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Comment: Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights

Katherine A. Sawyer

American University Washington College of Law

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Comment: Rejection of Weimarian Politics or Betrayal of Democracy?:
Spain's Proscription of Batasuna Under the European Convention on
Human Rights

COMMENT

REJECTION OF WEIMARIAN POLITICS
OR BETRAYAL OF DEMOCRACY?:
SPAIN'S PROSCRIPTION OF BATASUNA
UNDER THE EUROPEAN CONVENTION ON
HUMAN RIGHTS

KATHERINE A. SAWYER*

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* Senior Staff Member, *American University Law Review*, J.D. candidate, May 2004, *American University, Washington College of Law*, B.A. 2000, *University of Maryland*. This Comment is dedicated to my father, Dr. Robin G. Sawyer, who provided the inspiration for this and countless other endeavors and to whom I owe much more than could ever be accounted for here. I would also like to thank my editor and friend, Jon Levi for his insight and comments on earlier drafts, Jeremy Barber and the Law Review staff for their hard work, and Professor John Finn for lending his expertise in the field of political violence. Finally, all translations are my own, unless otherwise indicated.

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“Must a government, of necessity, be too strong for the liberties of
its own people, or too weak to maintain its own existence?”
- Abraham Lincoln, in a message to Congress, July 4, 1861

INTRODUCTION

The pages of twentieth century history are replete with the tragedy of Western democracy's struggle against terrorist wars of attrition waged in the name of nationalism.¹ In the face of those threats, the failure of many state responses has often led governments to resign themselves to policies of containment.² However, the attacks of September 11, 2001, illustrated that globalization has largely rendered that approach impotent due to the advent of international networks of terrorist organizations that have unprecedented resources at their disposal.³ Consequently, the nations of the world

1. See PETER CHALK, WEST EUROPEAN TERRORISM AND COUNTER-TERRORISM: THE EVOLVING DYNAMIC 5 (1996) (noting the pervasive presence of nationalist terrorism throughout Western Europe); Naeomi Gal-Or, *Introduction* to TOLERATING TERRORISM IN THE WEST: AN INTERNATIONAL SURVEY xiii (Naeomi Gal-Or ed., 1991) (observing that terrorism has become a fact of daily life in much of the western hemisphere); ANTONIO VERCHER, TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS 4 (1992) (analyzing the legal responses of Spain, France, Italy, Germany, and the United Kingdom to the threat of political violence). Vercher notes that the incidence of terrorist activity increased in the early 1990s. *Id.* at 1. See PAUL WILKINSON, TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE 17 (2000) (providing that “[t]he predominant form of armed conflict in the contemporary world is intrastate rather than interstate, and the overwhelming majority of insurgencies are ethnic or ethnoreligious in their underlying motivation.”).

2. See GERARD HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND 6-7 (1989) (noting the sporadic employment of emergency anti-terrorism measures during periods of unusual violence).

3. See CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION x (2002) (defining the phenomenon of “Third Millennium Terrorism” as that which emerges “through non-national, global networks and with aspirations which are likewise distanced from place and time”). Walker states that this notion of Third Millennium Terrorism serves to complement “modernist, nationalist terrorism, the prime exponent for most of the twentieth century” in that “threats of globalisation will ensure that cultural and national causes remain vibrant [and further observes that] [t]he attacks and scares of autumn 2001 . . . sharpened the desire for security.” *Id.* See WILKINSON, *supra* note 1, at 119 (noting the ease with which terrorists, particularly within the European Union, can transport their bases of operation and their capital between countries in order to evade capture); see also Emanuel Marotta,

have had to consider, with renewed vigor, how to confront the epidemic of nationalist terrorism and the effects that this new face of terrorism will have on civil rights, the rule of law, and the principles of democracy upon which they rest.⁴ International Human Rights law, particularly in the European context, has assumed a growing role in the tenuous reconciliation of necessary state repression and the preservation of the very rights that the state purports to protect, and introduces another tier to the debate concerning the employment of counter-terrorism measures.⁵ In light of the increasingly international nature of terrorism, an understanding of the international legal response to the issue of counter-terrorism will be crucial for states in creating effective anti-terrorism legislation that comports with the rule of law.⁶ Recent legislation passed in Spain provides a unique opportunity to evaluate the struggle of the modern Western democracy to reconcile anti-terrorist measures with

Europol's Role in Anti-Terrorism Policing, TERRORISM & POLITICAL VIOLENCE, Winter 1999, at 15 (stating that “[w]e only have to consider recent events to see the truly international nature of terrorism and its lack of respect for national boundaries.”); Max Taylor & John Horgan, *Future Developments of Political Terrorism in Europe*, TERRORISM & POLITICAL VIOLENCE, Winter 1999, at 83, 86 (asserting that “[n]ationalism, religion, and ethnicity are in our view the powerful forces which will drive future international terrorism in Europe.”); David Veness, *Low Intensity and High Impact Conflict*, TERRORISM & POLITICAL VIOLENCE, Winter 1999, at 8 (articulating the new challenges in modern counter-terrorism policy engendered by the evolution of means, motives, and opportunities for terrorism since its emergence in the 1960s).

4. See CHALK, *supra* note 1, at xii (postulating that “some of the potential responses to terrorism could pose an equal, if not a greater, threat to democratic norms than does terrorism itself.”); see also CHRISTOPHER HEWITT, CONSEQUENCES OF POLITICAL VIOLENCE 123 (1993) (identifying the choice regarding the degree to which a state is prepared to restrict the civil liberties of its citizens as one of the most important policy choices that a government can make); WILKINSON, *supra* note 1, at 230 (stating that “[t]he tightrope between under-reaction . . . and draconian overreaction, leading to serious infringement of civil liberties . . . is pitched at a different height and angle in each case.”); Fernando Jimenez, *Spain: The Terrorist Challenge and the Government's Response*, in WESTERN RESPONSES TO TERRORISM 110, 128-29 (Alex P. Schmid & Ronald D. Crelinsten eds., 1993) (exhorting governments to adhere to the rule of law in their efforts to combat terrorism); Dennis P. Riordan, *The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention of Human Rights*, 26 HASTINGS CONST. L.Q. 373, 376 (1998) (maintaining that “no rubric is more commonly used by states to trample on the fundamental rights of their citizens, particularly those of ethnic minorities, than that of the struggle against terrorism.”).

5. See Graham Head, *The Future is Bright . . .—But Whom For?*, TERRORISM & POLITICAL VIOLENCE, Winter 1999, at 19, 22 (noting the increasing integration of the European Court of Human Rights into legal rulings and its increasing relevance in British law); Marotta, *supra* note 3, at 16-17 (noting increased cooperation among European Union members regarding counter-terrorism as evidenced in the Europol Convention).

6. See Head, *supra* note 5, at 22 (identifying the increasing influence of the European Convention on Human Rights on legal rulings, particularly in light of the need for a uniform international system of checks and balances on counter-terrorism techniques).

fundamental civil rights, in a context that typifies the changing face of twentieth century terrorism.⁷

On August 23, 2002, Judge Baltásar Garzón of Spain's *Audiencia Nacional* [National Court] issued an order suspending Batasuna,⁸ the political front for the terrorist organization *Euzkadi ta Askatasuna* ("E.T.A.") [Basque Fatherland and Liberty].⁹ This ruling came nearly three months after Spain's Congress passed the *Ley Orgánica de Partidos Políticos* [Law of Political Parties] by an overwhelming ninety-five percent majority on June 4, 2002.¹⁰ The law, recently declared constitutional by the Spanish Constitutional Court,¹¹ provided the legislative predicate¹² upon which the Spanish Supreme Court based its definitive proscription of Batasuna in March, 2003.¹³ This

7. See Shlomo Ben-Ami, *Introduction to ETHNIC CHALLENGES TO THE MODERN NATION STATE 3* (Shlomo Ben-Ami et al. eds., 2000) (explaining that Europe's immediate challenge is "that of reconciling the community's natural diversity and the inevitable emphasis . . . on political self-determination . . . and the search for a unifying ethic . . ."). The ethno-identity conflict of the Basque population and the expression that it finds in the violent separatist movement fit the paradigm for the future of European terrorism that recent scholarship has promulgated. See *id.* (noting that we live in an "age of self-determination brought to its extreme"). The author cites the insolubility of Basque nationalism as exemplary of that assertion and identifies it as the strongest nationalist cause in Western Europe. *Id.* See Taylor & Horgan, *supra* note 3, at 86 (identifying nationalism as the driving cause behind modern European terrorism).

8. See JUZGADO CENTRAL DE INSTRUCCIÓN NO. 5, AUTO [CENTRAL COURT PROCEEDINGS NO. 5, ORDER], p. 344 (Aug. 26, 2002) [hereinafter ORDER] (determining that the suspension period would last for three years and could be renewed up to five years for Batasuna and its predecessor parties), at <http://parlamento.euskadi.net/actual/auto20020826.pdf> (on file with the American University Law Review).

9. Anthony Richards, *Terrorist Groups and Political Fronts: The IRA, Sinn Féin, the Peace Process and Democracy*, TERRORISM & POLITICAL VIOLENCE, Winter 2001, at 72, 73 (arguing that the term "political wing" is unsatisfactory in labeling groups such as Sinn Féin and Batasuna as it fails to reflect the fact such political fronts are subordinate to their corresponding terrorist organizations and often emerge from within them).

10. Ley Orgánica de Partidos Políticos ("L.O.P.P."), (B.O.E., 2002, 154) (Spain) (replacing an existing law with new procedures to dissolve a political party that fails to respect democratic principles and human rights), available at <http://www.igsap.map.es/cia/dispo/106-02.htm> (last visited July 20, 2003) (on file with the American University Law Review).

11. On March 12, 2003, the Constitutional Court issued a ruling rejecting the Basque Government's contention that the Law of Political Parties violates various provisions of the Spanish Constitution. S.T.C., Mar. 12, 2003 (No. 48/2003), available at <http://www.tribunalconstitucional.es/JC.htm> (on file with the American University Law Review). See EL T.C. DECLARA CONSTITUCIONAL LA LEY DE PARTIDOS POLÍTICOS [THE CONSTITUTIONAL COURT DECLARES THE LAW OF POLITICAL PARTIES CONSTITUTIONAL] *Iurislex* (Mar. 14, 2003), at <http://www.iurislex.net> (on file with the American University Law Review).

12. See *id.* art. 11 (conferring upon the Government and the Public Prosecutor the exclusive power to present to the Supreme Court a petition for the proscription of a political party).

13. TRIBUNAL SUPREMO, SENTENCIA, ILEGALIZACIÓN DE LOS PARTIDOS POLÍTICOS HERRI BATASUNA, EUSKAL HERRITARROK Y BATASUNA [SUPREME COURT, JUDGMENT,

condemnation represents the first of its kind since Spain returned to democracy in 1975.¹⁴

While the overwhelming majority of the Spanish citizenry supports Batasuna's proscription, Batasuna and other groups in the Basque Country have mounted staunch opposition.¹⁵ On September 9, 2003, the Basque Autonomous Government announced its intention to appeal the Constitutional Court's ruling before the European Court of Human Rights ("E.C.H.R.").¹⁶ Should the E.C.H.R. admit the complaint, the case would represent the first time in the Court's history that it has heard a claim instituted by a regional government against its own central State.¹⁷

ILLEGALIZATION OF THE POLITICAL PARTIES HERRI BATASUNA, BASQUE CITIZENS AND BATASUNA], Autos acumulados n^o 6/2002 y 7/2002 (Mar. 26, 2003) [hereinafter SUPREME COURT JUDGMENT] (describing the procedural history in the Spanish courts that ultimately led to the Supreme Court's decision to dissolve Batasuna), at <http://www.poderjudicial.es/tribunalsupremo> (on file with the American University Law Review).

14. See *United in Error: Spain's Ban on Batasuna Will Not Help*, GUARDIAN (London) (Aug. 28, 2002) (arguing that the ban is unprecedented and recommending a more conciliatory approach to the regulation of party activity), available at <http://www.guardian.co.uk/spain/article/0,2763,781601,0.00.html> (on file with the American University Law Review). From the conclusion of the Spanish Civil War in 1939 until the death of Francisco Franco in 1975, Spain existed as a totalitarian dictatorship. JOSÉ SÁNCHEZ JIMÉNEZ, *LA ESPAÑA CONTEMPORÁNEA: DE 1931 A NUESTROS DÍAS* [CONTEMPORARY SPAIN: FROM 1931 TO THE PRESENT] 247 (1991). The period preceding Franco's death in 1975 was characterized as one of "double crisis," in the economic and political spheres. *Id.* at 373-74 (noting that the country suffered from a period of unprecedented inflation and political unrest). Anticipating Franco's impending death, various opposition parties began to mobilize resources creating unified platforms from which to forge a new democracy. *Id.* at 383 (observing that the Christian Democrats, the Social Democrats and the Socialist Party joined forces in 1974 to create the short lived "Unitary Platform"). While this new atmosphere of freedom paved the way for Spain's democratization, it also provided an opportunity for the nationalists to voice their agenda. See Fernando Reinares & Oscar Jaime Jiménez, *Countering Terrorism in a New Democracy: The Case of Spain*, in EUROPEAN DEMOCRACIES AGAINST TERRORISM 119, 125 (Fernando Reinares ed., 2000) (noting that this political expression most commonly came in the form of terrorist violence which escalated markedly between 1978 and 1980).

15. *El Gobierno vasco se querrela contra Garzón por sus autos sobre Batasuna* [The Basque Government Files Charges Against Garzón for his Edicts Against Batasuna], EL PAÍS (Madrid) (Oct. 18, 2002) (reporting that the Basque government has filed charges of prevarication against Judge Garzón), available at <http://www.elpais.es/articulo.html?xref=20021018> (on file with the American University Law Review). Prevarication, one of the most egregious charges that a party can bring against a judge or magistrate, essentially alleges that the judge has knowingly or negligently issued an unjust ruling. *Id.*

16. *El Gobierno vasco sale en defensa de Batasuna al recurrir en Europa la Ley de partidos políticos* [The Basque Government Comes to Batasuna's Defense, Challenging the Law of Political Parties in Europe], EL MUNDO (Madrid) (Sept. 10, 2003) [hereinafter *Batasuna's Defense*], available at <http://www.abc.es> (on file with the American University Law Review).

17. *El Gobierno Vasco presenta la demanda al estado español en Estrasburgo* [Basque Government Files Claim Against the Spanish State In Strasbourg], ESTRELLA DIGITAL, Sept. 10, 2003, at <http://www.estrelladigital.es/articulo.asp?sec=esp&fech=10/09/03&>

In examining the controversial Law of Political Parties and the subsequent actions of the Spanish judiciary, this Comment will situate those decisions in an appropriate legal and political framework with reference to Spanish law and European human rights doctrine. It will further attempt to lend insight into the potential international import of the decision. Part I of this Comment explores the history of E.T.A. and the evolution of Batasuna. Part II examines the legislative and judicial movements that have culminated in the Spanish judiciary's most recent action. In defending the proscription of Batasuna, Part III examines the human rights concerns that this decision has awakened in light of recent E.C.H.R. jurisprudence.¹⁸ Finally, Part IV analyzes the arguments in favor of and against proscription and its efficacy as a weapon in the struggle against terrorism and concludes that the proscription of Batasuna is both a sound and necessary step in bringing an end to Spain's forty-year battle against political terrorism.

I. E.T.A. AND BATASUNA: A HISTORY OF VIOLENCE

E.T.A., one of the oldest operating Western European terrorist groups, is a separatist organization fighting for Basque independence from Spain.¹⁹ E.T.A. was formed in Bilbao by a group of young members of the journal, *Ekin* [*Action*].²⁰ They hoped to create a new

name=espanal (on file with the American University Law Review).

18. This Comment is primarily concerned with the notion of political proscription as a method of combating political violence in Western democracies. As the constitutionality of these measures will vary pursuant to the domestic constitution at issue, this Comment confines its analysis largely to the decision's consonance with E.C.H.R. jurisprudence.

19. See Jiménez, *supra* note 4, at 111-12 (providing a cursory history of E.T.A.'s historical development); Ludger Mees, *Between Votes and Bullets. Confronting Ethnic Identities in the Basque Country*, 24 ETHNIC & RACIAL STUDIES 798, 800 (2001) (tracing the historic origins of the Basque conflict to the beginning of Spanish state building in the fifteenth century). Mees also notes that until the late nineteenth century, the Basques succeeded in maintaining a traditional and extensive system of self-government known as the "Fueros." *Id.* at 801. The abolition of this system in 1876 engendered a "cultural renaissance" which paved the way for the more politicized and radical nationalist movements that followed. *Id.* at 802, 806; see Fernando Reinares, *Nationalism and Violence in Basque Politics*, 8 CONFLICT 141, 141 (1988) (chronicling the evolution of Basque nationalism from its emergence at the end of the nineteenth century until its manifestations in modern terrorism).

20. See Michael Wierviorka, *E.T.A. and Basque Political Violence*, in THE LEGITIMIZATION OF VIOLENCE, 292, 296-98 (David E. Apter ed., 1997) (explaining that the students editing the journal *Action* established groups in various cities in the Basque Country and then combined with the PNV youth organization *Egi* to form E.T.A.); *La ofensiva terrorista: De la universidad a la 'acción armada'* [*The Terrorist Offensive: From the University to "Armed Action"*], EL PAÍS (Madrid) [hereinafter *Terrorist Offensive*] (stating that the foundation of *Action* took place in 1952 at the Jesuit University of Deusto), at <http://www.elpais.es/temas/eta/menua/a4/los50.html> (last visited Sept. 17, 2002) (on file with the American University Law Review).

nationalist organization that would free the *Partido Nacionalista Vasco*²¹ (“P.N.V.”) [Basque Nationalist Party] from the quagmire in which it was entrenched during Franco’s oppressive regime.²² On July 31, 1959 the young dissidents formed E.T.A. on four basic principles: the defense of *Euskera* [the Basque language], ethnocentrism, anti-Spanish ideology, and the independence of the territory claimed by the Basques, including the northern Spanish provinces of the Basque Country and Navarra as well as the French provinces of Basse-Navarra, Labourd and Soule.²³ E.T.A. openly espoused the notion of the *lucha armada* [armed struggle] and committed its first act of terrorism on July 18, 1961.²⁴ The attack was a failed attempt to derail a train of Franco’s volunteers en route to San Sebastian for the commemoration of the military strike that gave rise to the Spanish Civil War in 1936.²⁵

Due to the internal ideological schism that occurred between 1972 and 1974, the group split into two factions, the “political-military” branch and the “E.T.A.-militia” (E.T.A.-M).²⁶ The political-military

21. Prior to the birth of E.T.A., the P.N.V. existed as the lone political force advocating for the Basque nationalist cause. See Wierviorka, *supra* note 20, at 296 (explaining the birth of E.T.A. as a product of the crisis within traditional Basque nationalist institutions and the sentiments of impotence that that crisis engendered). Wierviorka goes on to note that as the P.N.V. became increasingly marginalized from the regime, internal discord grew, ultimately resulting in the emergence of a contingent of critical younger members disillusioned by the impotence of its party. *Id.* The students, editors of the journal *Action*, formally broke ties with the P.N.V. and formed E.T.A. in order to vindicate the Basque identity and cultural heritage. *Id.* at 297-98.

22. See CHALK, *supra* note 1, at 55 (explaining that under Franco’s regime, which lasted from 1939-1975, “the use of the *Euskera* language was ruthlessly suppressed in an attempt to eliminate a regionalism which was seen to represent a fundamental threat to the Fascist Falange”). This attack on what Basques regarded as the pillar of their culture provided grist for the terrorist mill that E.T.A. was to become. *Id.*

23. See Montserrat Guibernau, *Spain: Catalonia and the Basque Country*, in DEMOCRACY AND CULTURAL DIVERSITY 55, 56 (Michael O’Neill & Dennis Austin eds., 2000) (tracing Basque claims of sovereignty to their status as the only remaining pre-Aryan race in Europe). Guibernau also notes that the Basque language is the only pre-Indo-European language still used within Europe. *Id.* See also VERCHER, *supra* note 1, at 168 (stating that “E.T.A. patterns itself somewhat after the I.R.A. and that some observers have described E.T.A.’s short-range goal as one of trying to ‘Ulsterize’ the Basque region, i.e., provoke a military intervention to pacify the area.”). “E.T.A. expects that such intervention would irretrievably alienate the Basque population and rally further support for E.T.A. against central authority.” *Id.* See generally *Terrorist Offensive*, *supra* note 20 (recounting the history of the Basque separatist movement).

24. See Reinares, *supra* note 19, at 144-46 (tracing the origins of E.T.A.); *Terrorist Offensive*, *supra* note 20 (summarizing the significant chronological history of E.T.A.’s terrorist offensive).

25. See *Terrorist Offensive*, *supra* note 20 (reporting that the failed attack resulted in immediate escalation of police action leading to the arrest of the group’s directorate and nearly to its dissolution).

26. *Primera gran escisión y comienzo de las acciones indiscriminadas* [The Terrorist

branch advocated a combination of the political structure typical of a legitimate organization with political pressure in the form of violence (excluding individual targets) while E.T.A.-M espoused a policy of "legitimate" violence.²⁷ In 1973, shortly after its formation, E.T.A.'s operatives assassinated Luis Carrero Blanco, the President of the Government and Franco's designated successor.²⁸ This pattern of violence has continued without respite and, since its inception, E.T.A. has claimed responsibility for 3,391 terrorist attacks that have killed 836 people and injured 2,367.²⁹

The first political arm of E.T.A. emerged in 1976, in the Irish tradition of Sinn Fein,³⁰ and the three subsequent years produced at least 82 other legal organizations.³¹ In April, 1978, four of the radical nationalist Basque parties formed a coalition group on behalf of E.T.A. This group, Herri Batasuna ("H.B."), later became the principal political wing of E.T.A.³² H.B. promoted a nationalist policy founded on Marxist-Leninist ideology and espoused five central, non-negotiable tenets:

1. Legalization of all Basque parties.
2. Expulsion of all national police forces from the Basque territory.
3. Recognition of Basque national sovereignty, the right to self-determination, and the creation of an independent state that would include Navarra and the provinces of the French Basque Country.
4. Improvement of conditions for Basque workers.

Offensive: First Great Split and Beginning of Indiscriminate Actions], EL PAÍS (Madrid), available at <http://www.elpais.es/temas/eta/menua/a4/los70.html> (last visited Sept. 17, 2002) (on file with the American University Law Review).

27. *Id.*

28. *Id.*; see also Reinales, *supra* note 19, at 148 (noting that the assassination of Franco's successor destroyed the nascent government's aspirations of continuity, bringing political uncertainty to the regime).

29. *Clausurada la sede de Batasuna en Pamplona y ocho más en el resto de Navarra* [Batasuna Headquarters in Pamplona and Eight Others in the Rest of Navarra Closed], EL MUNDO (Madrid), at <http://www.elmundo.es/elmundo/2002/08/26/espana/1030359464.html> (last visited Sept. 2, 2003) (on file with the American University Law Review).

30. See Mees, *supra* note 19, at 810 (quoting Batasuna's spokesman Arnaldo Otegi as stating that "Ireland was a mirror for us, and so was the republican movement."). Mees notes that social movements, including nationalist movements, possess a "cumulative power" which "not only repeat[s] many of the themes of their predecessors . . . but build[s] on the practices and themes of the past." *Id.* at 809.

31. *Terrorist Offensive*, *supra* note 20.

32. *Id.* (elaborating that this coalition decided to form an official political party in 1980 but was unable to secure official recognition until 1986).

5. Declaration of *Euskera* as the official and primary language of the Basque Country.³³

The coalition's strategic long-range agenda was to effect total Basque autonomy from Spain.³⁴

The 1980s represented the bloodiest decade in the history of the organization.³⁵ During this period, E.T.A. embarked on a campaign of indiscriminate violence, employing execution-style assassinations and car bombings.³⁶ On June 19, 1987, the group placed a car bomb outside of a major department store in Barcelona, resulting in twenty-one dead and more than forty-five wounded.³⁷

The 1990s saw the arrival of a new strategy under which E.T.A. based its actions on the maintenance of armed conflict as an end in itself and also broadened its list of potential targets, previously limited to members of security forces, to include politicians, members

33. *Id.*; see also Reinares, *supra* note 19, at 149 (noting that H.B.'s policy, in support of E.T.A.'s cause, was to decline any legislative seats that it claimed in elections); Wieviorka, *supra* note 20, at 325 (explaining that H.B., closely linked to E.T.A., employed its political weight to promote E.T.A.'s cause in various arenas including trade unions, women's movements, anti-nuclear movements and Basque cultural movements).

34. Peter Waldmann, *From the Vindication of Honor to Blackmail: The Changing Role of E.T.A. On Society and Politics in the Basque Region of Spain*, in TOLERATING TERRORISM IN THE WEST: AN INTERNATIONAL SURVEY, *supra* note 1, at 1, 11 (explaining E.T.A.'s short- and long-term strategies). Shortly after Garzón issued his order, Juan Jose Ibarretxe, the *lehendakari* [president] of the Basque Country, put forth a proposal for a "State of Free Association." *Ibarretxe plantea convertir Euskadi en un Estado libre asociado con una justicia propia* [Ibarretxe Proposes the Conversion of Euskadi into a "State of Free Association" with its Own Judiciary], EL MUNDO (Madrid), (Sept. 27, 2002), available at <http://www.elmundo.es/elmundo/2002/09/27/espana/1033120813.html> (on file with the American University Law Review). The plan would confer upon the Basque Country a status similar to that of a federal state and has as its objective the achievement of "shared sovereignty" with the central Spanish state. *Id.* However, the European Union has already demonstrated its disapproval of such a plan. On October 22, 2002, the European Commission adopted unanimously a declaration stating that Ibarretxe's plan is incompatible with the Treaty of the European Union. *La Comisión Europea asegura que el plan de Ibarretxe es incompatible con el tratado de la U.E.* [The European Commission Assures that Ibarretxe's Plan is Incompatible with the E.U. Treaty], ESTRELLA DIGITAL, Oct. 23, 2002 [hereinafter *Ibarretxe's Plan*], at <http://www.estrelladigital.es/021023/articulos/espana/espana1.asp>.

35. *La ofensiva más sangrienta, los G.A.L. y las confrontaciones de Argel* [The Bloodiest Offensive, the G.A.L. and the Confrontations of Argel], EL PAÍS (Madrid) [hereinafter *Bloodiest Offensive*], at <http://www.elpais.es/temas/eta/menua/a4/los80.html> (last visited Sept. 17, 2002) (on file with the American University Law Review). It is interesting to note that 1980, the year that the first autonomous elections for the Basque Parliament took place, witnessed the most deaths from terrorism of any year between the period 1968 and 1986. See Maria J. Funes, *Social Responses to Political Violence in the Basque Country*, 42 J. CONFLICT RESOL. 493, 495 (1998) (recording a marked increase in violence during the transition period and years of nascent democracy); Reinares, *supra* note 19, at 151 (reporting that 96 people died in terrorist attacks in 1980).

36. *Bloodiest Offensive*, *supra* note 35.

37. *Id.*

of the judiciary, civil servants, and journalists.³⁸ Throughout its twenty-year existence, H.B. maintained a symbiotic relationship with E.T.A., often including known or incarcerated E.T.A. members on its ballots.³⁹ In 1996, Judge Garzón established an affirmative link between H.B. and E.T.A., unveiling an E.T.A. propaganda campaign in which the political party participated. E.T.A. produced a videotape that H.B. distributed to public and private television stations for broadcast during free air time delegated for use by political parties in anticipation of an upcoming election.⁴⁰ This discovery resulted in the prosecution and incarceration of the H.B. National Cabinet.⁴¹

In 1998, only months after the dissipation of H.B. due to the conviction and imprisonment of its National Cabinet, *Euskal Herritarrok* ("E.H.") [Basque citizens], a new electoral platform appeared in Bilbao.⁴² The new party subsumed the remaining vestiges of H.B. and adopted the ideology of its predecessor.⁴³ Neither the Spanish political directorate nor the public doubted E.H.'s existence as the political guise under which H.B. continued to operate.⁴⁴

On September 12, 1998 the Basque nationalists and the Euskal Herritarrok, along with the *Izquierda Unida* [United Left] and other organizations, signed the *Estella-Lizarra* Pact in which they pledged to search for a negotiated solution to the violence plaguing the Basque Country.⁴⁵ Only days after signing the pact, E.T.A. announced an indefinite unilateral cease-fire.⁴⁶ The cease-fire lasted nearly fifteen

38. *El golpe de Bidart* [Bidart's Coup], EL PAÍS [hereinafter *Bidart's Coup*] (reporting that between 1995 and 2000, twelve members of the *Partido Popular* [Popular Party] and the ex-president of the Constitutional Court died at the hands of E.T.A.), at <http://www.elpais.es/temas/eta/menua/a4/los90.html> (last visited Sept. 17, 2002) (on file with the American University Law Review).

39. See Waldmann, *supra* note 34, at 11-13 (noting the extensive connections that existed between E.T.A. and its political front H.B.). H.B. received contributions from E.T.A.'s coffers and H.B. has assisted in the construction of arms and supply depots. *Id.* at 12.

40. *El entorno político de E.T.A.: HB/EH* [E.T.A.'s Political Environment: HB/EH], EL PAÍS (Madrid) [hereinafter *E.T.A.'s Political Environment*], at <http://www.elpais.es/temas/eta/menua/a2/hbeh.html> (last visited Sept. 17, 2002) (on file with the American University Law Review).

41. *El entorno de E.T.A.* [E.T.A.'s Environment], EL MUNDO (Madrid) (noting that at the time of the discovery much of the Basque population supported the proscription of H.B.), at <http://w3.el-mundo.es/eta/entornobatasuna.html> (last visited Sept. 3, 2003) (on file with the American University Law Review).

42. *E.T.A.'s Political Environment*, *supra* note 40.

43. *Id.*

44. *Id.*

45. *Bidart's Coup*, *supra* note 38.

46. See Mees, *supra* note 19, at 799 (noting the significance of the cease-fire as the first serious attempt at reconciliation since the emergence of Basque political

months until, on November 28, 1999, E.T.A. announced that its operatives would return to action.⁴⁷ E.T.A. consummated this threat on January 21, 2000 with the assassination of an army lieutenant colonel in Madrid.⁴⁸ On December 12 of the same year, in response to 23 assassinations since the previous January, the various national political parties, the *Partido Popular* ("P.P.") [Popular Party] and the *Partido Socialista de Obreros Españoles* ("P.S.O.E.") [Spanish Workers Socialist Party], signed the *Acuerdo por las libertades y contra el terrorismo* [Agreement for Freedom and Against Terrorism] in which these traditionally antagonistic parties pledged to work together to design a common strategy.⁴⁹ E.T.A. responded to the pact with the assassination of a politician in Barcelona within 48 hours of its signing.⁵⁰

Three years after the birth of E.H., the elections of May 2001 produced the worst results that the party, in any of its forms, had witnessed in its twenty-two year existence.⁵¹ One month after E.H.'s electoral debacle, Batasuna emerged as its successor,⁵² inheriting a political history defined by its inextricable links to E.T.A. and the imprimatur of complicity that such a history confers.⁵³

violence); *15 meses sin muertos* [15 Months Without Deaths], EL PAÍS (Madrid) (reporting that during the fifteen-month cease-fire more than 100 prisoners were released from prison, eighty-two of whom were serving preventative detentions and twenty-three others who were released at the discretion of the government), at <http://www.elpais.es/temas/eta/menua/a2/15meses.html> (last visited Sept. 17, 2002) (on file with the American University Law Review).

47. See Mees, *supra* note 19, at 799 (lamenting the return to violence, which marked the conclusion of a year without fatalities and was characterized by clandestine communications between the government and paramilitaries and the employment of increasingly institutionalized discourse); *Bidart's Coup*, *supra* note 38.

48. See *Bidart's Coup*, *supra* note 38 (explaining that the assassination was the first in a series of attacks that eventually resulted in the abandonment of the *Lizarra* Pact).

49. See *La anterior legislatura vasca El PP y el PSOE asumen juntos por primera vez y con un pacto la política antiterrorista* [The Prior Basque Legislature The PP and the PSOE Confront Antiterrorist Politics Together for the First Time with Nonpartisan Pact], EL PAÍS (Madrid) (providing a history of legislative agreements between political parties in their effort to create a united front with which to combat terrorism), at <http://www.elpais.es/temas/eta/menua/a2/pacto.html> (last visited Sept. 17, 2002) (on file with the American University Law Review).

50. *Bidart's Coup*, *supra* note 38.

51. E.T.A.'s *Political Environment*, *supra* note 40 (noting that the party garnered only seven parliamentary seats as compared to 14 in the previous election).

52. *Id.* (highlighting the relationship between E.T.A. and its various political fronts).

53. E.T.A.'s connection with H.B./E.H./Batasuna was not merely political but also economic. E.T.A. financed the party until 1992. After 1992, such subsidies continued by way of a complex business structure known as the *Proyecto Udaletxe* [Udaletxe Project]. ORDER, *supra* note 8, HECHOS [FACTS] para. 1.4. Also, before its transformation into Batasuna, H.B. routinely included various members of E.T.A. on its election ballots. For example, in the Basque Parliamentary elections of 1980, H.B. included on its ticket two members of E.T.A. who at the time of the election were serving prison sentences for their involvement in terrorist activity. *Id.* para. 2. The

Today, E.T.A. maintains extensive international connections, and reportedly has ties to the I.R.A.⁵⁴ Its members have attended Middle Eastern terrorist training camps, and the Castro government has, on occasion, provided safe haven and training for E.T.A. members.⁵⁵

II. CURRENT CONSTITUTIONAL AND LEGISLATIVE PANORAMA IN SPAIN

A. *The Constitution of 1978: The Rebirth of Democracy*

While modern Spanish constitutional tradition finds its roots in the early nineteenth century, the modern democratic era began with the adoption of the 1978 Constitution.⁵⁶ The new Constitution, composed of ten parts divided into chapters and articles, extended political freedoms through which the government provided for the right of political association and the freedom of expression following the legalization of political parties.⁵⁷

The Constitution contains three basic classes of rights: fundamental rights, constitutional rights, and those rights associated with social and economic policy.⁵⁸ Each class of rights enjoys a corresponding degree of constitutional protection. The fundamental rights appear in Chapter Two of Part I of the Constitution, entitled "Fundamental Rights and Duties." That chapter enshrines the freedoms of political parties⁵⁹ and of association.⁶⁰

existence of H.B., since its inception, as E.T.A.'s "institutional front" is further evidenced in various texts compiled from E.T.A.'s official publication "*Zutabe*." *Id.* Cited excerpts from the publication reveal the political party's subordination to the directives of the terrorist organization. *Id.* The magazine contains a section dedicated to "KAS meetings." The June 1978 issue included a reference to the campaign strategy of H.B. E.T.A. dictated that the political party would employ the slogan, "*Frente a la Constitución, la Alternativa*" [Against the Constitution, the Alternative]. *Id.*

54. Jimenez, *supra* note 4, at 112 (noting in addition the international connections that E.T.A. allegedly maintains with groups in Nicaragua, Cuba, France, and the Middle East).

55. *Id.*

56. See generally CHARLOTTE VILLIERS, *THE SPANISH LEGAL TRADITION: AN INTRODUCTION TO THE SPANISH LAW AND LEGAL SYSTEM* vii (1999) (tracing the origins of Spanish constitutionalism and explaining the significance of the 1978 Constitution).

57. See CONSTITUCIÓN ESPAÑOLA ("C.E.") arts. 6 & 20 (Spain) (enshrining the legalization of political parties and the freedom of expression, respectively); see also VILLIERS, *supra* note 56, at 18 (noting that the liberal atmosphere of the post-Franco political regime influenced the creation of the 1978 Constitution).

58. See ELENA MERINO-BLANCO, *THE SPANISH LEGAL SYSTEM* 26 (1996) (noting that citizens may plead violations of fundamental rights in the Constitutional Court but must plead violations of other rights pursuant to ordinary proceedings); see also VILLIERS, *supra* note 56, at 25-26 (noting that the first title establishes that all rights that the Constitution affords are not held in equal regard). No law may contradict the basic contents of these rights. *Id.*

59. C.E. art. 6. Article 6 states:

The Constitution accords this class of fundamental rights the highest form of protection, allowing for their regulation only through the passage of an Organic Law.⁶¹ Article 10 requires that the interpretation of all fundamental rights and freedoms conform to the provisions of the Universal Declaration of Human Rights and all other international treaties ratified in Spain.⁶²

Finally, Chapter Five of Part I provides for those circumstances under which the government may suspend the rights and liberties of citizens.⁶³ It is within this constitutional framework that this Comment seeks to evaluate the proscription of Batasuna.

B. Legislative and Judicial Actions: The Path to Proscription

1. The Law of Political Parties

The Spanish Congress approved the Law of Political Parties⁶⁴ on June 4, 2002 by an overwhelming 95 percent majority.⁶⁵ The law, effective on June 27, 2002, served to amend the existing law that had governed political parties since its passage in 1978.⁶⁶ The new law

Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people[,] and [they] are an essential instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and their functioning must be democratic.

Id.

60. C.E. art. 22 (providing that “[a]ssociations which pursue ends or use means legally defined as criminal offenses are illegal.”). It also prohibits all associations of a paramilitary nature. *Id.* Article 22 expressly contemplates the suspension of an association’s activities and also its dissolution upon the issuance of a court order. *Id.*

61. *See* C.E. art. 81.1 (providing that *leyes organicas* [organic laws] regulate fundamental rights and civil liberties, ratify Statutes of Autonomy, the general electoral regime, and any other matter for which the Constitution provides); *see also* MERINO-BLANCO, *supra* note 58, at 31 (explaining that an Organic Law requires the approval of an absolute majority of the Congress whereas ordinary legislation requires only a simple majority). Additionally, an Organic Law relates specifically to certain subject matters specified by the Constitution such as fundamental rights. *Id.* Any ordinary law that sought to regulate a matter which, pursuant to the Constitution, required an Organic Law for regulation, would be unconstitutional *per se*. *Id.* at 32.

62. C.E. art. 10.

63. C.E. art. 55 (providing for the suspension of the rights enshrined in articles 17.2, 18.2, and 18.3 pursuant to the passage of an organic law).

64. LEY ORGÁNICA DE PARTIDOS POLÍTICOS (Spain) (“L.O.P.P.”).

65. *See Batasuna proceso de ilegalización* [*Batasuna: The Proscription Process*], EL MUNDO (Madrid) (providing a chronology of salient events that facilitated the potential proscription of Batasuna), at <http://www.elmundo.es/especiales/2002/08/espana/batasuna/claves.html> (last visited July 2, 2003) (on file with the American University Law Review).

66. *See* L.O.P.P. Exposición de Motivos [Purpose Statement] sec. I (stating that the 1978 version of the law had become antiquated and insufficient to provide for the modern political climate).

regulates the creation, activities, and dissolution of all registered political parties.⁶⁷ With regard to dissolution, the law provides that only the Public Prosecutor or the Government, at the behest of the Congress of Deputies or the Senate, may submit a complaint⁶⁸ to a special panel of the Supreme Court requesting the definitive proscription of a political party.⁶⁹ Upon receiving the complaint, the Supreme Court will then notify the party of the proceeding against it, at which time it will have eight days to respond.⁷⁰ When a response is received, the court will consider the original complaint and may then rule on its admissibility.⁷¹ Once the court admits the complaint, it may then initiate a discretionary period of discovery upon the conclusion of which it has twenty days to issue an order.⁷² The law provides that a ruling of illegality will take immediate effect and affords no right of appeal with the exception of the “*recurso de amparo*”⁷³ [protective appeal] before the Constitutional Court.⁷⁴

67. See L.O.P.P. art. 11.1 (conferring upon the government and the Public Prosecutor the exclusive authority to request judicial dissolution of a political party). Criminal proceedings in Spain, such as those in the instant case, consist of three denominations of offenses: public, semi-public, and private. VILLIERS, *supra* note 56, at 137. These classifications determine who must proceed with prosecution. *Id.* The *Ministerio Fiscal* [Public Prosecutor] generally files and prosecutes the majority of all cases. *Id.*

68. L.O.P.P. art. 11.1 to 11.2.

69. See *id.* art. 11.2 (establishing a Supreme Court “special panel” as the entity empowered to order the definitive dissolution of a party); see also LEY ORGANICA DEL PODER JUDICIAL (“L.O.P.I.”) art. 61 (Spain) (providing that a special panel of the Supreme Court shall consist of the President of the Supreme Court, the Presidents of the Supreme Court’s five chambers, and the most senior and most junior magistrates of each chamber), available at <http://www.igsap.map.es/cia/dispo/lopjL1.html> (last visited Oct. 7, 2003) (on file with the American University Law Review). The Supreme Court has jurisdiction over the entire national territory and consists of five chambers. MERINO-BLANCO, *supra* note 58, at 81. These five chambers include civil, criminal, administrative, social, and military. *Id.*

70. L.O.P.P. art. 11.3.

71. See *id.* (providing that a complaint will be inadmissible in three circumstances: if an unauthorized party submits the complaint, if it fails to comply with the procedural or substantive requisites for admission, or if it is manifestly unsubstantiated).

72. *Id.* art. 11.4. In the event that the court dismisses a complaint, charges may be refiled only upon the discovery of new evidence not contained in the original complaint. *Id.* art. 11.7.

73. *Id.* art. 7; see also MERINO-BLANCO, *supra* note 58, at 100. The protective appeal is an appellate procedure that safeguards the fundamental rights and freedoms enshrined in the Constitution and exists as the last domestic appeal available to a Spanish citizen. *Id.* at 101. According to Merino-Blanco, this type of appeal

is only justified when judicial intervention has proved inefficient, because the object of the *recurso de amparo* [protective appeal] is protection against any act of public power which violates any of the following rights: article 14 CE (principle of non-discrimination), articles 15-19 CE (fundamental rights and public freedoms) and article 30(2) CE (right to military objection).

Id.

The Spanish legislature offered three fundamental justifications for the law's passage.⁷⁵ First, in noting that nearly twenty-five years have transpired since Spain's transition to democracy, the legislature stated that the law seeks to reflect the experience and institutional evolution that has occurred during that period.⁷⁶ The law further seeks to "renovate" certain norms anchored in antiquated legislative and judicial priorities that have subsequently proven insufficient and inadequate in confronting the realities of the present.⁷⁷ Finally, the authors of the law sought to fill a perceived legislative void by articulating concrete constitutional requisites for the organization and activities of political parties in a democracy.⁷⁸

The new law consists of four chapters, the most salient reforms of which appear in Chapter Two.⁷⁹ This chapter governs the organization, functioning, and activities of parties and requires that

74. L.O.P.P. art. 11.7. The Constitutional Court is an autonomous entity and does not fall within the ambit of the judicial branch: it is subject only to relevant provisions of the Constitution and other laws that created it. MERINO-BLANCO, *supra* note 58, at 95. The Constitutional Court exists as a mechanism for controlling acts of the Congress in the exercise of its legislative power, and its primary function is the interpretation of the Constitution. *Id.* at 97. As an autonomous entity, the court also has the authority to evaluate the constitutionality of actions of the Executive and the Judiciary. VILLIERS, *supra* note 56, at 129. The court is composed of twelve members; the Congress chooses four members, the Senate four, the Executive two, and the *Consejo General del Poder Judicial* [General Council of the Judiciary Branch] chooses the remaining two. MERINO-BLANCO, *supra* note 58, at 97. Members are generally lawyers, judges, civil servants or university professors, all of whom practice in the legal field and have more than fifteen years of experience and "recognized professional standing." *Id.* This Court also holds the power to review the actions of the Executive and the Judiciary for consonance with the Constitution as provided for in the protective appeal. *Id.*

75. L.O.P.P. Purpose Statement.

76. *See id.* § I (reasoning that since Spain's return to democracy, the protagonism and constitutional significance of political parties in Spain has increased significantly and that modern legislation should reflect such evolution).

77. *See id.* (considering the trend of legislative modernization that has accompanied the growth of other institutional actors, such as political foundations and associations).

78. *See id.* (noting the failure of previous legislation to clearly and explicitly prescribe the duties and obligations that the constitution imposes on political parties).

79. The first chapter provides for the creation of political parties and sets forth the requirements governing their registration with the Ministry of the Interior. L.O.P.P. arts. 1-5. The second chapter regulates the organization, function, and activities of political parties. *Id.* arts. 6-9. Article 6 of this chapter provides that parties must conform their organization, functions, and activities to the principles of democracy, the Constitution, and to all relevant law. *Id.* art. 6. Article 9 sets forth, in detail, the activities that can result in proscription. *Id.* art. 9. Chapter Three regulates the dissolution of political parties including the procedure and effects related thereto. *Id.* arts. 10-12. The fourth chapter governs the financing of political parties. *Id.* art. 13.

their activities be democratic and consonant with the Constitution and all relevant legislation.⁸⁰

The heart of the legislation appears in Article 9 of Chapter Two, which governs the actions of political organizations and enumerates those activities that may result in proscription.⁸¹ It provides, in pertinent part, that political parties are obliged to respect constitutional values and that a party may be declared illegal if its activities jeopardize established principles of democracy.⁸² More specifically, the law provides for proscription when any such party seeks, in a "recurring and egregious manner," to erode or destroy fundamental freedoms by engaging in any of an exhaustive list of proscribed activities.⁸³

Article 10 provides for the exclusive jurisdiction of a special panel of the Supreme Court⁸⁴ and Article 11 outlines the procedure by which a political party may be declared illegal.⁸⁵ Finally, Article 12 articulates the substantive and practical effects of such a dissolution.⁸⁶

2. *Garzón's order: The suspension of Batasuna*

Judge Garzón's extensive order cited a multitude of justifications for the suspension and was no doubt the product of the unrelenting terrorist campaign that E.T.A. has waged on Spanish society throughout the last forty years.⁸⁷ However, Batasuna's temporary suspension came in the wake of an E.T.A. attack that claimed that

80. L.O.P.P. arts. 6-9.

81. *Id.* art. 9.

82. *Id.*

83. Article 9 expressly states that the court may declare a political party illegal if it engages in any of the following:

- a) Systematic affronts to fundamental rights and freedoms by fomenting, justifying, or excusing affronts to the life or integrity of the citizenry or the exclusion or persecution of an individual based on his ideology, religion, nationality, race, sex, or sexual orientation.
- b) Fomenting, providing, or legitimizing violence as a means of reaching political objectives or of preventing the exercise of democracy, pluralism, and political freedom.
- c) Politically assisting or supporting the actions of terrorist organizations in order to subvert the existing constitutional order or egregiously affecting public order for the purpose of subjecting public officials, particular individuals, or the population in general, to a climate of terror.

Id. art. 9.2(a)-(c).

84. *See* L.O.P.P. art. 10 (vesting the power of proscription in a special panel of the Supreme Court pursuant to Article 61 of the Ley Organica del Poder Judicial [Organic Law of the Judiciary]).

85. L.O.P.P. art. 11.

86. *See* L.O.P.P. art. 12 (including such measures as the closure of party establishments and the transfer of assets to the Treasury).

87. *See generally* ORDER, *supra* note 8 (tracing E.T.A.'s history of violence and the symbiotic role that H.B.-E.H.-Batasuna has played in that enterprise).

lives of two people, one of whom was a six-year old girl, at a beach resort in the summer of 2002.⁸⁸ While this tragic event and Batasuna's subsequent failure to join in a multi-partisan condemnation of the attack likely served as catalysts for the Government's action, nationalists might argue that Garzón calculated the timing of his order so as to preclude Batasuna from running in the Basque elections of May 2003.⁸⁹ The elimination of Batasuna from the Basque municipal elections resulted in a substantial increase in electoral support for its rival party, the Basque Nationalist Party.⁹⁰

Pursuant to the Law of Political Parties, a definitive declaration of illegality falls within the exclusive province of the Supreme Court.⁹¹ However, the Penal Code provides for temporary suspensions in situations in which an organization is under investigation for alleged illicit activity.⁹² Title 21 of the Penal Code,⁹³ "Crimes Against the

88. See DEMANDA PRESENTADA POR LA FISCALÍA [PROSECUTOR'S COMPLAINT] 12 (Sept. 2, 2002) (citing Batasuna's failure to condemn the attack as demonstrative of its support for the actions of E.T.A.), at <http://www.elmundo.es/especiales/2002/08/espana/fiscalia.pdf> (on file with the American University Law Review).

89. See Javier Pérez Royo, *El derecho de Batasuna a no condenar* [Batasuna's Right Not to Condemn], EL PAÍS (Madrid) (Aug. 20, 2002) (criticizing the measure for punishing silence rather than affirmative acts and raising doubt as to the constitutionality of the Law of Political Parties), available at <http://www.elpais.es/articulo.html> (on file with the American University Law Review). Also of note in considering the impetus for the dissolution is the fact that the Basque Country will hold elections in May. Given that the proscription process is one that requires the intervention of various governmental and judicial entities, Garzón could conceivably have timed his suspension to afford sufficient time in which to achieve Batasuna's definitive proscription before the May elections. See Jane Walker, *Beating Batasuna*, GUARDIAN (London) (Aug. 27, 2002) (stating that rival parties had hoped for Batasuna's proscription as the party controlled sixty-two town councils and held seven parliamentary seats), available at <http://www.guardian.co.uk/spain/article/0,2763,781175,00.html> (on file with the American University Law Review); *El Tribunal Supremo da un plazo de 20 días a Batasuna para que presente sus alegaciones* [The Supreme Court Gives Batasuna a Period of Twenty Days to Present Their Arguments], EL MUNDO (Madrid), Feb. 15, 2003 (stating that as of February 14, 2003, Batasuna will have twenty days to submit allegations and evidence regarding its proscription), available at <http://www.elmundo.es/elmundo/2003/02/14/espana/1045230214.html> (on file with the American University Law Review). At the conclusion of those twenty days, the Supreme Court will then have an additional twenty days to issue its ruling. *Id.*

90. See *El PNV consigue un importante incremento en el País Vasco* [The P.N.V. Gains Important Momentum in the Basque Country], EL MUNDO (Madrid), (May 26, 2003) (noting that the P.N.V. saw substantial electoral gains in the Basque municipalities of Bilbao, Vizcaya, Guipúzcoa, and Álava), available at <http://www.elmundo.es/elmundo/2003/05/25/enespecial/1053890378.html> (on file with the American University Law Review).

91. L.O.P.P. art. 11 (establishing that the Supreme Court Special Panel is the only entity empowered to affect the permanent dissolution of a party).

92. See CÓDIGO PENAL ("C.P.") arts. 129 & 520 (Spain) (providing for temporary measure of suspension and its corollary effects).

93. *Id.*; see ORDER, *supra* note 8, at 324 (further grounding Garzón's precautionary measure in relevant provisions of the Penal Code).

Constitution,” confers upon the judiciary the authority to adopt such precautionary measures.⁹⁴ Those measures serve to prevent the continuation of the allegedly illicit activity and its deleterious effects during the period of investigation.⁹⁵ Batasuna is currently under investigation for alleged complicity with a terrorist organization, a crime expressly proscribed in the Penal Code.⁹⁶ Pursuant to the Penal Code, Judge Garzón’s order provided for a three-year suspension (renewable up to five years) of Batasuna’s political activities and the closure of its headquarters, offices, and all other locations that the organization or its members occupied.⁹⁷ In accordance with Article 23 of the Constitution, the order allowed Batasuna’s elected members to continue in their individual parliamentary capacities.⁹⁸ The temporary nature of the order was intended to afford the court sufficient time in which to conduct an investigation regarding the party’s alleged criminal links to E.T.A.⁹⁹

Judge Garzón’s order prohibited all public, private, and institutional activities and disbanded all public organizations, banks, notaries, foundations, associations, societies, and other entities related to Batasuna.¹⁰⁰ It also contained a provision requiring the

94. See C.P. art. 129.1 (providing for the imposition of various sanctions including the temporary dissolution of the association, suspension of its activities, and the closure of its offices, businesses or other establishments during the provisional period). The National Court, by virtue of the crimes alleged, has jurisdiction over the present case. This court is a collegiate tribunal located in Madrid and has jurisdiction over administrative, criminal, and labor matters throughout the nation. See MERINO-BLANCO, *supra* note 58, at 86 (noting that this court has jurisdiction over criminal cases involving, for example, offenses against the state, drug trafficking, financial crimes, terrorism, and extradition of prisoners).

95. See ORDER, *supra* note 8, at 323 (confirming that the purpose of the temporary suspension is to prevent the continuation of criminal activity and its effects); see also C.P. art. 129.3 (enumerating the precautionary measures at the tribunal’s disposition).

96. See C.P. art. 515.2 (providing for the proscription and dissolution of terrorist organizations); *id.* art. 516.2 (prescribing six to twelve years of incarceration and a six to fourteen year exclusion from public office as sanctions for participation in a terrorist organization); see also ORDER, *supra* note 8, at 343 (basing the order on a theory of Batasuna’s inextricable links with E.T.A.’s terrorist enterprise). In his order, Judge Garzón proceeds on the theory that Batasuna-E.H.-H.B. is not merely a political and ideological ally of E.T.A. but rather that it actually forms part of the same terrorist machinery. *Id.* at 323. Judge Garzón states that “a terrorist is not only he who perpetrates terrorist acts, but also he who incites, directs, subsidizes and gives life to the organizational complex, constructing a common edifice that gives life to the group.” *Id.* at 318.

97. ORDER, *supra* note 8, at 343-48.

98. *Id.* Article 23 of the Constitution protects the equal access of all citizens to participate in elections either as a candidate or as a voter. C.E. art. 23.

99. See ORDER, *supra* note 8, at 331 (identifying the purpose of the temporary measure as precluding the continuation of criminal activity and its effects in the case of illicit terrorist association during the period of investigation).

100. See *id.* at 344 (providing for such endeavors undertaken in the names of H.B. and E.H. or under any other name that the group should choose to adopt).

Ertzaintza (Basque autonomous police force) to identify and close all centers of Batasuna activity not included explicitly in Parts I and II of the Order.¹⁰¹ The Order suspended all financial aid to Batasuna.¹⁰² It also suspended water, electricity, and telephone services, prohibited the party from conducting any financial business.¹⁰³ Finally, the order prohibited Batasuna from organizing demonstrations, marches, or rallies and proscribed the use of any form of propaganda including the display of symbols associated with the group.¹⁰⁴ Finally, the Order required Batasuna to terminate any web page or electronic service that it operated on the Internet.¹⁰⁵

3. *Supreme and Constitutional Court decisions: A definitive proscription*

On September 2, 2002, pursuant to the Law of Political Parties, both the Public Prosecutor and the Government filed requests for the proscription of Batasuna with the Supreme Court.¹⁰⁶ However, before that Court could reach a final decision, the Basque Government called upon the Constitutional Court to rule on an interlocutory appeal challenging the constitutionality of the law itself.¹⁰⁷

101. *See id.* at 346 (requiring the closure of all such establishments within four days of identification).

102. *See id.* (mandating the freezing of all of Batasuna's assets and providing a bank account for the deposit of all such funds).

103. *See id.* (eliminating Batasuna's capacity to contract, negotiate, buy stock, receive loans, and make investments).

104. *See id.* at 348 (describing the prohibited activities as demonstrations, marches or rallies as well as the display of any form of propaganda such as signs or symbols identified with the group).

105. *See also* Pedro de Alzaga, *Los problemas de Garzón en Internet* [Garzón's Internet Problems], EL PAÍS (Madrid) (Oct. 23, 2002) (noting the difficulties that Garzón encountered in impeding Internet access to Batasuna sponsored web pages), available at <http://www.elpais.es/articulo.html> (on file with the American University Law Review). Jurisdictional issues have arisen as the web provider of batasuna.org, Blueberry Hills Communications, is incorporated and has its place of business in the United States. *Id.* The U.S. company originally blocked access to Batasuna's web page; however, the company's legal department later advised that Garzón's order could not compel the block. Lawyers concluded that since the provider was a U.S. company and the organization that contracted the site, *La Agrupación Electoral Euskal Herritarrok* [The Basque People's Electoral Group], maintained its headquarters in France, the issue fell within the province of international jurisdiction and was not subject to Judge Garzón's order. *Id.*

106. PROSECUTOR'S COMPLAINT, *supra* note 88; DEMANDA PRESENTADA POR EL GOBIERNO [GOVERNMENT'S COMPLAINT] (Sept. 2, 2002) [hereinafter GOVERNMENT'S COMPLAINT], at <http://www.elmundo.es/documentos/2002/09/demanda.pdf> (on file with the American University Law Review).

107. *El Constitucional respalda la Ley de partidos que hará posible la Ilegalización de Batasuna* [The Constitutional Court Upholds the Law of Political Parties Which Will Facilitate Batasuna's Proscription], EL MUNDO (Madrid), Mar. 14, 2003 [hereinafter *The Court Upholds the Law of Political Parties*] (reporting that the Basque Government filed its appeal with the Constitutional Court in September 2002), available at <http://www.elmundo.es/elmundo/2003/03/12/espana/1047493966.html> (on file with the American University Law Review). The Basque Government filed a *recurso de*

The constitutionality of all legislation in Spain falls within the province of the Constitutional Court, an autonomous entity independent of the judicial branch.¹⁰⁸ Questions of constitutionality reach the court through any one of five different procedural mechanisms,¹⁰⁹ one of which is the protective appeal provided for in the Law of Political Parties.¹¹⁰ This appeal allows an individual to contest the constitutionality of a law that infringes upon a fundamental right as defined in the Constitution.¹¹¹

The Constitutional Court ultimately rejected the Basque Government's appeal and upheld the constitutionality of the Law of Political Parties.¹¹² The Constitutional Court issued its ruling on March 13, 2003 allowing the Supreme Court to continue its consideration of Batasuna's proscription.¹¹³ Two weeks later, on March 27, 2003, the Supreme Court issued its decision resulting in the party's definitive proscription.¹¹⁴ This ruling rendered permanent

inconstitucionalidad [appeal of unconstitutionality] which serves to challenge any rules that carry "force of law." *Id.* See also MERINO-BLANCO, *supra* note 55, at 98 (explaining the procedural mechanisms that govern the use of the "appeal of unconstitutionality").

108. See MERINO-BLANCO, *supra* note 58, at 95 (noting that the Constitutional Court exists as its own jurisdiction and its decisions are based solely on the text of the Constitution); VILLIERS, *supra* note 56, at 129 (explaining that the Constitutional Court has jurisdiction over the decisions of the executive and the judiciary and also exists to protect the fundamental rights enshrined in the 1978 Constitution).

109. See MERINO-BLANCO, *supra* note 58, at 98-104 (enumerating and describing the various mechanisms for challenging the constitutionality of legislative, executive, and judicial actions). For instance, the *recurso de inconstitucionalidad* [appeal of unconstitutionality] allows the Court to review the constitutionality of any rule that carries the force of law. *Id.* at 98. The only parties with standing to initiate such an appeal are the members of the Congress of Deputies, the Senate, the President, the Ombudsman, the Governments of the Autonomous Communities, and the Legislative Assemblies of the Communities. *Id.* at 99. The *cuestión de inconstitucionalidad* [question of unconstitutionality] is essentially an interlocutory appeal of a law's constitutionality. *Id.* at 100. Any party to a judicial proceeding or the judge himself may initiate this appeal. *Id.* at 101. In the case of the *conflicto de competencia* [conflicts of law], the Constitutional Court may rule on the distribution of powers as between the central State and the Autonomous Communities upon disagreement regarding which of the two has jurisdiction to decide the question at issue. *Id.* at 103. Finally, the Constitutional Court may also hear issues of *conflictos de atribuciones* [conflicts of attributions] which arise when there is some dispute with regard to separation of powers. *Id.* at 104. Such a proceeding is actionable only at the behest of the Executive, the Congress, the Senate or the General Council of the Judiciary. *Id.*

110. See *supra* note 73 (describing the relevance of the protective appeal).

111. See VILLIERS, *supra* note 56, at 25 (identifying the fundamental rights subject to the protective appeal as those included in Articles 14 through 29 of the Constitution); see also MERINO-BLANCO, *supra* note 58, at 102-03 (stating that the court will nullify the contested legislation if it finds the law unconstitutional).

112. S.T.C., Mar. 12, 2003 (No. 48/2003), available at <http://www.tribunalconstitucional.es/JC.htm> (on file with the American University Law Review).

113. *Id.*

114. SUPREME COURT JUDGMENT, *supra* note 13. The judgment also bans

the effects of Judge Garzón's order and relied on much of the same reasoning.¹¹⁵

After studying the evidence adduced by the Government, the Public Prosecutor, and Batasuna, the Supreme Court concluded that the party functioned as an extension and under the influence of E.T.A.¹¹⁶ In so concluding, the Supreme Court relied in large part on Batasuna's violation of various provisions of Article 9 of the Law of Political Parties. This Article enumerates the actions which, when committed in a recurring and egregious manner, will result in proscription. Such activities include systematically jeopardizing fundamental rights¹¹⁷ and fomenting, providing, or legitimizing violence as a means of achieving political ends.¹¹⁸ It also proscribes complementing or supporting a terrorist organization so as to subvert the constitutional order and disrupting public order by subjecting public officials, particular individuals, or the population in general to a climate of terror.¹¹⁹ A party may violate these provisions through the commission of any one of a number of proscribed activities including: "providing express or tacit support for terrorism,"¹²⁰ "accompanying violent action with programs or behavior designed to foment an atmosphere of civil confrontation or to deprive others of basic liberties (opinion and participation in public affairs) by way of coercion, intimidation, etc.,"¹²¹ and finally, "the regular inclusion of persons convicted of terrorist crimes in the party's directorate or on its electoral ballots."¹²²

The Supreme Court lent significant weight to evidence demonstrating Batasuna's legitimization of violence through express and tacit political support for the actions of terrorists in pursuit of political ends.¹²³ The Supreme Court's application of this provision

Batasuna's predecessor parties, H.B. and E.H. *Id.* at 197.

115. Garzón derived his authority to suspend the party from the Penal Code, which provides only for temporary suspensions for investigatory purposes whereas the Law of Political Parties vests in the Supreme Court the exclusive power to issue a definitive proscription. C.P. art. 129 (allowing for the temporary suspension of allegedly illicit associations); L.O.P.P. art. 11 (reserving the power of proscription for the Supreme Court).

116. SUPREME COURT JUDGMENT, *supra* note 13, at 18-19.

117. L.O.P.P art. 9.2(a).

118. *Id.* art. 9.2(b).

119. *Id.* art. 9.2(c).

120. *Id.* art. 9.3(a).

121. *Id.* art. 9.3(b).

122. *Id.* art. 9.3(c). The law goes on to provide for six other activities that come within the scope of Article 9 proscriptions. *Id.* art. 9.3(d)-(i). As the court's opinion focuses primarily on the first three activities, this Comment confines its analysis to those provisions.

123. *Id.* art. 9.2(b) & 9.3(a).

closely reflects the analysis of political support for violence that the E.C.H.R. conducts in assessing the existence of a "pressing social need" for the proscription of a political party.¹²⁴ This analysis relies heavily on the public statements of party leaders evidencing the party's acceptance of violence as a legitimate means of achieving its political objective.¹²⁵

In further applying the standards established in the Law of Political Parties, the Court cited the degree of symbiosis that exists between E.T.A. and its political wing. It noted, in particular, that various convicted members of E.T.A. occupy the highest echelons of the Batasuna directorate.¹²⁶ For example, in 1989, the National Court convicted Batasuna's spokesman, Arnaldo Otegi of kidnapping and sentenced him to six years in prison.¹²⁷ Another Batasuna parliamentarian, once a candidate for the presidency of the Basque Parliament, was convicted for crimes of terrorism in France on February 26, 1990 and is currently wanted for involvement in a car bombing, with an outstanding warrant for his arrest.¹²⁸ The Supreme Court also noted that currently, four of Batasuna's seven representatives in the Basque Parliament have been convicted of crimes of terrorism.¹²⁹

III. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE FREEDOM OF ASSOCIATION

On March 12, 2003, Spain's Constitutional Court issued a ruling that upheld the constitutionality of the Law of Political Parties¹³⁰

124. See, e.g., *Refah Partisi v. Turkey*, App. No. 41340/98, 35 Eur. H.R. Rep. 56, 89 (2002) (holding that while the party employed legitimate means in pursuing its political objectives, its allusions to the possibility of the recourse to violence were sufficiently flagrant so as to justify its loss of society's tolerance); *Socialist Party v. Turkey*, App. No. 21237/93, 27 Eur. H.R. Rep. 51, 71 (1998) (examining various statements of party leaders and concluding that they failed to demonstrate the acceptance of violence as a legitimate political method); *United Communist Party v. Turkey*, 62 Eur. Ct. H.R. 1, 27 (1998) (considering Communist party leaders' statements calling for a Kurdish nation in holding that those remarks failed to justify restrictions on the freedom of association); *Zana v. Turkey*, 57 Eur. Ct. H.R. 2533, 2567 (1997) (considering the remarks of a politician expressing support for a terrorist organization in determining the legitimacy of restrictions placed on his freedom of expression).

125. See SUPREME COURT JUDGMENT, *supra* note 13, at 75-79 (quoting various Batasuna members in demonstrating the party's constructive support for E.T.A.'s terrorist campaign); see also *infra* note 193 (examining the statements of various Batasuna representatives extolling the use of violence in pursuit of Basque independence).

126. SUPREME COURT JUDGMENT, *supra* note 13, at 18.

127. *Id.*

128. *Id.*

129. *Id.*

130. S.T.C., Mar. 12, 2003 (No. 48/2003), available at <http://www.>

leaving the E.C.H.R. as the final forum in which to challenge Batasuna's proscription.¹³¹ Accordingly, on September 9, 2003, the Basque Autonomous Government announced its intention to appeal the Constitutional Court's ruling before the E.C.H.R.¹³² The Basque Government contends that Batasuna's proscription constitutes a violation of Articles 6,¹³³ 7,¹³⁴ and 11¹³⁵ of the European Convention.¹³⁶ The European Convention on Human Rights exists as an international, extra-constitutional guarantor of certain fundamental rights and its tribunal, the E.C.H.R., serves as a supplementary forum in which parties, unsuccessful in domestic courts, may seek redress for alleged human rights violations.¹³⁷ Articles 26 and 27 of the Convention set forth the admissibility conditions with which all

tribunalconstitucional.es/JC.htm (on file with the American University Law Review).

131. See *infra* note 139 and accompanying text (explaining E.C.H.R. requisites for the appeal of domestic judicial rulings).

132. *Batasuna's Defense*, *supra* note 16 (noting that the Constitutional Court decided by unanimous vote to uphold the law).

133. Eur. Conv. on H.R. art. 6 (enshrining the right to a fair and public trial).

134. *Id.* art. 7. Article 7 reads in pertinent part:

No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense 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 offense was committed.

Id.

135. *Id.* art. 11. Article 11 reads as follows:

Article 11 - Freedom of Assembly and Association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, . . .

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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Id.

136. SERVICIO ANALÍTICO-INFORMATIVO DE LA RED VASCA ROJA, LA "DEMOCRACIA" ESPAÑOLA JIBARIZADA: LA "HISTÓRICA" SESIÓN DEL ESPAÑOL CONGRESO DE LOS DIPUTADOS QUE ACTIVÓ LA INCONSTITUCIONAL LEY DE PARTIDOS PARA ILEGALIZAR A BATASUNA [ANALYTICAL-INFORMATIVE SERVICE OF THE RED BASQUE NET, SPANISH DEMOCRACY "JIBARIZADA": THE "HISTORIC" SESSION OF THE SPANISH CONGRESS OF DEPUTIES THAT PROMULGATED THE UNCONSTITUTIONAL LAW TO BAN BATASUNA] [hereinafter SPANISH DEMOCRACY] (examining ways in which the Law of Political Parties violates the rights of expression and association protected by the Spanish Constitution), at <http://www.basque-red.net/cas/oculto/ejemplo/ag2002/ag028.html> (last visited Feb. 15, 2003) (on file with the American University Law Review). This Comment confines its analysis to the law's conformity with Article 11 as it relates to the freedom of association and political proscription.

137. See MERINO-BLANCO, *supra* note 58, at 101 (explaining the system of appeals and stating that individuals may appeal determinations of constitutionality affecting fundamental rights before the E.C.H.R.).

claims must comply.¹³⁸ The most salient provision states that in order for the E.C.H.R. to consider a complaint, the complaining party must have exhausted all domestic remedies¹³⁹ and must have submitted the application within six months from the date of the issuance of the national decision.¹⁴⁰ As the Law of Political Parties provides only for protective appeal before the Constitutional Court, that court's recent decision upholding the constitutionality of the law represents an exhaustion of local remedies.¹⁴¹ Consequently, the E.C.H.R. represents the final forum in which to challenge the proscription of Batasuna.¹⁴²

A. *Domestic Applicability of the European Convention*

Pursuant to the doctrine of incorporation, all international treaties to which Spain is a signatory, upon ratification, automatically form part of domestic law.¹⁴³ Spain subscribes to the monist school of incorporation, which provides for automatic incorporation of international rules with no further legislative action necessary to confer binding authority upon an international agreement.¹⁴⁴ The Spanish Constitution identifies three distinct varieties of treaties.¹⁴⁵ Among those, Article 93 treaties confer some of the powers of the State upon an international organization.¹⁴⁶ In order to assume force of law, such treaties require the passage of a *Ley Orgánica* [Organic

138. See P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 67 (2d ed. 1990) (explaining the process by which claims arrive at the E.C.H.R.).

139. Eur. Conv. on H.R. arts. 26 & 27; see VAN DIJK & VAN HOOF, *supra* note 138, at 89 (defining exhaustion of domestic remedies as the employment of all "remedies provided for up to the highest level only if and in so far as the appeal to a higher tribunal can still substantially affect the decision on the merits").

140. Eur. Conv. on H.R. art. 26; VAN DIJK & VAN HOOF, *supra* note 138, at 98.

141. See MERINO-BLANCO, *supra* note 58, at 101-02 (stating that the protective appeal is the last internal appeal available to a citizen contesting the alleged infringement upon a fundamental right or freedom).

142. See *id.* (explaining the system of appeals and stating that individuals may appeal determinations of constitutionality affecting fundamental rights before the E.C.H.R.).

143. *Id.* at 33 (noting that Article 96 of the Spanish Constitution expressly provides for the incorporation of valid treaties into the domestic legal system).

144. *Id.* The monist system, largely favored in Continental tradition, is in juxtaposition with the dualist system employed in England. *Id.* at 33 n.27. The dualist system necessitates legislative action in order to confer binding authority upon international treaties. VAN DIJK & VAN HOOF, *supra* note 138, at 11-12.

145. See MERINO-BLANCO, *supra* note 58, at 33 (describing the three types of treaties as: Article 93 treaties which give some state power to an international organization; treaties that require prior authorization by Parliament; and finally, any other treaty that does not fall into the previously described categories).

146. C.E. art. 93; MERINO-BLANCO, *supra* note 58, at 33.

Law] authorizing their signature.¹⁴⁷ The Treaty of the Accession of Spain to the European Union¹⁴⁸ is exemplary of such a treaty.¹⁴⁹

Upon the passage of the requisite Organic Law, any subsequent legislation that the European Union passes becomes binding in Spain without any action on the part of domestic institutions.¹⁵⁰ The Supreme Court of Spain has confirmed that "European Community Law has direct effect and supremacy over national law by virtue of the partial cession of sovereignty brought about by the accession to the European Community."¹⁵¹ Similarly, the Constitutional Court has stated that "the binding force of Community Law emanates from the Accession Treaty according to Article 93 of the Spanish Constitution."¹⁵² Consequently, the European Convention on Human Rights, to which Spain is a signatory, carries with it the force of domestic law and accordingly governs all domestic legislative and judicial pronouncements.

B. E.C.H.R. Jurisprudence Regarding Political Proscription and the Freedom of Association

The E.C.H.R. has had frequent occasion to consider the issue of political proscription. Both the case of *Refah Partisi (Welfare Party) v. Turkey*¹⁵³ and the case of *Socialist Party v. Turkey*,¹⁵⁴ in addition to other recent decisions, exemplify recent E.C.H.R. jurisprudence regarding the proscription of political parties. Those decisions provide a useful paradigm through which to examine and evaluate the potential fate of the ban on Batasuna.¹⁵⁵

In interpreting Article 11, specifically in the context of political proscription, the E.C.H.R. has established a tripartite test that governs its analysis. The E.C.H.R.'s Article 11 jurisprudence establishes that, in order to comply with the Convention, restrictions

147. MERINO-BLANCO, *supra* note 58, at 33.

148. *Id.* at 34.

149. *See id.* (citing a Constitutional Court decision which provided that "the binding force of Community Law comes from the Accession Treaty according to Article 93 of the Spanish Constitution").

150. *Id.*

151. MERINO-BLANCO, *supra* note 58, at 36 (internal quotations omitted).

152. *Id.* at 34.

153. App. No. 41340/98, 35 Eur. H.R. Rep. 56 (2002).

154. App. No. 21237/93, 27 Eur. H.R. Rep. 51 (1998).

155. *Compare Refah Partisi*, 35 Eur. H.R. Rep. at 56 (finding no violation of Article 11), *with Socialist Party*, 27 Eur. H.R. Rep. at 51 (holding that the dissolution of the Socialist Party violated provisions of Article 11), *and United Communist Party v. Turkey*, 62 Eur. Ct. H.R. 1, 28 (1998) (holding that the dissolution of the Communist Party constituted an Article 11 violation). The Socialist and Communist Party cases prove particularly instructive in the case of Batasuna as they also address the dissolution of political parties associated with terrorist separatist organizations.

on the freedoms of association must be: (1) “prescribed by law,” (2) directed at one or more “legitimate aims,” and (3) be “necessary in a domestic society” in order to achieve those aims.¹⁵⁶

The first element, prescription by law, requires that relevant domestic law provide for the dissolution of a political party.¹⁵⁷ With regard to the second element, Article 11 enumerates various interests that will satisfy the “legitimate aim” inquiry.¹⁵⁸ The European Court regards as legitimate, those actions taken to ensure national security or public safety, to prevent disorder or crime, and to protect the rights and freedoms of others.¹⁵⁹ Finally, with regard to the third element, “necessary in a democratic society,” the E.C.H.R. routinely lends primacy to this factor¹⁶⁰ and has established several general principles that govern its analysis.

The E.C.H.R. defines “necessary in a democratic society” as those measures that meet a “pressing social need.”¹⁶¹ It has expressly limited its role in such an inquiry to that of determining whether the relevant national authority has employed a means “‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authority to justify it are ‘relevant and sufficient.’”¹⁶² In

156. See *Refah Partisi*, 35 Eur. H.R. Rep. at 76 (applying the tripartite test in holding that the dissolution of the Welfare Party did not violate Article 11); *Socialist Party*, 27 Eur. H.R. Rep. at 80-81 (applying the tripartite test in finding that Turkey’s dissolution of the Socialist party resulted in a violation of Article 11). In *Socialist Party*, the European Court noted that it generally conflates its analyses of Articles 10 and 11 as Article 11 violations must be “considered in light of Article 10 [as] 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.” *Id.* at 83.

157. See *Refah Partisi*, 35 Eur. H.R. Rep. at 76 (concluding that a constitutional provision or similar statutory provision will constitute a prescription by law); *Socialist Party*, 27 Eur. H.R. Rep. at 80-81 (holding that various articles of both the Constitution and domestic law satisfied the prescription by law element); *United Communist Party*, 62 Eur. Ct. H.R. at 18 (holding that statutory and constitutional provisions satisfied the inquiry as to prescription by law).

158. Eur. Conv. on H.R. art. 11 (identifying as legitimate aims, the preservation “of national security or public safety,” “the prevention of disorder or crime,” or “the protection of the rights and freedoms of others”).

159. *Id.*

160. *Id.* See *Refah Partisi*, 35 Eur. H.R. Rep. at 91 (finding unanimity among the parties as to the first two criteria and establishing the third element as outcome determinative); *Socialist Party*, 27 Eur. H.R. Rep. at 86 (holding that the restriction failed Article 11 scrutiny due to its failure to satisfy the court’s pressing social need inquiry); *United Communist Party*, 62 Eur. Ct. H.R. at 28 (noting that the dissolution of the Communist party similarly failed to comply with Article 11 due to its inconsistency with the third prong of the test); *Zana v. Turkey*, 57 Eur. Ct. H.R. 2533, 2547 (1997) (finding that interference complied with all three prongs of the Article 10 test).

161. See *Refah Partisi*, 35 Eur. H.R. Rep. at 80 (finding that Turkey’s dissolution of the Welfare Party met a “pressing social need” in light of the party’s intention of establishing a plurality of legal systems and its tacit support of political violence).

162. See *id.* (ruling that the nature and severity of the restriction imposed are factors in the calculus of proportionality and deeming the measures adopted in *Refah*

doing so, the E.C.H.R. must find that national authorities applied a standard consonant with Article 11 and that "they based their decisions on an acceptable assessment of the relevant facts."¹⁶³

Specifically with regard to restrictions on the activities of political parties, the E.C.H.R. expressly noted that states are not free to place restrictions on the fundamental freedoms of a political party simply because they disagree with its message.¹⁶⁴ The E.C.H.R. has, however, tempered the scrutiny to which it subjects alleged Article 11 violations with several limitations regarding the activities of political parties.¹⁶⁵ For example, it explicitly eschewed the employment of any means other than democracy to achieve political ends.¹⁶⁶ The European Court elaborated with the admonition that "a political party whose leaders incite recourse to violence, or propose a policy which does not comply with [the] rules of democracy . . . cannot lay claim to the protection of the Convention against penalties imposed for those reasons."¹⁶⁷ Accordingly, the E.C.H.R. has held that, on occasion, the exercise of a fundamental right may be subordinated in the interest of maintaining order and public safety and protecting the fundamental rights of other citizens.¹⁶⁸

Recognizing the unique difficulties associated with the fight against terrorism, the E.C.H.R. also takes into account the historical predicate of any case before it.¹⁶⁹ In one such case, it stated that

Partisi to be both relevant and sufficient).

163. *See id.* (establishing the general principles that govern the court's analysis of alleged Article 11 violations).

164. *See United Communist Party*, 62 Eur. Ct. H.R. at 27 (holding that there is no justification for restricting the rights of a political party "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.").

165. *See generally Refah Partisi*, 35 Eur. H.R. Rep. at 56 (upholding dissolution of the Welfare Party).

166. *Id.* at 78. This case articulates the rule regarding political activity such 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; and (2) the change proposed must itself be compatible with fundamental democratic principles. *Id.*

167. *See Refah Partisi*, 35 Eur. Ct. H.R. at 78-79 (stating that no person may take umbrage in provisions of the Convention in order to perform acts aimed at destroying those same rights and freedoms as they apply to others). Such definitive prohibitions apply with notable force to the case of Batasuna as its connections to E.T.A. illustrate the role that it has played in depriving the Spanish population of fundamental rights that Batasuna now claims that the government has violated. *See infra* note 226 (elaborating on the ways in which the Batasuna/E.T.A. alliance has violated the rights of the Basque citizenry).

168. *Id.*; *see Dahlab v. Switzerland*, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001) (holding that freedom of religion could be restricted in the interest of a neutral public education service).

169. *See, e.g., United Communist Party v. Turkey*, 62 Eur. Ct. H.R. 1, 26-27 (1998)

political freedoms are not absolute and that “in a democratic society, it is of cardinal importance for the authorities to fulfill their duties to wage a relentless and unremitting battle against terrorism.”¹⁷⁰

The applicant in *Refah Partisi*¹⁷¹ was a political party properly registered under Turkish law.¹⁷² Following the 1995 elections, it

(considering the climate of internal discord that characterized the nationalist struggle between the Turks and the Kurds). In a similar vein, in *Refah Partisi*, the Court considered the role and the history of political proscription in Western European nations and examined the notion of “militant democracy.” See 35 Eur. H.R. Rep. at 83 (examining the evolution of political proscription and its role in the constitutional development of Western totalitarian states). The concept of a militant democracy was borne of the experiences of Germany and Italy in their struggles with fascism and national-socialism, movements which came to power after free elections. See *id.* (defining a militant democracy as “a democratic system which defended itself against all political movements which sought to destroy it”). Such a notion finds particular resonance in the case of Spain, which likewise freed itself from the yoke of fascism upon the death of Franco in 1975. See JIMÉNEZ, *supra* note 14, at 386 (noting the precarious political situation that characterized the period between the death of Franco and the eventual achievement of democratic stability). In response to these new threats, “the concept of militant democracy and the possibility of repressing political groups which abused the freedoms of association and expression were set forth in the Constitutions of European States,” illustrating that many Western democracies not only accept the practice but recognize it as an invaluable means of combating the threats that radical political factions pose to democracy. See Ami Pedahzur, *Struggling Challenges of Right-Wing Extremism and Terrorism within Democratic Boundaries: A Comparative Analysis* 20 (Apr. 2001) (unpublished manuscript, on file with the American University Law Review) (contextualizing the employment of political proscription as a response to the abuse of newly conferred freedoms by radical parties in post-dictatorship periods), available at <http://www.essex.ac.uk>; see also John Finn, *Electoral Regimes and the Proscription of Anti-Democratic Parties*, in *THE DEMOCRATIC EXPERIENCE AND POLITICAL VIOLENCE* 70-74 (David C. Rapoport & Leonard Weinberg eds., 2001) (indicating that Australia, Chile, France, Germany, Israel, and Italy, among others, have either constitutional or legislative provisions that allow for the proscription of political parties). Finn also notes that the European Convention explicitly provides for such proscriptions. *Id.* at 71. The European Parliament also affirmed this practice in its resolution of December 10, 1996 on the constitutional status of European political parties. According to the resolution, the program and activities of political parties must respect democracy, human rights, and the fundamental constitutional principles of the rule of law enshrined in the Treaty on the European Union. *Refah Partisi*, 35 Eur. H.R. Rep. at 74.

170. *Zana v. Turkey*, 57 Eur. Ct. H.R. 2533, 2548 (1997). The Commission stated in its opinion:

[W]here in such a society, political violence is a permanent threat to the life and safety of the population, and where support for that violence is expressed through the media, it is imperative to strike a fair balance between the right to freedom of expression and the legitimate right of the community to protect itself against the activities of armed groups whose avowed or concealed aim is to overthrow the democratic system which is the guarantee of human rights.

Id. at 2568. This statement, in the context of an alleged violation of Article 10 assumes importance in the instant case as the court has stated that Article 11 violations must be considered in light of the provisions contained in Article 10. See *supra* note 156 and accompanying text (discussing the joint application of Articles 10 and 11).

171. App. No. 41340/98, 35 Eur. H.R. Rep. 56 (2002).

172. See *id.* at 63 (noting that the party was founded in July 18, 1983).

existed as the largest political party in the Turkish parliament.¹⁷³ In May of 1997, the Principal State Counsel applied to the Turkish Constitutional Court to dissolve the Welfare Party on the grounds that its activities and central tenets contravened principles of secularism.¹⁷⁴

The Constitutional Court, in holding that activities incompatible with the rule of law were impermissible, cited various provisions of domestic legislation obliging political parties to abide by the principle of secularism.¹⁷⁵ Of special significance in the Constitutional Court's analysis was Turkey's experience with religious discord and the fact that secularism was consequently enshrined in the Constitution as a pillar of the Turkish State.¹⁷⁶ The Constitutional Court ultimately found that the government's actions to maintain a secular state were required to preserve the principles of democracy.¹⁷⁷ The Turkish Court ordered the immediate and permanent dissolution of the Welfare Party, transferred its assets to the State Treasury, and banned five of its Members of Parliament from participating in any political party for five years.¹⁷⁸

The applicants subsequently appealed the Constitutional Court's ruling before the E.C.H.R. They alleged that the order dissolving the Welfare Party and prohibiting its leaders from holding office in that party or in any other political party constituted an interference with their right to freedom of association in violation of Article 11 of the European Convention of Human Rights.¹⁷⁹

173. *See id.* (claiming 158 of the 450 total seats in the Turkish parliament following the 1995 election).

174. *See id.* (noting that the application reflected that the Welfare Party's leaders promoted the concept of *jihad* in advocating for the abolition of secularism in Turkey).

175. *See id.* at 66 (stating that the Constitutional Court based its ruling on Turkish Law No. 2820 on regulation of political parties). The domestic law provides for the dissolution of political parties that "jeopardize the existence of the Turkish State and Republic, abolish fundamental rights and freedoms, [or] introduce discrimination on grounds of language, race, colour, religion or membership of a religious sect . . ." *Id.* at 74. The law vests authority in the Constitutional Court to dissolve a party if it finds that it is operating contrary to the above provision. *Id.* at 75.

176. *Id.* at 67.

177. *See id.* at 83 (resting its decision largely on remarks of Welfare Party leaders indicating that the party "had an actively aggressive and belligerent attitude to the established order" and was making "a concerted attempt to prevent it from functioning properly") (internal quotations omitted). The Government had argued that such speeches existed as calls for popular insurgency in order to bring about the demise of the existing political order and thus the dissolution of the Welfare Party served the "pressing need" of the preservation of democracy. *Id.* at 83-84.

178. *See id.* at 72 (concluding that the offending Members of Parliament were responsible for the Welfare Party's dissolution by virtue of the radical threat to democracy that they posed as evidenced in various statements and speeches).

179. *See id.* at 81 (refuting the government's claim that the Welfare Party militated

The E.C.H.R., applying its tripartite test, agreed with the Constitutional Court and upheld the dissolution.¹⁸⁰ With regard to the first criterion, all parties stipulated that the dissolution was prescribed by law as both the Turkish Constitution and Law 2820 on the regulation of political parties provided for proscription.¹⁸¹ The E.C.H.R. further held that, in preserving secularism, the Welfare Party's dissolution served the interests of protecting national security, public safety, and the rights and freedoms of others.¹⁸²

Finally, the E.C.H.R. held that the party's proscription was necessary in a democratic society and hinged its ruling on three grounds for dissolution: the Welfare Party's advocacy of a pluralistic legal system, its intent to institute the law of *sharia*,¹⁸³ and finally, remarks of party members advocating *jihad* as a legitimate political method.¹⁸⁴ The E.C.H.R. based its ruling largely on the facts that the Welfare Party declared its intention of setting up a plurality of legal systems and had "adopted an ambiguous stance with regard to the use of force to gain power and retain it."¹⁸⁵ In concluding that the dissolution did not violate Article 11 of the European Convention, the E.C.H.R. declared that, "a State may reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime."¹⁸⁶

The E.C.H.R. upheld the first justification for dissolution, stating that a plurality of legal systems in the same nation would be inconsistent with the Convention system.¹⁸⁷ It explained that such a model would not only preclude the State from exercising its role as a "guarantor of individual rights and freedoms," but would also result

for the abandonment or destruction of existing Turkish constitutional order and asserting that the government had violated freedom of expression in barring parliament members from political participation).

180. *See id.* at 76-77 (requiring that the dissolution of a political party be "prescribed by law," executed in pursuit of a "legitimate aim," and "necessary in a democratic society").

181. *See id.* at 76 (establishing that a constitutional provision permitting the dissolution of a political party will satisfy the "prescribed by law" requirement).

182. *See id.* at 76-78 (concluding, in agreement with the Constitutional Court, that the preservation of secularism was necessary in order to protect national security, public safety, the rights and freedoms of others, and to prevent disorder or crime).

183. *See id.* at 86 (defining *sharia* as Islamic law).

184. *See id.* at 84 (dividing all arguments put forward by the Principal State Counsel and those the Constitutional Court cited into three categories).

185. *Id.* at 91.

186. *Id.*

187. *See id.* at 85-86 (noting that the State bears the obligation of procuring and applying laws uniformly with regard to all citizens).

in an inherently unequal legal treatment of individuals.¹⁸⁸ The E.C.H.R. noted that the creation of a pluralistic legal system based on religion would import a disparity in the treatment, legal and otherwise, of Turkish citizens according to their religions.¹⁸⁹

The final and most compelling consideration in the E.C.H.R.'s analysis is characteristic of all of its Article 11 jurisprudence.¹⁹⁰ In all of these cases, the E.C.H.R. lent significance to the party's tacit support for violence as a political method as evidenced in the remarks of its members and directorate.¹⁹¹

For example, in *Refah Partisi*, the E.C.H.R. upheld proscription of the Welfare Party, and in *Zana*,¹⁹² it affirmed the conviction of a political leader for statements that he made in support of a separatist terrorist organization. In both cases the E.C.H.R. took special notice of remarks in which party leaders espoused the use of force as a means by which to reach political ends. It also lent probative weight to the fact that those leaders failed to take affirmative steps to distance themselves from the factions within their parties that had extolled the virtue of armed struggle against politicians who opposed them.¹⁹³

188. *See id.* (condemning the creation of a pluralistic legal system as incompatible with the European Convention). It is worth noting that the *lehendakari* [president] of the Basque Country presented a plan for shared sovereignty over the autonomous community. *Ibarretxe plantea una soberanía compartida entre País Vasco y España* [*Ibarretxe Proposes a Shared Sovereignty Between the Basque Country and Spain*], ABC (Sept. 27, 2002), available at <http://www.abc.es/Nacional/noticia.asp?id=132180&dia=hoy> (reporting that Ibarretxe also suggested that the Basque Country should enjoy direct participation in European institutions). The European Commission unanimously rejected the plan as incompatible with the existing framework of the European Union. *See Ibarretxe's Plan*, *supra* note 34 (declaring that there is no judicial basis for Ibarretxe's initiative).

189. *See Refah Partisi v. Turkey*, App. No. 41340/98, 35 Eur. H.R. Rep. 56, 85-86 (2002) (warning that such distinctions would undermine legislative and judicial unity).

190. *See id.* at 89 (noting that while the party employed legitimate means in pursuing its political objectives, its allusions to the possibility of the recourse to violence were sufficiently flagrant so as to justify its loss of society's tolerance); *Socialist Party v. Turkey*, App. No. 21237/93, 27 Eur. H.R. Rep. 51, 71 (1998) (examining the statements of party leaders that allegedly reflected their acceptance of violence as a legitimate political method); *United Communist Party v. Turkey*, 62 Eur. Ct. H.R. 1, 27 (1998) (considering Communist party leaders' statements calling for a Kurdish nation in holding that those remarks failed to justify restrictions on the freedom of association); *Zana v. Turkey*, 57 Eur. Ct. H.R. 2533, 2567 (1997) (considering the remarks of a politician expressing support for a terrorist organization in determining whether restricting his freedom of expression met a "pressing social need").

191. *See infra* note 193 (exploring the role of public statements in the Court's evaluation of the existence of a pressing social need).

192. 57 Eur. Ct. H.R. at 2534, 2549 (regarding the comments that the leader made in support of the PKK as likely to exacerbate an "explosive situation" and concluding that the interference with the freedom of expression served a "pressing social need").

193. *See Refah Partisi*, 35 Eur. H.R. Rep. at 83 (noting that the Turkish

The E.C.H.R. cited statements of various party members as support for its findings regarding proscription and a pressing social need. In

Constitutional Court identified speeches made by Welfare Party leaders demonstrating “an actively aggressive and belligerent attitude to the established order” and making “a concerted attempt to prevent it from functioning properly” as grounds for dissolution); *see also Zana*, 57 Eur. Ct. H.R. at 2567 (stating that in describing acts of terrorism as a “national liberation struggle,” the applicant not only failed to dissociate himself from such acts, but implicitly justified them).

In *Refah Partisi*, the Constitutional Court found that the offending speeches constituted a call for public uprising and the use of force, that the proscription of the party represented a preventative measure for the protection of democracy which, for the purposes of the E.C.H.R.’s analysis, constituted a “pressing social need.” 35 Eur. H.R. Rep. at 83. In its analysis, the Court gave special consideration to remarks of several Welfare Party Members of Parliament. *Id.* at 88. “We shall certainly call to account those who turn their backs on the precepts of the Koran and those who deprive Allah’s messenger of his jurisdiction in their country.” *Id.* at 69. The court quoted one Member of Parliament as proclaiming, “Our homeland belongs to us, but not the regime.” *Id.* at 70. Another member avowed, “[i]f you attempt to close down the . . . theological colleges while the Welfare Party is in government, blood will flow That’s how democracy will be installed.” *Id.* at 71.

While the court conceded that government documents contained no explicit calls for the use of force, it lent probative weight to the failure of Welfare Party leaders to take “prompt practical steps to distance themselves from” the factions within the party who had made such calls for violent insurgency. *Id.* at 88. *See Zana*, 57 Eur. Ct. H.R. at 2549 (finding no violation of Article 10’s freedom of expression where Turkey imposed criminal sanctions based on the applicant’s statements in support of a separatist organization). The court again lent compelling weight to the conclusion of the Commission in its finding that, in failing to dissociate himself from acts of terrorism, the applicant had implicitly justified and propagated them. *Id.* In this case, the Court also noted the relevance of the fact that the applicant made the remarks on the same day that PKK militants killed a number of civilians resulting in an atmosphere of “extreme tension.” *Id.*

Similarly, the Spanish Government pointed out that Batasuna was the only political party that failed to sign on to a multi-lateral condemnation of recent E.T.A. attacks that resulted in the deaths of a six-year-old girl and a fifty-seven-year-old man at a popular beach resort in Santa Pola, Alicante. PROSECUTOR’S COMPLAINT, *supra* note 88, at 12. Not only did Batasuna fail to condemn the terrorist attack but one of its representatives, Antton Morcillo, affirmed that the failure to condemn acts of E.T.A. was a sign of Batasuna’s political identity and further that “the events in Santa Pola are the result of the situation of perpetual conflict that one lives with in Euskal Herria.” *Id.* at 14.

The Public Prosecutor’s complaint is replete with similar statements manifesting Batasuna’s support for E.T.A.’s bloody enterprise. On August 11, 2002, at a rally in San Sebastian, the Batasuna directorate was involved in cheers supporting E.T.A.: “gora E.T.A. militarra” [long live E.T.A.]. *Id.* at 16. At the closure of the rally, a member of Batasuna’s National Cabinet addressed the crowd promising that “if Aznar wants a war, the *abertzale* [left] and all of *Euskal Herria* will respond with war;” and continued, proclaiming “when all doors to agreement are closed before the people, it has only one recourse, death or independence. Independence or death is our mantra.” *Id.* at 16.

The complaint also contained the transcript of statements that Arnaldo Otegi, spokesman for Batasuna, delivered at a press conference regarding Garzón’s order. *Id.* at 19. It quoted Otegi as saying, “Don’t even think, and we ask this with absolute humility but with rotundity, about using the mechanisms [referring to the *Ertzaintza*] at your disposal, to collaborate with the strategy of annihilating the left [Batasuna-E.H.-H.B.], don’t even think about collaboration with the Spanish State’s strategy of genocide.” *Id.* at 19. Otegi concluded warning the Basque Government to “disobey the State [or] assume the consequences.” *Id.* at 19-20.

Zana, the E.C.H.R. examined the statements of a political leader in which he expressed his solidarity with a terrorist organization, the PKK, at a time that coincided with a deadly attack that resulted in the deaths of various civilians.¹⁹⁴ It concluded that in such a case, the penalty imposed could reasonably be regarded as serving a pressing social need.¹⁹⁵

Also, the European Court in *Refah Partisi* cited one leader as stating that “the question we must ask ourselves is whether this change will be violent or peaceful . . . will it be achieved harmoniously or by bloodshed.”¹⁹⁶ Another stated that those who opposed the party would suffer the “calamity [of] the renegades they will have to face.”¹⁹⁷ The E.C.H.R. further noted that the remarks of one of the Welfare Party’s parliament members revealed deep hatred for those he considered to be opponents of an Islamist regime.¹⁹⁸ The court concluded that “where the offending conduct reaches a high level of insult and comes close to a negation of the freedom of religion of others it loses the right to society’s tolerance.”¹⁹⁹

Upon deciding that the dissolution of the Welfare Party met a pressing social need, the E.C.H.R. addressed the issue of proportionality, stating that the nature and severity of the interference are also factors to be weighed in its assessment.²⁰⁰ In doing so, it noted that despite the exclusion of five party members from political activity, the Party’s remaining 152 members of parliament continued in their parliamentary capacities, and also that the Welfare Party at no time alleged pecuniary damage based on the transfer of assets to the Treasury.²⁰¹

The E.C.H.R. ultimately held that the interference was not disproportionate to the legitimate aims pursued in light of the fact that it “answered a pressing social need.”²⁰² It further held “that the

194. *See Zana v. Turkey*, 57 Eur. Ct. H.R. 2533, 2549 (1997) (lending significance to the fact that *Zana* made the statements at issue in an atmosphere charged with social tension in the wake of a terrorist attack).

195. *See id.* (noting the significance of the leader’s role as a public figure and the publication of his statements in a national publication as further support for government’s need to diffuse a potentially volatile situation).

196. *See id.* at 68.

197. *Id.* at 70.

198. 35 Eur. H.R. Rep. at 89 (including statements of party leaders tending to show that the Welfare Party extolled violence as a legitimate means to its political end).

199. *Id.*

200. *See id.* at 90 (stating that excessive state intervention would not be a permissible means to protect the social need).

201. *See id.* at 91 (describing how the Welfare Party was still a viable political force despite the government crackdown).

202. *Id.* (internal quotations omitted).

grounds cited by the Constitutional Court to justify the Welfare Party's dissolution and the temporary forfeiture of certain political rights by the other applicants were relevant and sufficient.²⁰³ Accordingly, the E.C.H.R. concluded that the Welfare Party's proscription did not violate Article 11.²⁰⁴

Only three years earlier, in *Socialist Party*, the E.C.H.R. employed a similar analysis in reaching an opposite conclusion holding that Turkey's dissolution of the Socialist Party constituted a violation of Article 11.²⁰⁵ In dissolving the Socialist Party, the Turkish Constitutional Court provided two justifications for its decision. According to the government, the Socialist Party promoted the establishment of a Kurdish-Turkish federation thus undermining the national unity and threatening the territorial integrity of the Turkish State.²⁰⁶ The government also likened the Socialist Party to a terrorist organization and claimed that it was incompatible with Articles 11 and 17 of the Convention.²⁰⁷

Accordingly, the Constitutional Court dissolved the Socialist Party, liquidated its assets, and transferred them to the Treasury.²⁰⁸ Additionally, the Constitutional Court's order banned the party's founders and managers from holding office in any other political party.²⁰⁹

The Socialist Party argued that it had always defended the integrity of the Turkish State and denied the proposal of any solution to the Kurdish problem that would preclude such State unity.²¹⁰ The Socialist Party also asserted that the federal system that it supported would promote the peaceful coexistence of Turks and Kurds thus safeguarding the integrity of the Turkish Republic.²¹¹

Conversely, the government argued that the Socialist Party had begun to espouse a progressively more overt policy of separatism.²¹² It asserted that, in invoking a Kurdish right to self-determination, the

203. *Id.* (internal quotations omitted).

204. *Id.*

205. App. No. 21237/93, 27 Eur. H.R. Rep. 51 (1998).

206. *See id.* at 61 (foreclosing the feasibility of the existence of two nations within the Republic of Turkey regardless of the ethnic origin of its citizens).

207. *See id.* (stating that despite a difference in means employed, "objectives which . . . encouraged separatism and incited a socially integrated community to fight for the creation of an independent federated State were unacceptable").

208. *See id.* at 60 (noting that, despite liquidation of their assets, the Socialist Party never suffered any financial injury).

209. *Id.*

210. *Id.* at 68.

211. *Id.* (noting that a federation, and not a confederation, would protect Kurdish interests while simultaneously maintaining the unity of the Turkish state).

212. *Id.* (stating the government's concern about growing separatist movements among Kurdish groups).

Socialist Party was attempting to polarize the population into ethnic minorities and majorities, in contravention of the principle of national unity.²¹³ It rested its claim on speeches of the Party's chairman in which he allegedly sought to vindicate the use of violence and terrorist methods calling for insurgency aimed at the establishment of a separate state within Turkish territory.²¹⁴

On appeal before the E.C.H.R., all parties stipulated to the prescription by law of the dissolution. The E.C.H.R. further determined that the prohibition of activity that could jeopardize the territorial integrity of the Turkish State constituted a protection of national security and thus a "legitimate aim" within the meaning of Article 11.²¹⁵

The E.C.H.R. concluded, however, that the dissolution of the political party was not necessary in a democratic society.²¹⁶ In reaching this determination, the E.C.H.R. again examined statements of party leaders finding that the Socialist Party and its chairman had employed pacific and lawful political means to achieve their objective.²¹⁷ The E.C.H.R. deferred in large part to the findings of the

213. *Id.* at 69 (claiming that "[t]he concept of national unity is based on equal rights for all citizens without distinction.").

214. *Id.* at 58 (including oral statements of the party's chairman invoking the expression "*Ayaga kalk*" [stand up] as evidence of inciting political violence). In order to evidence the violent policy of the Socialist Party, the government proffered extracts from its publications and various statements of its chairman. *Id.* at 55-59. Excerpts from Socialist Party publications make consistent reference to the assertion of Kurdish rights including statements such as "[t]he second dynamic is the Kurdish dynamic. It is the call for equality and freedom, [it is] the Kurds' claim to rights as a nation." *Id.* at 55. Statements from the Socialist Party chairman include the following remarks that he made at a public meeting in calling for the Kurdish people to unite in asserting their right to self-determination:

The Kurdish and Turkish nations should have the same rights. The Kurdish and Turkish nations will form a popular republic It is the Socialist Party that is with the oppressed Kurdish people By standing up, the Kurdish people have begun to demonstrate the combat they have been waging for years The Kurdish people will bring about a new revolution The oppressed Kurdish people . . . are coming to join the Socialist Party Long live the awakening! Long live our people!

Id. at 59.

215. *Id.* at 80-81.

216. *Id.* at 84-85.

217. *See id.* at 83 (noting that "the publications did not contain anything intended to encourage extremist or terrorist groups to destroy the constitutional order of the State or to found a Kurdish State through the use of force."). The court noted with regard to the chairman's statements, that Article 10 freedom of expression necessarily informs all Article 11 analysis. *Id.* It stated that such protections extend not only to ideas "favourably received . . . but also to those that offend, shock or disturb." *Id.* In finding that nothing in the chairman's statements alluded to his condoning or promoting the use of violence, the court found that he had in reality spoken out against "the former culture idolising [sic] violence and advocating the use of force to solve problems between nations and in society . . ." *Id.* at 57. The court declined to find any infringement on the rules of democracy and failed to

Commission in holding that the restriction in question was radical: the government had dissolved the party with immediate and permanent effect, liquidated its assets, and banned its leaders from engaging in political activity.²¹⁸ The E.C.H.R. stated that while it would take into account the background of the cases before it, particularly the difficulties associated with the prevention of terrorism, in this case it found no reason to doubt the Socialist Party's compliance with democratic practices.²¹⁹ In support of its finding the E.C.H.R. noted, as evidenced in various speeches, that the Socialist Party had no immediate intention of undermining the national integrity of the Turkish State.²²⁰ It concluded that the government had failed to prove that the statements upon which it based its case demonstrated the Socialist Party's espousal of violence as a political method or were in any way responsible for the terrorist threat in Turkey.²²¹

*C. Consonance of Spanish Measures with the E.C.H.R.'s Article 11
Jurisprudence*

Pursuant to its Article 11 jurisprudence, the E.C.H.R. will likely uphold the proscription of Batasuna. In the instant case, the first element of prescription by law will not prove problematic as the Law of Political Parties provides expressly for the dissolution of political parties as do Article 22 of the Constitution²²² and Article 129 of the Spanish Penal Code.²²³

distinguish such statements from those that political groups in other European countries had made. *Id.* at 85.

218. *Id.* at 60.

219. *See id.* at 86 (noting the relevance of a nation's history with terrorism in construing the threat that a particular party poses to the security of that nation).

220. *See id.* at 87 (finding no relationship between the statements of party leaders and the terrorist threat in Turkey).

221. *Id.* at 86-87 (emphasizing that the fact that a political platform is at odds with an existing political structure is not a threat, per se, to the institution of democracy.) The court noted that, despite references to a Kurdish right to secede, the statements at issue, when read in context, did not advocate for secession as much as they militated for the establishment of a federal state pursuant to a popular referendum. *Id.* at 71.

222. While the Constitution explicitly refers only to the dissolution of associations, the Spanish Constitutional Court has determined that political parties constitute associations for the purposes of Article 22. S.T.C. 85/1986.

223. *See* C.E. art. 22 (providing for the dissolution or suspension of an association only by means of a resolution from the appropriate judicial entity); *see also* C.P. arts. 129 & 520 (vesting in the judiciary the authority to dissolve an illicit association and close its businesses, offices and establishments for a period not to exceed five years). Article 515 of the Penal Code defines "illicit" associations, inter alia, as terrorist organizations, those that have as their objective the commission of a crime, and those that promote discrimination, hate or violence against persons, groups or associations based on ideology, race, ethnicity, nationality or religion or beliefs. C.P. art. 515.

The E.C.H.R. will also likely find that Spain's ban on Batasuna served a legitimate aim. In both Turkish cases, the court held that at least one of the State's aims was legitimate.²²⁴ With regard to the proscription of the Socialist Party, the E.C.H.R. determined that the protection of territorial integrity furthered the interest of national security and thus constituted a legitimate aim.²²⁵ Similarly, Spain's actions against Batasuna were not only in the interests of national security and territorial integrity but also were necessary to ensure public safety and protect the rights and freedoms of others, all of which are legitimate aims as expressly defined in Article 11.²²⁶ In light

224. See *Refah Partisi v. Turkey*, App. No. 41340/98, 35 Eur. H.R. Rep. 56, 76-78 (2002) (agreeing with the Constitutional Court that the preservation of secularism was necessary in order to protect national security, public safety, the rights and freedoms of others, and to prevent disorder or crime). All such interests constitute legitimate aims for the purposes of Article 11. *Id.* See also *Socialist Party v. Turkey*, App. No. 21237/93, 27 Eur. H.R. Rep. 51, 80-81 (1998) (holding that the proscription of the Socialist Party in furtherance of national security constituted a legitimate aim); *Zana v. Turkey*, 57 Eur. Ct. H.R. 2533, 2547 (1997) (finding a legitimate aim in the protection of territorial integrity and crime prevention). This case proves especially instructive in evaluating Batasuna's dissolution. The applicant in *Zana* made statements demonstrating his support for the armed separatist struggle which the PKK, an illegal terrorist organization, was waging against the central Turkish government. *Id.* at 2549 (citing remarks in which the applicant referred to the acts of violence committed by PKK militants as part of a "national liberation struggle"). The Commission concluded, and the Court agreed, that such comments, coming from persons of a certain political status, could "reasonably lead the national authorities to fear a stepping up of terrorist activities in the country." *Id.* at 2546-47 (holding that Turkey's actions constituted the "legitimate aims" of preserving territorial integrity, and preventing crime).

225. *Socialist Party*, 27 Eur. H.R. Rep. at 80-81.

226. See ORDER, *supra* note 8, at 332 (identifying the subsidiary effects of alleged HB-E.T.A coordination as affronts to the life, security, freedom and patrimony of persons and public institutions with the goal of subverting constitutional order and public peace). The temporary proscription of Batasuna, as an entity inextricably linked with E.T.A., serves the interests of national security and public safety. *Id.* See also L.O.P.P. Purpose Statement § I (identifying the law's objective as one of guaranteeing fundamental freedoms of the citizenry and preventing political parties from employing policies predicated on violence, terror, and the violation of the rights and freedoms of others); PROSECUTOR'S COMPLAINT, *supra* note 88, at 5 (describing the atmosphere of intimidation that plagues the lives of those Basques who do not identify with the goals of Batasuna and E.T.A.). The Public Prosecutor asserts that, in collaborating with E.T.A. to create such an atmosphere, Batasuna has infringed upon the freedoms of opinion, expression, education, press, movement of the Basque population and the right to hold elected office. See *id.* (noting that the confluence of pro-E.T.A. propaganda and terrorist attacks on newspapers, journalists, professors, and politicians have resulted in the domestic exile of many Basques and an atmosphere of trepidation throughout the Basque Country). The Ministry of the Interior issued a report chronicling the effects of terrorism on the freedom of expression in the Basque Country during 2002. The report cited a study conducted in the University of the Basque Country concluding that ten percent of Basque journalists have received threats from E.T.A. and further, that three-quarters of the journalists surveyed consider that the exercise of their profession in *Euskadi* is different from the experience of journalists in any other region due to the threats and attacks of E.T.A. and the volatile climate of confrontation and political pressure. OFICINA DE RELACIONES INFORMATIVAS Y SOCIALES, MINISTERIO DEL INTERIOR,

of the E.C.H.R.'s precedent, such objectives will surely constitute legitimate aims within the meaning of its Article 11 jurisprudence.²²⁷

Finally, the E.C.H.R. will likely hold that Batasuna's proscription was "necessary in a democratic society" thus satisfying the final element.²²⁸ The factors that the E.C.H.R. employed in its analyses of *Refah Partisi* and *Socialist Party* apply with equal force through analogy and advocate more strongly in favor of the measure's consonance with the E.C.H.R.'s jurisprudence.

Whereas in *Refah Partisi*, the dissolution sought to prevent the establishment of a plurality of legal systems and, in Spain, the divisive element is nationality rather than religion, the implications for the affected community are analogous. Any plan for autonomy, shared or otherwise, would subject those citizens who recognize their Spanish identity to a legal and political regime with which they do not identify. Statistically, the majority of Basque citizens regard themselves not as exclusively Basque, but rather recognize a dual identity. Further, only nineteen percent of the population supports secession from Spain.²²⁹ Any State concessions toward the secession of the Basque Country would similarly do away with the Spanish State's role as a guarantor of individual rights and freedoms forcing

CRONOLOGÍA—2002 "E.T.A. CONTRA LA LIBERTAD DE EXPRESIÓN" [OFFICE OF INFORMATION AND SOCIAL RELATIONS, MINISTRY OF THE INTERIOR, CHRONOLOGY 2002—"E.T.A. AGAINST THE FREEDOM OF EXPRESSION"], at <http://www.mir.es/oris/prensa/2002.htm> (last visited June 29, 2003) (on file with the American University Law Review).

227. The court has not had occasion to expound significantly on this prong of the Article 11 test, as it has not generally served as a grounds for contention. See *United Communist Party v. Turkey*, 62 Eur. Ct. H.R. 1, 20 (1998) (holding that the dissolution of the Communist party on the grounds that it promoted a distinction between Turks and Kurds pursued the legitimate aims of territorial integrity and national security); *Zana*, 57 Eur. Ct. H.R. at 2547 (finding that a restriction on the freedom of expression of a political figure who verbalized his support for the PKK terrorist movement furthered the legitimate aims of preservation of territorial integrity and the prevention of crime). The court in *United Communist Party* did note, however, that a proscription based solely on the party's use of the word "communist" in its name would not satisfy any of the legitimate aims set forth in Article 11. 62 Eur. Ct. H.R. at 20.

228. See *Refah Partisi*, 35 Eur. H.R. Rep. at 91 (voicing that a state may apply such severe measures in only the most serious cases); *Socialist Party*, 27 Eur. H.R. Rep. at 86 (imposing strict construction of Article 11 exceptions in the context of political parties and noting that "only convincing and compelling reasons can justify restrictions on such parties' freedoms of association"); see also *United Communist Party*, 62 Eur. Ct. H.R. at 23 (establishing that political proscription is subject to rigorous scrutiny and holding that Turkey's dissolution of the Communist Party constituted a violation of Article 11).

229. See LUIS MORENO, *THE FEDERALIZATION OF SPAIN* 5 & 8 n.6 (John Laughlin ed., 2001) (reporting that approximately fifty-seven percent of Basque citizens claim a dual identity thus diminishing the viability of secession as a solution and also that only approximately twenty-seven percent of the citizenry identifies itself as exclusively Basque).

the State to concede all exercise of authority over the region to the autonomous government. Such a concession would also fail to achieve the balance to which the court referred in *Refah Partisi* between claims of one group to be governed by their own rules and the interests of the rest of the Basque population.²³⁰ As the majority of the Basque population has expressed equal allegiance to Spain as to the Basque Country, in permitting secession the Spanish State would effectively permit the Ulsterization of the nation, that is, the polarization of the population into nationalist and loyalist factions resulting in a continental Northern Ireland.²³¹

Both *Refah Partisi* and *Socialist Party* demonstrate that the E.C.H.R. routinely lends compelling weight to the party's declared position regarding violence as a political method.²³² A similar argument forms the crux of the Government's contention regarding Batasuna's role in the perpetuation of terrorist violence.²³³ Both the Government and the Public Prosecutor have thoroughly documented not only Batasuna's expression of solidarity with E.T.A.'s cause of Basque autonomy but also its acceptance of the violent means employed to that end.²³⁴ For example, one of Batasuna's National Cabinet members threatened, "if President Aznar wants war, the *abertzale* [left] and *Euskal Herria* [Basque Country] will respond with war."²³⁵ Also, on August 11, 2002, at a rally in San Sebastian, members of the Batasuna directorate were involved in cheers supporting E.T.A., "*gora E.T.A. militarra*" [long live E.T.A.].²³⁶ Just as Zana's comments came at a time of particular societal tension, Batasuna's statements

230. See *Refah Partisi*, 35 Eur. H.R. Rep. at 86 (explaining that a bifurcated "system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms").

231. Giles Tremlett, *Basques Back Poll on Free State*, GUARDIAN (London) (Oct. 28, 2002) (noting that critics of Ibarretxe's plan for a free state have suggested that it could result in the discrimination of non-Basques who have settled in the region), available at <http://www.guardian.co.uk/spain/article/0,2763,820526,00.html> (on file with the American University Law Review). The article noted that a study showed that one in five Basques feared the plan's implications for non-native Basques. *Id.*

232. See *Refah Partisi*, 35 Eur. H.R. Rep. at 88 (holding that statements of party leaders revealed the party's acceptance of violence as a political method and its animus toward the central State); *Socialist Party*, 27 Eur. H.R. Rep. at 84 (concluding that the chairman's statements did not advocate violence or encourage secession from Turkey).

233. The prevention of such political participation in terrorist enterprise was the impetus behind the Law of Political Parties. See L.O.P.P. Purpose Statement § I (recognizing the importance of identifying those political parties that base their political activities on violence, terror, discrimination, exclusion, and violation of the freedoms and rights of others).

234. See generally PROSECUTOR'S COMPLAINT, *supra* note 88, at 20; GOVERNMENT'S COMPLAINT, *supra* note 106, at 19-28.

235. PROSECUTOR'S COMPLAINT, *supra* note 88, at 20.

236. *Id.* at 19.

immediately followed a brutal E.T.A. attack that claimed the lives of a fifty-seven-year-old man and a six-year-old girl at a beach resort, revealing the party's constructive support for the violent means E.T.A. employs to achieve its political aims.²³⁷

Further, just as the E.C.H.R. lent probative weight to the Welfare Party's failure to disassociate itself with the more radical factions that extolled the use of political violence, so the Government, the Public Prosecutor, Garzón, and the Supreme Court have identified Batasuna's similar failure as evidence of its complicity with E.T.A.'s terrorist enterprise. Such complicity is reflected in the Supreme Court's use of the term "double militancy" to refer to those members of the Batasuna party who also maintain connections to E.T.A.²³⁸ Currently, four of Batasuna's seven parliamentarians, including party spokesman Arnaldo Otegi, have been convicted of terrorist crimes.²³⁹ In further demonstrating Batasuna's complicity with E.T.A., not only did the Supreme Court cite Batasuna's lone abstention from various non-partisan declarations against the use of violence,²⁴⁰ but it also identified explicit statements in which Batasuna's spokesman Arnaldo Otegi exhorted the Basque Government to "disobey the State [or] assume the consequences."²⁴¹ Following the issuance of Garzón's order, Otegi also made statements denouncing the judge as a puppet of the Spanish state and warned that the "Basque people were organizing themselves for a fight . . . so that a Spanish fascist would never again be able to dictate to the Basques what they must learn nor the form that their internal institutions must assume."²⁴² Like those of Zana and the Welfare Party, Batasuna's statements clearly

237. See *id.* at 12-13 (lending significance to the fact that Batasuna was the only party that refused to sign on to the condemnation); GOVERNMENT'S COMPLAINT, *supra* note 106, at 19 (noting that Otegi, Batasuna's spokesman, justified the attacks as the product of the State's ineffective political policy).

238. See SUPREME COURT JUDGMENT, *supra* note 13, at 10-19.

239. *Id.*; see also GOVERNMENT'S COMPLAINT, *supra* note 106, at 12-13.

240. See SUPREME COURT JUDGMENT, *supra* note 13, at 20-22 (noting Batasuna's consistent refusal to condemn E.T.A. attacks); PROSECUTOR'S COMPLAINT, *supra* note 88, at 12-14 (noting that Batasuna representatives at all echelons of the Spanish government uniformly refused to sign the non-partisan condemnations of recent E.T.A. attacks); GOVERNMENT'S COMPLAINT, *supra* note 106, at 20-21 (observing Batasuna's failure to sign the multi-lateral condemnation which expressed sympathy for the families of the victims and demanded the dissolution of E.T.A.). The Basque Nationalist Party signed the condemnation as did the traditionally antagonistic Popular Party. *Id.* Batasuna has expressly stated that its refusal to condemn the acts of E.T.A. is a symbol of its identity, further supporting its complicity with the terrorist organization. *Id.*

241. PROSECUTOR'S COMPLAINT, *supra* note 88, at 19-20.

242. See GOVERNMENT'S COMPLAINT, *supra* note 106, at 19-28 (enumerating Batasuna's violations of the Law of Political Parties since its effective date in order to address issues of retroactivity).

reflect not only its tacit support for E.T.A.'s terrorist campaign but also evidence its affirmative complicity with the organization.²⁴³ Consequently, its dissolution analogously serves a "pressing social need."

Finally, regarding proportionality, whereas both of the Turkish decisions prohibited party members from running for office for five years, neither judicial decision nor the relevant law precludes Batasuna's representatives from occupying their electoral seats or from running in future elections under the auspices of another party.²⁴⁴ Furthermore, whereas the dissolutions in both *Refah Partisi* and *Socialist Party* were permanent and immediate, with no provision for domestic recourse or independent judicial review, the Supreme Court's proscription of Batasuna followed a temporary suspension for investigative purposes²⁴⁵ and also provides for appeal before the Constitutional Court.²⁴⁶ The Spanish measure thus provides a comprehensive system of safeguards to insure not only the factual propriety of the dissolution, but also effective and independent judicial review.²⁴⁷ The dissolution, preceded by a temporary and limited precautionary measure, when weighed against the severity of the threat it seeks to prevent, belies any serious claim of

243. Also relevant to the question of complicity is the fact that Batasuna's spokesman, Otegi, shares his parliamentary seat with Josu Ternera who is currently under Supreme Court subpoena, wanted for his involvement in a 1987 E.T.A. attack that claimed the lives of eleven people. See PROSECUTOR'S COMPLAINT, *supra* note 88, at 7 (noting that in 1990, a French court convicted ex-E.T.A. director, Ternera, of membership in a terrorist organization); *Justicia presenta los 23 cargos contra Batasuna* [*Justice Presents 23 Charges Against Batasuna*], EL PAÍS (Madrid) (enumerating the twenty-three charges that the Ministry of Justice filed against Batasuna in its report on Aug. 21, 2002), at <http://www.elpais.es/temas/dossieres/leydepartidos/23cargos.html> (last visited Sept. 17, 2002) (on file with the American University Law Review).

244. ORDER, *supra* note 8, at 343. In anticipation of the Basque elections in May, 2003, a new party recently applied for inscription in the political register. M. Alonso, *Elkarri se ofrece a los proetarras para que puedan concurrir a las elecciones* [*The Elkarri Party Volunteers to Represent E.T.A. Supporters So That They May Participate in Elections*], ABC (Feb. 14, 2003) (reporting that the party hoped to provide an alternative legal platform under which ex-Batasuna members could run in the May elections).

245. C.P. arts. 192 & 520 (limiting a lower court's suspension or dissolution to a period of five years); ORDER, *supra* note 8, at 344 (setting the suspension's duration at three years renewable up to five years).

246. See L.O.P.P. art. 11 (providing for appeal in the form of the protective appeal before the Constitutional Court); SUPREME COURT JUDGMENT, *supra* note 13, at 198 (stating that the decision is final subject to review only before the Constitutional Court).

247. See Finn, *supra* note 169, at 68 (noting the importance of the incorporation of a mechanism for judicial review of political proscription); JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW 134 (1991) [hereinafter CONSTITUTIONS IN CRISIS] (noting that "the proscription process, if it is to be retained, must be redrafted to include an objective standard capable of independent review . . .").

disproportionality. When viewed in light of relevant E.C.H.R. jurisprudence, it is likely that the proscription of Batasuna will survive any potential Article 11 challenge.

IV. EFFECTS OF PROSCRIPTION ON TERRORISM AND IMPLICATIONS FOR THE USE OF POLITICAL PROSCRIPTION IN COMBATING POLITICAL VIOLENCE

Justice Felix Frankfurter once warned that “[f]ocusing attention on constitutionality tends to make constitutionality synonymous with wisdom.”²⁴⁸ Thus, limiting the consideration of proscription to the foregoing legal analysis, without a pragmatic inquiry into its practical effects, would be of doubtful utility to nations considering the incorporation of such a measure into a counter-terrorism strategy.²⁴⁹

Proscription generally serves two classes of objectives: one practical and the other presentational.²⁵⁰ The practical rationale for proscription looks to the measure’s pragmatic effects on the incidence of political violence within a given country.²⁵¹ More commonly, however, proscription serves a presentational purpose in affording a State the appearance of intransigence in its crusade against terrorism.²⁵²

With regard to practical analyses, empirical evidence is of consummate importance in evaluating the efficacy of restrictions on political freedoms.²⁵³ However, discord plagues the debate over the merits of political proscription, which suffers from a pronounced and

248. See *Dennis v. United States*, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring) (upholding the conviction of three defendants under the Smith Act for conspiracy to organize the Communist Party as a group advocating the overthrow of the Government by force).

249. See Finn, *supra* note 169, at 65 (providing that “[a] policy that may be justified as a matter of constitutional theory is not for that reason alone a good policy”).

250. See HOGAN & WALKER, *supra* note 2, at 143, 246 (explaining that the presentational rationale for proscription attempts “to remove public manifestations of the existence of, and support for, terrorist[s] rather than to prevent terrorism as such”).

251. See *id.* (finding that the Prevention of Terrorism Act served the practical purpose of easing prosecution).

252. See Finn, *supra* note 169, at 66 (identifying four functions of proscription: legitimating, integrating, socializing, and systematizing); Walter F. Murphy, *Excluding Political Parties: Problems for Democratic and Constitutional Theory*, in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 173 (Paul Kirchof & Donald P. Kommers eds., 1993) (discouraging states from employing the presentational rationale as its sole justification for banning a political party).

253. See Finn, *supra* note 169, at 67 (“[A]nalysis of the relationship between democracy and violence should be informed by empirical evidence and by detailed case studies.”); Dan Gordon, *Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence With That of the United States and Germany*, 10 HASTINGS INT’L & COMP. L. REV. 347, 392 (1987) (determining that empirical evidence could prove decisive in reaching conclusions regarding the necessity and efficacy of political proscription).

often cited dearth of empirical research.²⁵⁴ An analysis of the advantages and disadvantages commonly associated with political proscription²⁵⁵ juxtaposed with the experiences of other Western democracies²⁵⁶ will serve as the rubric under which this section will attempt to lend preliminary insight into the promise of proscription in combating political violence in the Basque Country.

Many Western nations currently provide for the proscription of political parties either statutorily or constitutionally.²⁵⁷ The experiences of these nations have produced useful paradigms for analyzing the utility of Batasuna's proscription.

The failure of the Weimar Republic²⁵⁸ provided fodder for the most compelling arguments in favor of proscription.²⁵⁹ Inherent in this

254. See Finn, *supra* note 169, at 56 (noting the empirical void that exists in scholarly research regarding the practical effects of proscription on political terrorism); Gordon, *supra* note 253, at 385 (criticizing both opponents and proponents of proscription for employment of statistical claims in the absence of any compelling empirical evidence). "The dearth of unambiguous empirical data in an area where such evidence would be decisive may account for the rarefied character of much of this debate." *Id.*

255. See Finn, *supra* note 169, at 65-67 (discussing both the virtues and potential vices inherent in any State's decision to ban a political party); see also Gordon, *supra* note 253, at 392 (addressing the continuing nature of the debate over the efficacy of political proscription and comparing the arguments that have emerged on both sides of that debate).

256. See Murphy, *supra* note 252, at 188 (noting the failure of political proscription to effectively suppress the popular opinions propounded by the suspended parties); see also CHALK, *supra* note 1, at 103 (finding that the repressive policy in Italy resulted in a restriction upon the rights of citizens without correlative success in counter-terrorism efforts). "[T]he widespread use of crime by association . . . merely had the effect of increasing support for and recruitment to left-wing terrorist organizations." *Id.*

257. See Finn, *supra* note 169, at 70-73 (enumerating the various nations that currently maintain provisions allowing for the bans on political parties including Western democracies such as Austria, France, Germany, the Republic of Ireland, Northern Ireland, Israel and Italy); see also ARIZ. REV. STAT. §§ 16-805 to -806 (1956 & Supp. 2002) (incorporating legislation that remains as a vestige of the United States' anti-Communist crusade). Section 16-806 reads in pertinent part:

The Communist Party of the United States, or any successors of such party . . . the object of which is to overthrow by force or violence the government of the United States, or the government of the state of Arizona . . . shall not be entitled to be recognized or certified as a political party under the laws of the state of Arizona and shall not be entitled to any of the privileges, rights or immunities attendant upon legal political bodies recognized under the laws of the state of Arizona

ARIZ. REV. STAT. § 16-806.

HOGAN & WALKER, *supra* note 2, at 138 (describing the proscription provisions that have existed in Northern Ireland in various forms since that country's enactment of the Criminal Law and Proceedings Act of 1887). The authors note that the British government employed these provisions to outlaw a number of political organizations during the course of the "Troubles." *Id.* Sinn Fein, once regarded as the political front for the Irish Republican Army, numbered among those proscribed organizations until it became legal in 1974. *Id.*

258. The Weimar Republic was the failed experiment in democracy that succeeded the collapse of the German monarchy at the conclusion of World War I.

argument is the concept of the “militant democracy”²⁶⁰ which asserts that “the polity need not commit suicide by allowing those people

See DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN, AND HERMANN HELLER IN WEIMAR 17 (1997) (providing a concise history of the rise and fall of the Weimar Republic). A popularly elected National Assembly convened in the German city of Weimar in 1919 to create a new constitutional regime. *Id.* It drafted the two-part constitution and created the Republic of the Reich. *Id.* at 18. This new constitution, however, was plagued with fatal internal contradictions. *Id.* at 20 (noting that the constitution required the Reichstag to supervise the president’s use of his emergency powers but also allowed the president to dissolve the Reichstag). Scholars have argued that the demise of the Weimar Republic resulted less from the abuse of the president’s extensive emergency powers employed by Hitler to dismantle the Republic, and more from the Republic’s fatally equivocal stance with regard to proscription. See Finn, *supra* note 169, at 63 (postulating that Weimar’s demise lay in its failure to ban the National Socialist Party).

259. See Finn, *supra* note 169, at 63 (asserting that “Weimar fell because it could not respond to challenges to constitutionalism disguised in the language of democratic legality.”) (internal quotation omitted). Professor Finn explains the dominant theory regarding the failure of Weimarian politics. He asserts that the Weimerian ideology was formed in large part by the jurisprudence of Hans Kelsen who extolled the virtues of the “equal chance doctrine.” *Id.* at 64. This doctrine essentially “held that anyone willing to abide by the formal rules of electoral procedure could contest for power . . . [and did not limit participation] to political parties committed to the maintenance of constitutional democracy.” *Id.* A common condemnation of Weimarian politics derives from Carl Schmitt’s critical response to the Kelsenian theory outlined above. Schmitt rejected the equal chance doctrine and argued that such liberalism is inherently self-subverting. DYZENHAUS, *supra* note 258, at 65. Schmitt postulated that in allowing all parties equal access to the political process, regardless of their attitude toward the maintenance of democracy, the State creates the risk that an anti-democratic party may employ the legal political system to gain the power that will later allow it to bring about the destruction of that very same system. *Id.* (arguing that untempered political liberalism will allow an anti-democratic party to “shut behind [it] the door of legality through which [it] had entered.”). Weimar’s failure arguably lies in its refusal to proscribe the Nazi party, thus preventing it from legitimately gaining the control that later allowed it to destroy the democratic regime. CONSTITUTIONS IN CRISIS, *supra* note 247, at 156. One of the most common criticisms of the Weimar Republic was its failure to prohibit the National Socialist Party from participating in elections. Finn, *supra* note 169, at 63. See also Arthur J. Jacobson & Bernhard Schlink, *Constitutional Crisis: The German and the American Experience*, in WEIMAR: A JURISPRUDENCE OF CRISIS 1, 14 (Arthur J. Jacobson & Bernhard Schlink eds., 2000) (noting that the Weimar Republic’s last presidential cabinet transformed into a National Socialist dictatorship).

260. See *Refah Partisi v. Turkey*, App. No. 41340/98, 35 Eur. H.R. Rep. 56, 83 (2002) (classifying Turkey as a militant democracy); Finn, *supra* note 169, at 64 (contextualizing the use of political proscription in nascent democracies); see also DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 222 (1989) (explaining that the concept of the militant democracy in Germany derives from its experience with totalitarianism and dictatorship and was enshrined in numerous provisions of the country’s Basic Law). Kommers elaborates on this principle identifying its emergence as a product of the ailing Weimar Republic, “namely its tolerance of extremist parties bent on destroying democracy.” *Id.* The vulnerability of nascent democracies to the threats embodied in radical parties produced the perceived need to provide a mechanism by which democratic regimes could exclude those parties from political processes thereby preserving the integrity of the nation. *Id.* (identifying the manifestation of the notion of the militant democracy in various articles of the German Basic Law). Kommers specifically references Article 21(2) which provides that “[p]arties which, by reason

who [reject the political order] to utilize its free and open processes to demolish those very processes.”²⁶¹ In accordance with this principle, proponents of proscription argue, with notable force in the case of Batasuna,²⁶² that no justification exists for depriving a democracy of the means to defend itself against a party that seeks to undermine its legitimacy.²⁶³ This thesis is compelling with regard to the Spanish government’s right to protect itself from those factions, such as Batasuna, that seek to destroy the Spanish State as it exists today.

One risk inherent in the employment of proscription is its potential for abuse.²⁶⁴ The slippery slope argument posits that

of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or endanger the existence of the Federal Republic of Germany, shall be unconstitutional.” *Id.* (internal quotation omitted).

261. Murphy, *supra* note 252, at 180 (concluding that “[i]n short, a democracy may punish or exclude those whose clear aim is to destroy the system.”).

262. Spain arguably falls within the “defending democracy” paradigm promulgated in research regarding liberal state responses to political violence and terrorism. See Pedahzur, *supra* note 169, at 5 (establishing a tripartite rubric under which to examine the correlation between the degrees of repression employed in combating political violence and the level of democratic infrastructure characteristic of each of three nations: Israel, Germany, and the United States). In her analysis, the author cites three classes of democracies: “militant,” “defending,” and “immunized.” *Id.* The “defending democracy” paradigm has elicited various definitions and is generally regarded as a type of democracy that excludes individuals or organizations, the aims of which “may endanger the state, its political regime or the basic national consensus.” *Id.* Such states will exclude political parties from elections so long as there is constitutional or legislative predicate for doing so and generally rely on a criminal justice model in responding to terrorism. *Id.* at 13. As distinguished from the militant and defending models, the author identifies the “immunized democracy” as representative of a Lockian liberal approach with “minimal penetration of the state into the social sphere.” *Id.* at 14-15. Such a state operates wholly within the boundaries of the law and subjects all state responses to violence to judicial review. *Id.* at 15. These states will generally exclude a party from free elections only upon finding that it “constitutes a clear and present danger to the regime and consequently to the society.” *Id.* at 15. The United States is exemplary of the “immunized democracy.” *Id.*

263. See Murphy, *supra* note 252, at 191 (explaining that the theory of a militant democracy “allows government to exclude certain kinds of peaceful efforts to change the system.”); see also Finn, *supra* note 169, at 64 (stating that “proscription hopes to save democracy from its own excesses.”).

264. See Finn, *supra* note 169, at 67 (citing the utility of an inquiry into how and in what ways the decision to ban parties may have provided the basis for further state activities designed to censor or harass anti-democratic forces in assessing the possibility for abuse). Finn cited a study, which demonstrated that following the German decision to proscribe the Communist party, preliminary inquisitions from state prosecutors increased from 7,975 to 12,600 the following year. *Id.* (citing Donald P. Kommers, *The Spiegel Affair: A Case Study in Judicial Politics*, in *POLITICAL TRIALS* 15 (Theodore L. Becker ed., 1971)); see also Gordon, *supra* note 253, at 391 (positing that bans hold dangerous potential to become legitimate State weapons of political struggle). While acknowledging the potential for abuse, the author claims that empirical evidence suggests that a slippery slope does not exist. *Id.* at 392. Gordon notes that despite the proscriptions of two parties in both Israel and Germany, there is no evidence to suggest that they have or will lead to similar action

proscribing one group “pushes other groups to the brink of illegality.”²⁶⁵ This argument fails, however, to distinguish between terrorist fronts like Batasuna and opposition parties, like the P.N.V., that conform their activities to standards inherent in societies governed by the rule of law.²⁶⁶

In Spain, such distinctions are of paramount importance in illustrating that the proscription of Batasuna has as its foundation not the prohibition of an ideology but rather of the means employed in promoting that ideology.²⁶⁷ For example, the Basque Nationalist Party was one of the most influential promulgators of a Basque nationalist policy yet operates wholly within the institution of national mainstream politics.²⁶⁸

Opponents of proscription often speculate that bans will serve only to romanticize the cause, converting its fallen soldiers into martyrs.²⁶⁹

against any other party or organization in either nation. *Id.*

265. Gordon, *supra* note 253, at 391. While often problematic, such concerns resound in the recent decision of the National Court’s Public Prosecutor to initiate a similar proceeding against the Communist Party of Spain, the alleged political wing of GRAPO, a leftist terrorist organization. See *La fiscalía pide la suspensión del P.C.E.(r) al considerar que es el brazo político de los GRAPO* [The Public Prosecutor Requests the Suspension of the P.C.E.(r) Alleging it to be the Political Arm of GRAPO], ESTRELLA DIGITAL (reporting that the Public Prosecutor filed a request for the party’s suspension with the National Court), at <http://www.estrelladigital.es/021023/articulos/espana/grapo.asp>. (last visited Oct. 23, 2003) (on file with the American University Law Review). This application to the National Court comes only two months after the Public Prosecutor and the Government took similar action against Batasuna.

266. See Gordon, *supra* note 253, at 392 (noting the relative ease with which governments can distinguish between extremist parties and traditional opposition parties, “which accept ‘the rules of the game’”).

267. See generally ORDER, *supra* note 8 (enumerating, in extensive and extremely precise detail, throughout approximately 350 pages of material supporting this decision, the actions that evidence H.B.-E.H.-Batasuna’s connections with E.T.A.). Judge Garzón’s order states that the objective of the ban is to prevent activity that furthers terrorism and the subsidiary effects resulting therefrom. *Id.* In doing so he claims that Batasuna allowed E.T.A. to use its headquarters to plan many of its attacks, provided shelter to its members, contributed to the terrorization of the citizenry, and defended the “institutional front” of the terrorist organization. *Id.*

268. See Mees, *supra* note 19, at 804 (identifying the Basque Nationalist Party as instrumental in procuring a referendum regarding the Statute of Basque Autonomy ratified in 1978). The author also credits Sabino Arana, the founder of the P.N.V., with providing the impetus for the influence that the party wielded in the 1980s. Far-reaching Basque autonomy in matters of tax policy, education, industrial policy, and justice evidences the power of the P.N.V. in effecting change in the Basque Country. See *id.* at 809 (concluding that radical nationalists have never recognized these steps in the process of Basque nation-building as they view autonomy as an obstacle to self-determination). Mees notes the cleavage that exists within the nationalist movement between the majority, peaceful, and democratic wing and the minority faction that condones the use of violence to vindicate its Basque identity. *Id.* at 805.

269. See Gordon, *supra* note 253, at 391 (arguing that the banned organization could potentially gain strength from proscription); *United in Error: Spain’s Ban on Batasuna Will Not Help*, *supra* note 14 (expressing the measure’s futility and predicting that proscription will have the sole effect of converting Batasuna members into martyrs).

The argument continues that in making a martyr of the restricted party, the State risks conceding a degree of its own legitimacy in appearing that it feared allowing the people a genuine choice between the existing system and the radical party's platform.²⁷⁰ This argument fails in the case of Spain as, among its supporters, E.T.A. militants have already achieved a certain degree of martyrdom.²⁷¹ Additionally, the existence of legitimate political parties that advocate for an autonomous Basque Country yet also function within bounds of democracy belies the argument that the Spanish state fears a challenge to its standing policy regarding Basque autonomy.²⁷²

Proponents of proscription often make a contrary argument. They assert that permitting a terrorist front to participate in elections inherently confers upon it the legitimacy associated with law abiding parties.²⁷³ Bans can serve as a denunciation of the radical party's legitimacy in the eyes of the State and of democracy in general.²⁷⁴ Proscription can further serve a presentational function, demonstrating the State's intransigent stance with regard to the suppression of terrorism and instilling confidence in its citizenry.²⁷⁵

270. Gordon, *supra* note 253, at 391; *see also* CHALK, *supra* note 1, at 99-103 (examining the effects of relatively repressive counter-terrorism measures in democratic nations); Finn, *supra* note 169, at 66 (identifying the risk that proscription could delegitimize the electoral process).

271. *See* Jose Manuel Mata, *La estrategia de la insurrección* [*The Strategy of Insurrection*], EL PAÍS (Madrid) (reporting that one of the unifying factors of Batasuna members is their common perception of incarcerated E.T.A. operatives as heroes), at <http://www.elpais.es/temas/dossiers/ledpartidos/batasuna.html> (last visited Sept. 17, 2002) (on file with the American University Law Review).

272. *See supra* note 268 (discussing the role of P.N.V. as a political advocate for Basque nationalism that nonetheless operates within the established political mainstream).

273. *See* Gordon, *supra* note 253, at 390 (deriving support for this argument in the case of the Israeli politician Meir Kahan). Gordon explains that had the Israeli Supreme Court banned Kahan's party from running in Knesset elections it could have denied Kahan the legitimacy that afforded him a seat in the Congress and the attendant protected speech that Israeli law confers on its members and thus "nipped the 'Kahanist' phenomenon in the bud." *Id.*

274. *See id.* (noting that the dichotomous nature of the positive effects often associated with proscription weaken the target party while simultaneously strengthening the ruling regime); *see also* WILKINSON, *supra* note 1, at 113 (observing that some legislation serves a symbolic function of "*expressing public revulsion . . . and reassuring the public that something is being done.*").

275. *See* Gordon, *supra* note 253, at 391 (observing that in banning the Socialist Reich Party, the Bonn government achieved "the prestige which the vacillating Weimar Republic never had"). Here, the author notes that the government's proscription of the Socialist Reich Party and the Communist Party (KPD) did not result in increased popular support for either party or a loss of confidence in the strength of the nascent democratic regime. *Id.* *See also* HOGAN & WALKER, *supra* note 2, at 246 (articulating the "presentational" justification for proscription). The authors derive this term from the Jellicoe Report on the Prevention of Terrorism Act of 1976 in Northern Ireland. *Id.* The report justified the existence of the power to proscribe as "presentational" rather than "practical" in that its object was "to remove

Opponents also argue against the efficacy of bans stating that the proscribed organizations will simply reappear under the guise of another party or will employ some extra-parliamentary means to reestablish support.²⁷⁶ This reasoning similarly fails in the case of Batasuna as the proscription Order expressly prohibits the party's constituents from reorganizing under any other name.²⁷⁷ Further, the Law of Political Parties expressly articulates the conduct that may result in proscription. Thus, should Batasuna reorganize under some alternate guise, the Law of Political Parties and the Supreme Court's order would presumably render any such organization illegal and its assets subject to seizure.²⁷⁸

This seizure of assets is also an invaluable part of the Spanish proscriptive legislation. Capital is the oxygen that allows a terrorist enterprise to thrive and the seizure provision serves the extremely practical purpose of denying a party the means by which it operates.²⁷⁹

public manifestations of the existence of, and support for, terrorist organizations, rather than to prevent terrorism as such." *Id.*

276. See Gordon, *supra* note 253, at 389 (finding support for his view in the reappearance of the DKP (German Communist Party) in West Germany pursuant to the proscription of the KPD (Communist Party of Germany)). Gordon also cites Justice Jackson's concurrence in *Dennis v. United States*, 341 U.S. 494 (1951), which expressed doubt regarding the "long range effectiveness of legislative bans in stopping the rise of the Communist movement." *Id.* at 389 n.255 (quoting *Dennis*, 341 U.S. at 578) (Jackson, J., concurring).

277. See L.O.P.P. art. 3 (prohibiting political parties from employing registration materials that identify it or otherwise coincide with those of a suspended or proscribed party); ORDER, *supra* note 8, at 344 (providing for the suspension of activities undertaken in the names of H.B., E.H., Batasuna and any other name they should choose to adopt).

278. See SUPREME COURT JUDGMENT, *supra* note 13, at 108-09 (denying the Prosecution's request for a prospective ban including parties yet to be formed but stating that any party that attempts to continue to serve as E.T.A.'s political wing may expect a similar fate); PROSECUTOR'S COMPLAINT, *supra* note 88, at 63-64 (requesting that the effects of the proscription extend to all new political parties formed to circumvent the ruling as well as to any existing party which acts as a successor to the banned party or continues its activities); *La Fiscalía evitará que Batasuna concurra 'camuflada' a las próximas elecciones* [*The Public Prosecutor Will Preclude Batasuna from Running in "Camouflage" in the Next Elections*], EUROPA PRESS (Madrid/San Sebastian) (Mar. 31, 2003) (reporting that the Attorney General stated that his office intends to initiate proceedings against any party that it suspects of serving as a front for Batasuna's participation in the May elections), available at <http://es.news.yahoo.com/fot/ftxt/20030331195943.html> (on file with the American University Law Review).

279. See HOGAN & WALKER, *supra* note 2, at 143 (suggesting that seizing and forfeiting assets and shutting down facilities are practical measures in curbing political violence); see also Richards, *supra* note 9, at 79 (claiming that the British government, in granting Sinn Fein the financial subsidies that all democratic parties receive, "helped [the party] to achieve its highest electoral support in modern times, before it resembled a democratic party"). Richards faults the government for granting subsidies to Sinn Fein in the absence of any commensurate concessions from the I.R.A., thus implicitly recognizing the correlation between the financial status of the political front and the success of the terrorist organization. *Id.*

This provision also lends legitimacy to the legislation in demonstrating that the ban has concrete pragmatic effects and is not merely an expression of State animus toward a particular party.²⁸⁰

Finally, opponents argue that the efficacy of individualized criminal sanctions belie the necessity of proscription.²⁸¹ This approach has encountered criticism and, in practice, has proven insufficient in responding to political violence.²⁸² Spain has long since employed the "criminal justice model" in sanctioning political violence.²⁸³ As reflected in Batasuna's consistent and extensive collaboration with E.T.A., this less restrictive approach has proven insufficient in deterring the party from supporting E.T.A.'s campaign of terror.²⁸⁴ In addition to employing criminal sanctions, the Spanish government has also ceded an extraordinary degree of autonomy to

280. See Gordon, *supra* note 253, at 390 (identifying the risk that citizens could perceive the proscription of a party as an "admission of failure" on the part of the State); see also Richards, *supra* note 9, at 85 (condemning the British government for allowing the I.R.A. to make substantial electoral advances). The Supreme Court's opinion orders the dissolution of the party and the distribution of all proceeds from the liquidation of Batasuna's assets among its creditors along with the dissolution of the party. SUPREME COURT JUDGMENT, *supra* note 13, at 196.

281. See Gordon, *supra* note 253, at 386 (citing Justice Barak of the Israeli Supreme Court who identified the criminal justice system as one of the "accepted tools with which the democracy can protect itself"). Barak argued that in the presence of sufficient criminal sanctions there is "no need to take the drastic means of denying the right to be elected." *Id.*

282. WILKINSON, *supra* note 1, at 223 (rejecting the sole use of the criminal justice system due to the inefficacy of attempting to quell terrorism through employment of law enforcement and criminal sanctions alone). Wilkinson argues that despite some notable successes of this approach, it nonetheless retains certain serious inadequacies. *Id.* For example, Wilkinson notes that in many nations, terrorists have escaped the reach of criminal sanctions by fleeing abroad and continuing to operate from outside their home nations. *Id.* at 224. Additionally, the author notes that it is often exceedingly easy for convicted terrorists to continue operating from within prison by influencing existing networks outside of the prison. *Id.*

283. See C.P. tit. XXI (enumerating among the "offenses against the Constitution:" complicity with a terrorist organization, participation in an association that has as its objective the commission of a crime, and membership in a terrorist organization).

284. For example, the Spanish Penal Code expressly prohibits membership in a terrorist organization, yet these provisions have proved ineffective as Batasuna has consistently allowed members of E.T.A. to figure among its ranks. See PROSECUTOR'S COMPLAINT, *supra* note 88, at 6-11 (naming those Batasuna members who maintain a joint association with both the political party and E.T.A.); GOVERNMENT'S COMPLAINT, *supra* note 106, at 12 (identifying those members of Batasuna convicted of collaborating with a terrorist organization); see also *El Tribunal Supremo dicta orden de busca y captura internacional para el parlamentario de Batasuna* [Supreme Court Issues Order for International Search and Capture of Batasuna's Member of Parliament], ESTRELLA DIGITAL (evidencing the failure of Batasuna representative Josu Ternera to appear at two judicial proceedings and stating that his last appearance in public was in October of 2002 in Switzerland), at <http://www.estrella.digital.es/imprimir.asp> (last visited June 29, 2003) (on file with the American University Law Review). The article states that the Supreme Court is currently investigating Ternera for ordering the E.T.A. attack of a Civil Guard's quarters that resulted in the deaths of 11 people. *Id.*

the Basque Country in its effort to appease nationalist factions.²⁸⁵ The inefficacy of such action further illustrates that the law is the last remaining means by which to insulate democratic society from the deleterious effects of political parties associated with terrorism.²⁸⁶

All democracies must regard proscriptive legislation with the utmost suspicion and weigh its potential benefits carefully against the inherent restriction on freedom that it imports.²⁸⁷ However, the foregoing analysis suggests that Batasuna's proscription promises to complement existing criminal sanctions by serving both practical and presentational rationales for proscription²⁸⁸—practical, in depriving Batasuna and thus E.T.A. of its financial support, and presentational in establishing a firm state position of intolerance for those political parties that seek refuge in the freedoms that they undermine and which are enshrined in the Constitution that they reject.

CONCLUSION

When considered with reference to recent E.C.H.R. jurisprudence, Spain's proscription of Batasuna is likely to withstand any Article 11 challenge brought pursuant to the European Convention on Human Rights. Political parties are obliged to operate within the bounds of

285. See WILKINSON, *supra* note 1, at 113 (classifying the Statute of Basque Autonomy as a form of "prophylaxis" or reform "designed to have a preventative effect by attempting to redress underlying grievances that might otherwise lead to extreme disaffection among sectors of the population"); see also Mees, *supra* note 19, at 804 (observing that the Basque Government currently enjoys autonomy regarding matters including education, taxation, industrial policy and justice).

286. Other research has found that, in certain circumstances, proscription arguably represents the least restrictive alternative in confronting the actions of political parties associated with terrorism. See Gordon, *supra* note 253, at 387 (noting that those who argued in favor of a ban on the Kach party in Israel in 1984 "can now argue that *Kach's* strength increased so much from Kahan's election to the Knesset in 1984" that any measure short of proscription would have proved insufficient). Gordon also noted that "the victory of the National Front in the 1986 French legislative elections was said to bestow legitimacy to its leader, Le Pen." *Id.* at 387 n.246

287. WILKINSON, *supra* note 1, at 113, 115 (considering the way in which the subsidiary effects of repressive counter-terrorism measures should factor into states' consideration of whether to impose such restrictions). Wilkinson notes that in order to insure the legitimacy and democratic accountability of anti-terrorist legislation, civil authorities should control all aspects of its procurement and implementation and provide for judicial review of its application. *Id.* at 117.

288. Generally writers have found the employment of the presentational rationale, alone, as insufficient justification for banning a political party. See HOGAN & WALKER, *supra* note 2, at 143 (arguing that states should retain proscription as a security measure but should reject presentational grounds for such legislation). The authors qualify their acceptance of proscription with two limiting principles. The first qualification is the demonstrated necessity of "evidential shortcuts" and the second is that the system adopted ensures that membership "is shorthand for criminal activity." *Id.*

the Constitution and of established notions of democracy.²⁸⁹ If a given party, in aligning itself with a terrorist organization, chooses not to do so, it may not, then, invoke those same constitutional principles as a shield nor seek legal refuge in the very provisions that it has chosen to violate.²⁹⁰ Legislative and judicial tolerance of such subversion would contravene the basic notions of democracy upon which all legal systems are predicated. The newly ordained Law of Political Parties and subsequent judicial measures represent a coordinated and laudable national effort to lift from Batasuna the political facade behind which reside nothing less than popularly elected terrorists.

The inherent challenge for any democracy engaged in the struggle against terrorism is always the reconciliation of individual civil liberties with an effective and unequivocal counter-terrorism policy.²⁹¹ In light of the protracted struggle with terrorism that lies ahead, this tension will necessarily inform the world's legislative and judicial responses. While it seems that Spain has succeeded in achieving that delicate balance,²⁹² the response of the international legal system will ultimately define the juridical boundaries within which the nations of the world must wage their offensives.²⁹³ In an international community torn between its dedication to the war on terrorism and its veneration for democracy, states would be wise to heed the lessons that Spain's experience will offer as the international legal system will be the force with which future counter-terrorism measures will have to contend.

289. See *supra* note 166 (articulating the restrictions that the E.C.H.R. has imposed on the activities of political parties pursuant to the European Convention on Human Rights).

290. See *Lawless v. Ireland*, 3 Eur. Ct. H.R. (serv. A) 45 (1961) (stating that "no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms").

291. See *supra* note 4 (identifying the reconciliation of civil liberties with state security as the greatest challenge for a democracy in confronting the threat of terrorism).

292. The Law of Political Parties has resulted in a clear articulation of behaviors that can lead to proscription, thus allowing parties to conform their activities to objective standards. See L.O.P.P. art. 9 (enumerating, in detail, the activities that can form the basis of a proscriptive order). Moreover, the law provides for independent judicial review, thus protecting against the Government's indiscriminate application of its provisions. See *id.* art. 11 (providing for the protective appeal before the Constitutional Court). Finally, the option of a temporary suspension lends itself to a thorough investigation of the facts and will prevent the courts from precipitously foreclosing on the legal and constitutional rights of a political party. See ORDER, *supra* note 8 (stating that the purpose of the suspension was to facilitate the Court's factual investigation).

293. See Head, *supra* note 5, at 73 (anticipating the growing role that international law and, more specifically, the European Convention on Human Rights will play in determining the propriety of counter-terrorism measures).