September 2002.

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