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NATIONAL SECURITY – A TRUMP CARD?  
THE EUROPEAN COURT OF HUMAN RIGHTS DECISIONS IN  
*HERRI BATASUNA AND BATASUNA V. SPAIN, ETXEBERRIA  
AND OTHERS V. SPAIN AND HERRITARREN ZERRENDA V.  
SPAIN*

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE  
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*National Security – a Trump Card?*  
*The European Court of Human Rights decisions in Herri Batasuna and Batasuna*  
*v. Spain, Etxebarria and Others v. Spain and Herritarren v. Spain*

JERNEJ LETNAR ČERNIČ

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## **Abstract**

On 30 June 2009, the European Court of Human Rights delivered three decisions deriving from the situation in the Basque country, *Herri Batasuna and Batasuna v. Spain*, *Etxeberría and Others v. Spain* and *Herritarren Zerrenda v. Spain*. In *Herri Batasuna and Batasuna v. Spain*, the European Court of Human Rights upheld the dissolution of the political parties Herri Batasuna and Batasuna, whereas it held in *Etxeberría and Others v. Spain* and *Herritarren Zerrenda v. Spain* that the political groups, which wished to continue the activities of the illegal political parties, are also prohibited from presenting candidates in municipal, regional and autonomous community elections. This article will briefly explore some of the basic legal questions arising from the above decisions. It attempts to demonstrate that the Court's analysis is entirely at odds with the functioning of democratic society, and it argues that the extreme measure of dissolution of *Herri Batasuna and Batasuna*, *Etxeberría* and *Herritarren Zerrenda* may have been avoided by employing less drastic and individualized measures. Despite the Court holding that the dissolution of the political parties and groups was necessary and proportionate, it may have failed to establish the factual basis and therefore also its conclusions are subjected to criticism.

## **Keywords**

European Convention on Human Rights and Fundamental Freedoms, freedom of association, freedom of expression, fight against terrorism, Spain, the Basque Country, necessary in democratic society.



## 1. Introduction

On 30 July 2009, the fifth section of the European Court of Human Rights delivered three eagerly awaited judgements deriving from the situation in the Basque country, *Herri Batasuna and Batasuna v. Spain*,<sup>1</sup> *Etxeberria and Others v. Spain*<sup>2</sup> and *Herritarren Zerrenda v. Spain*.<sup>3</sup> In *Herri Batasuna and Batasuna v. Spain*, the European Court of Human Rights [The Court] upheld the dissolution of the political parties Herri Batasuna and Batasuna, and it further held in *Etxeberria and Others v. Spain* and *Herritarren Zerrenda v. Spain* that the political groups, which wished to continue the activities of the illegal political parties, are also prohibited from presenting candidates in municipal, regional and autonomous community elections.<sup>4</sup> On 6 November 2009, the Court's Grand Chamber panel of five judges rejected a request for referral of the judgements to the Grand Chamber.<sup>5</sup> The Courts judgements therefore became final on 6 November 2009.<sup>6</sup>

*Herri Batasuna and Batasuna v. Spain*, *Etxeberria and Others v. Spain* and *Herritarren Zerrenda v. Spain* illustrate the dilemma encountered by states in reconciling two conflicting values in contemporary democratic societies. This is whether the prevention of terrorism and the protection of national security may undermine the protection of fundamental human rights, and whether the protection of fundamental human rights may impede the suppression of terrorism and the protection of national security. The protection of human rights has always concentrated on balancing the interests of

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<sup>1</sup> *Herri Batasuna and Batasuna v. Spain*, application nos. 25803/04 and 25817/04, Chamber Judgment, 30 June 2009.

<sup>2</sup> *Etxeberria and Others v. Spain*, nos. 35579/03, 35613/03, 35626/03 and 35634/03, Chamber Judgment, 30 June 2009.

<sup>3</sup> *Herritarren Zerrenda v. Spain*, no. 43518/04, Chamber Judgment, 30 June 2009.

<sup>4</sup> See also José Yoldi, *Estrasburgo entierra a Batasuna*, *El País*, 1 July 2009,

<[http://www.elpais.com/articulo/espana/Estrasburgo/entierra/Batasuna/elpepiesp/20090701elpepinac\\_1/Tes](http://www.elpais.com/articulo/espana/Estrasburgo/entierra/Batasuna/elpepiesp/20090701elpepinac_1/Tes)>.

<sup>5</sup> Article 43 (2) of the European Convention on Human Rights and Fundamental Freedoms provides that: 'A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.' Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.

<sup>6</sup> European Court of Human Rights, Press release by Registrar, 15.12.2009, See Article 44 (2) (c) of the European Convention on Human Rights and Fundamental Freedoms, which provides that 'The judgment of a Chamber shall become final ... when the panel of the Grand Chamber rejects the request to refer under Article 43'.

*El País*, *Estrasburgo avala la ilegalización de Batasuna*, 11 November 2009,

[http://www.elpais.com/articulo/espana/Estrasburgo/avala/ilegalizacion/Batasuna/elpepuesp/20091111elpepunac\\_7/Tes](http://www.elpais.com/articulo/espana/Estrasburgo/avala/ilegalizacion/Batasuna/elpepuesp/20091111elpepunac_7/Tes).

*El Correo*, "El PNV es el más interesado en que Batasuna sea ilegal" , dice el PSE, 22 November 2009, <http://www.elcorreodigital.com/vizcaya/20091122/politica/interesado-batasuna-ilegal-dice-20091122.html>.

Fernando Ituribarria, El Gobierno francés se siente preocupado por el fallo que ilegaliza al partido radical, *El Correo*, 13 November 2009,

<http://www.elcorreodigital.com/vizcaya/20091122/politica/interesado-batasuna-ilegal-dice-20091122.html>.

*El Correo*, PNV, Aralar, EB y EA piden al Parlamento vasco que manifieste su rechazo a la Ley de Partidos, 11 November 2009,

<http://www.elcorreodigital.com/vizcaya/20091111/mas-actualidad/politica/decision-tedh-perpetua-mayoria-200911111841.html>.

*El Correo*, Ilegalización definitiva, 12 November 2009,

<http://www.elcorreodigital.com/vizcaya/20091112/opinion/ilegalizacion-definitiva-20091112.html>.

Florencio Dominguez, Se acabó el recreo, *El Correo*, 12.11.09,

<http://www.elcorreodigital.com/vizcaya/20091112/politica/acabo-recreo-20091112.html>.

Xabier Gurrutxaga, Imprescindible adecuación, *El Correo*, 13 November 2009,

<http://www.elcorreodigital.com/vizcaya/20091113/politica/imprescindible-adecuacion-20091113.html>.

the individual with those of society as whole. Such conundrums are sometimes also known as democratic dilemmas, eloquently described by E. Brems as 'fundamental rights will be restricted for the purpose of protecting fundamental rights'.<sup>7</sup> More specifically, *Herri Batasuna and Batasuna v. Spain*, *Etxebarria and Others v. Spain* and *Herritarren Zerrenda v. Spain* concern the delicate balancing exercise between the interests of the individual and those of Spanish society as a whole.

The Court decisions in the above cases do not come as a surprise. On the contrary, academic commentators have widely predicted the outcome of the Court's deliberations in recent cases against Spain.<sup>8</sup> To this effect, this article aims to demonstrate that the Court's ruling is unsatisfactory both as a matter of law and as a matter of policy. More importantly, it sends a disturbing message to states that they can do almost whatever they wish in the name of the protection of national security. This article will briefly explore some of the basic legal questions arising from the dissolution of political parties in the Basque country. It attempts to demonstrate that the Court's analysis is entirely at odds with the functioning of democratic society, and is equally dubious as a matter of European human rights law. In other words, it argues that the extreme measure of dissolving *Herri Batasuna and Batasuna*, *Etxebarria* and *Herritarren Zerrenda* may have been avoided by employing less drastic but individualized measures. Despite the Court holding that the dissolution of the political parties and groups was necessary and proportionate, it may have failed to establish the factual basis, and therefore also its conclusions are subjected to criticism.

One can rarely observe situations in proclaimed democratic societies where the right to represent and support a political party is denied on the basis of a populist fight against terrorism, with the decision later upheld by courts at the highest national and European level. What is more, the latter issue is coupled not only to a prohibition from voting for a particular political party but also from representing the party and expressing opinions on behalf of it. These are two of the core issues arising from the recent European Court of Human Rights's decisions in *Batasuna and Herri Batasuna*, *Etxebarria and Others*, and *Herritarren Zerrenda* decisions. More disturbingly, the decisions send a clear message to the Spanish state that it can do whatever it wishes in fighting against terrorism so long as the measures employed are tacitly approved at the highest political level.

The balance of this article is devoted to exploring and analysing the nature of the Court's decisions and its legal reasoning. Thus, the article employs the following outline: Section 2 provides the historical context for the subsequent analysis of the Court's decisions. Section 3 examines the Spanish Law on Political Parties and presents the factual and legal dimensions of the Court's decisions in the *Batasuna and Herri Batasuna*, *Etxebarria and Others*, and *Herritarren Zerrenda* decisions. These decisions are deserving of scrutiny not simply because they are recent, but also because they provide a rather unique example of the (non-) application of the European Convention on Human Rights to protecting public security and the rights and freedoms of others. Section 4 analyzes the decisions from the legal point of view and submits that the Court could have employed a more thorough analysis when delivering its decisions, arguing that the decisions appear dubious as a matter of human rights law. Finally, Section 5 argues that the Court's decisions are equally dubious in terms of policy in fighting against terrorism.

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<sup>7</sup> E. Brems, Freedom of political association and the question of party closures, in W Sadurski (ed) *Political Rights under Stress in 21st Century Europe* (OUP, 2006), p. 160.

<sup>8</sup> Thomas Ayres, *Batasuna banned: the dissolution of political parties under the European Convention on Human Rights*, Boston College International and Comparative Law Review (2004), volume 27, issue 1, pp. 99-113. Leslie Turano, *Spain: Banning political parties as a response to Basque terrorism*, International Journal of Constitutional Law, Vol. 1, number 4, October 2003. Ian Cram, *Constitutional responses to extremist political associations – ETA, Batasuna and democratic norms*, Legal studies, Vol. 28, Issue 1, pp. 68-95. Katharine A. Sawyer, *Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights*, 52 American University Law Review. 1531, volume 52, issue 6, (2003). E. Brems, Freedom of political association and the question of party closures, in W Sadurski (ed) *Political Rights under Stress in 21st Century Europe* (OUP, 2006), p. 169.



## 2. Historical background

This section attempts to contextualize the subsequent discussion and analysis of the Court's cases by describing the history of the Basque country (Euskadi, Euskadi Herria), not only during the Franco totalitarian regime but also beforehand. The Basque country first arose in modern times as an independent political unit within the Kingdom of the Spain in the autumn of 1936, when three of the four traditional Basque provinces in Spain (Bizkaia, Gipuzkoa and Araba) merged into a single unit with its capital in Bilbo.<sup>9</sup> Its autonomy, which was formally established, was severely limited due to the Spanish civil war and the geographical separation of the Basque Provinces from the centre of the Spanish Republic, resulting in an almost confederate relationship between the Basque Country and the rest of Spain. As early as 1937, when the pro-fascist forces of General Franco occupied the entire north of Spain, the Basques lost their recently-gained autonomy. Late in the afternoon of an April day in 1937, the hunters of the Condor Legion of the German Luftwaffe and the Italian Aviazione Legionaria suddenly flew over the idyllic Basque town of Gernika and began one of history's most brutal attacks on Basque national identity. Gernika in a few hours found itself at the heart of the fight between the Republican and nationalist forces in the Spanish Civil War.

The bombing of Gernika was not selected randomly, as the town had always symbolized the heart of Basque national identity and sovereignty. *Gernikako Arbola* (the Gernika oak tree) had already been growing for several centuries next to the first Basque Parliament, an oak tree which has since the fourteenth century symbolized national sovereignty and the rights of the Basque people. On that April day, through five waves of bombing attacks, the German Luftwaffe destroyed most of Gernika. The attacks eventually killed 1,654 people. However, they left the oak tree and the ancient Basque Parliament intact and they still stand on the same site, symbolizing Basque identity and the viability of the Basque nation. Demolition of historic places only further strengthened Basque national consciousness and identity, which survived the brutality of the totalitarian rule of General Franco and his followers. The Basque customs and language were totally oppressed during the totalitarian fascist regime, which partly influenced the emergence of an embryonic armed guerrilla resistance, still continuing today under the auspices of the military terrorist group ETA,<sup>10</sup> which the European Union now includes on its list of persons, groups and entities supporting terrorism.<sup>11</sup> In this context, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (hereinafter the UN Special Rapporteur), notes that 'the violence perpetrated by ETA has taken more than 820 lives since 1968.'<sup>12</sup>

After Franco passed away in 1975, bilateral negotiations started for the immediate restoration of autonomy, but without concrete results. Under the Spanish Constitution of 1978, those regions which had lost autonomy since the fall of the Spanish Republic had their self-government restored

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<sup>9</sup> This article employs the Basque orthography of place names.

<sup>10</sup> Euskadi ta Askatasuna – in English translation: Basque country and Freedom. For an in-depth study on Basque Nationalism and ETA see: Cameron, J. Watson, *Basque Nationalism and Political Violence: The Ideological and Intellectual Origins of ETA*, Centre for Basque Studies, University of Nevada, Reno, University of Nevada Press, 2007 – arguing that 'there is ... an important link between some elements of Basque culture and the political violence that has afflicted the Basque country for almost forty years.' At p. 16. Also see Alfonso Pérez Agote, *The Social Roots of Basque Nationalism*, University of Nevada Press, 2006.

<sup>11</sup> Council Common Position 2009/67/CFSP of 26 January 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2008/586/CFSP, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:023:0037:0042:EN:PDF>>, last visited 12 October 2009.

<sup>12</sup> The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/10/3/Add. 2, 16 December 2008, para. 47, <<http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.HRC.10.3.Add.2AEV.pdf>>. R. Alonso and F. Reinales 'Terrorism, human rights and law enforcement in Spain' (2005) 17 *Terrorism and Political Violence* 265, note using Spanish Ministry of Interior statistics that ETA claimed responsibility for more than 800 terrorist killings in the period 1968–2001. Cited in I. Cram, p. 1. Sawyer noted in 2003 that ETA was responsible for 3,391 terrorist attacks that killed 836 persons and injured 2,367, K.A. Sawyer, at page 1538.

under an expedited procedure.<sup>13</sup> In accordance with these provisions the Statute of Gernika was adopted in 1979. In this way, the Basque country was granted broad autonomy, with its own parliament, autonomous government and the delegation of powers in the most important areas, with the exceptions of the areas of foreign policy, defence and justice.<sup>14</sup> Jurisdiction over the areas of security policy and finance is divided between the Basque country and the central government.

However, the statute of Gernika has not resolved the central Basque question. Not only does jurisdiction over certain areas which were intended to gradually come under the umbrella of the autonomous Basque authorities (justice, international trade and higher education) still rest in the hands of central government, but the bone of contention has been and still is the official status of the Basque country within Spain. Under the Spanish Constitution the Basque Country represents only one of seventeen Spanish regions which enjoy a higher level of autonomy than other regions for historical and linguistic reasons. Despite a degree of decentralization, Spain is still officially a unitary state. This paradox, which at the end of the seventies helped the peaceful transition from the centralized unitary dictatorship to democracy, has in recent years been hanging like the sword of Damocles over the future fate of Spain. It appears that during the transition period the Spanish political elite deliberately created a conflict between the declarative nature of the Spanish State - the prevailing public political discourse argues for a unitary Spanish state - and the wide-ranging autonomy which certain Spanish regions enjoy, notably the Basque Country, Catalonia and Galicia. Spain, which is still formally centrally governed, in many respects more resembles *de facto* a classic federation, such as Germany or Austria. Although this arrangement has proven to be quite propitious in practice, it also encounters serious challenges.<sup>15</sup> For instance, in 2007 the Basque government attempted to organise a consultative referendum on the right to decide on the future constitutional framework of the Basque country (*derecho de decidir*), which was fiercely rejected by the central Spanish government and both major Spanish political parties. Having briefly described the background situation in the Basque country, the next section will now briefly summarize the facts and the law of the Court's decisions.

### 3. Legislative and Factual Background

This section attempts first to identify and succinctly describe the relevant legal basis for the prohibition and dissolution of political parties and political groups in Spain. Subsequently, it presents the main facts and legal issues involved in the Court's *Batasuna and Herri Batasuna, Etxebarria and Others*, and *Herritarren Zerrenda* decisions.

#### 3.1 Spanish normative framework on political parties

Article 1 of the Spanish Constitution declares that Spain is 'a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order.'<sup>16</sup> It further provides in Article 6 that 'political parties express democratic pluralism, assist in the formulation and manifestation of the popular will, and are a basic instrument for political participation.'<sup>17</sup> Freedom of association is further protected in Article 22 of the Constitution, which recognized the right to association. Associations may be declared illegal if they 'pursue purposes or use methods which are classified as crimes, and are illegal.'<sup>18</sup> They can be 'dissolved or their activities suspended by virtue of a motivated judicial order.'<sup>19</sup>

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<sup>13</sup> See, for example, I. Cram, pp. 81-82.

<sup>14</sup> See J. Mata 'Terrorism and nationalist conflict: the weakness of democracy in the Basque Country' in S Balfour (ed) *The Politics of Contemporary Spain* (Oxford: Routledge, 2005).

<sup>15</sup> See, for example, Zoe Bray, *Living boundaries: Frontiers and Identity in the Basque Country*, Peter Lang, 2004.

<sup>16</sup> Constitución española de 27 de diciembre de 1978, modificada por reforma de 27 de agosto de 1992, Article 1. <[http://www.senado.es/constitu\\_i/index.html](http://www.senado.es/constitu_i/index.html)>.

<sup>17</sup> *Ibid.* Article 6.

<sup>18</sup> *Ibid.* Article 22 (2).

<sup>19</sup> *Ibid.* Article 22 (4).

On 27 June 2002, the Spanish Parliament enacted amendments to the Law on Political Parties.<sup>20</sup> This Law regulates mainly the organisation, functioning and activities of political parties, and their dissolution or judicial suspension. It was published in the Official Journal of the State on 28 June 2002, and entered into force on the following day. The Law on Political Parties provides in Article 9 that political parties function ‘freely’ and ‘they must observe in their activities constitutional values, expressed in democratic principles and human rights.’ It further states that political parties should function ‘democratically and with full respect for pluralism.’<sup>21</sup> A political party can be declared illegal under the Spanish law on Political Parties if it:

disregards the democratic principles and aims, in particular to the deterioration or destruction of the regime, making it impossible for freedom, or removes the democratic system, using one of the following acts repeatedly and seriously:

- a) systematically violating freedoms and fundamental rights by promoting, supporting or condoning attacks against the life or physical integrity of persons or the exclusion or persecution of persons because of their ideology, religion or belief, nationality, race, gender or sexual orientation;
- b) instigating, assisting or legitimizing violence as a method to achieve political goals or to eliminate specific conditions for the exercise of democracy, pluralism and political freedoms;
- c) complementing and supporting the political action of terrorist organizations to disrupt the constitutional order or seriously injure the public peace, to compel public authorities, certain individuals or groups in society or the general population in a climate of terror or contribute to multiply the effects of terrorist violence and fear and intimidation caused by it.<sup>22</sup>

The above provision is very broad in its nature as it endows authorities with very extensive discretionary powers in deciding whether a political party falls within the ambit of Article 9 of the Law on Political Parties. In this way, the Special Rapporteur on the promotion and protection of human rights while countering terrorism noted that article 9 (2) (c) may be interpreted as to ‘include any political party which through peaceful political means seeks similar political objectives as those pursued by terrorist groups.’<sup>23</sup> Therefore, the Special Rapporteur insists that ‘all limitations on the right to political participation must meet strict criteria in order to be compatible with international standards.’<sup>24</sup> Further, Leslie Turano aptly notes that the Law on Political Parties is ‘a desperate and probably ineffective measure against terrorism; one can only hope that it will not serve to exacerbate the situation.’<sup>25</sup>

The government and the public prosecutor can initiate proceedings to declare a political party illegal and dissolve it.<sup>26</sup> The legal dissolution of a political party is decided by the Special Chamber of the Supreme Court.<sup>27</sup> The decision by the Supreme Court can be challenged through protective appeal (*recurso de amparo*) before the Constitutional Court.<sup>28</sup> Another concern is that the Spanish authorities dissolve political parties through non-criminal proceedings, which may not afford individual and legal persons fair trial guarantees compliant with the ECHR standards. Having explored and briefly analyzed the relevant Spanish normative framework, the next section will now briefly summarize the facts and the law of the Court's decisions.

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<sup>20</sup> Ley Orgánica de Partidos Políticos, 6/2002, 27 June 2002, BOE No. 154 of 28 May 2002, 23600-23607.

<sup>21</sup> *Ibid.* Article 9 (1).

<sup>22</sup> *Ibid.* Article 9 (3).

<sup>23</sup> The United Nations Special Rapporteur, 2008 Report on Spain, para. 14.

<sup>24</sup> *Ibid.*

<sup>25</sup> L. Turano, Spain: Banning political parties as a response to Basque terrorism (2003) *International Journal of Constitutional Law*, p. 739.

<sup>26</sup> Ley Orgánica de Partidos Políticos, 6/2002, 27 June 2002, BOE No. 154 of 28 May 2002, 23600-23607, Article 11 (2).

<sup>27</sup> *Ibid.* Article 10.

<sup>28</sup> *Ibid.* Article 7.

### 3.2 Herri Batasuna and Batasuna v. Spain

The political party Herri Batasuna was established to participate in the first democratic elections in Spain after the adoption of the 1978 Constitution, which were held on 1 March 1979. Herri Batasuna was thereafter on 5 June 1986 registered in the register of political parties of the Ministry of Interior. The political group Batasuna filed an application on 3 May 2001 to register itself as a political party.

The central investigating judge, Baltásar Garzón, at the *Audiencia Nacional* in a decision of 26 August 2002, suspended the activities of Herri Batasuna and Batasuna and ordered the closure, for three years, of any offices and premises that Herri Batasuna and Batasuna might use. Further to the agreement adopted by the Council of Ministers on 30 August 2002, on 2 September 2002, the State counsel for the Spanish Government brought an action before the Supreme Court to dissolve the political parties Herri Batasuna, EH and Batasuna on the grounds that they violated the new Law on Political Parties because of conduct irrefutably at odds with the proper function of democracy and constitutional human rights and values. Simultaneously, the Public Prosecutor's Office also brought proceedings before the Supreme Court to dissolve the political parties in accordance with section 10 *et seq.* of the Law on Political Parties. On 10 March 2003 Batasuna challenged the constitutionality of the Law on Political Parties because it believed that the whole act, and in particular, several of its articles, violated the rights to freedom of association, freedom of expression, freedom of thought, the principles of legality, legal certainty and non-retroactivity of criminal laws, the principles of proportionality and *ne bis in idem*, and the right to participate in public affairs.

On 27 March 2003 the Supreme Court unanimously dismissed the *amparo* appeals, noting that the objections raised concerning the constitutionality of the LOPP had already been examined and dismissed in a judgment delivered by the Constitutional Court on 12 March 2003. The Supreme Court declared the parties Herri Batasuna, EH and Batasuna illegal, and ordered their dissolution on the grounds that there was a connection between the three main parties involved and the terrorist organization ETA. It held that the political parties and the terrorist organization ETA pursued substantially the same ideology and that those political parties were closely controlled by that terrorist organization. In other words, the Supreme Court concluded that the terrorist organization ETA was behind the apparent diversity of legal persons established at different points in time. It based its decision on Article 9 (2 and 3) of the Law on Political Parties. It also proceeded with the liquidation of the assets of the dissolved parties in compliance with Article 12 (1). Subsequently, the European Court of Human Rights found no violation of Article 11 of the European Convention on Human Rights.

### 3.3 Etxebarria and Others v. Spain

On 28 April 2003 the electoral commissions of the Basque Country and Navarra received applications from groups of Spanish nationals to participate in municipal elections and regional elections in the autonomous Basque Country and Navarra on 25 May 2003.<sup>29</sup> It must be noted that these individuals were politically active in the political parties Herri Batasuna and Batasuna, which had been declared illegal on 27 March 2003 and thereafter dissolved.

On 1 May 2003, the State Counsel and Public Prosecutor's Office presented a request for judicial review for annulment of about 300 applications for participation in the elections, including those of the political groups above, before the Special Chamber of the Supreme Court, constituted under Article 61 of the organic law on judicial power.<sup>30</sup> They accused the political groups of attempting to continue the activities of the political parties Batasuna and Herri Batasuna, which had been declared illegal and disbanded in March 2003.<sup>31</sup> On 3 May 2003 the Supreme Court prohibited the political groups from standing in the elections because they had been held to continue the activities of the three parties that had been declared illegal and dissolved. It based its findings on section 44 (4) of the organic law on the general electoral system. The candidates thereafter raised a complaint before the ECtHR invoking violation of Article 10 of the ECHR relating to the prohibition of their

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<sup>29</sup> *Etxebarria and Others v. Spain*, para. 15.

<sup>30</sup> *Ibid.* Para. 16.

<sup>31</sup> *Ibid.*

candidatures for election to the Parliament of Navarre, as well as in the municipal and regional elections in the Basque Country and Navarra.

They challenged the predictability of Article 44 (4) of the Organic Law on the general electoral system and denounced the lack of a legitimate aim, and cited the necessity of non-interference in democratic society. The applicants considered that the terms of the law were very vague, indeterminate and ambiguous and that these deficiencies had not been remedied in this case by domestic jurisprudence, the provision only having been in force since June 29, 2002. They also complained about the retroactive application of Article 44 (4) of the Organic Law on the general electoral system, since the facts alleged against the political groups of the Member applicants did not constitute a criminal offence and were not contrary to applicable law. The complainants contended that the purpose of the Spanish legislation was to prohibit all political expressions of the Basque independence movement. Finally, they felt that the measures were not proportionate to the aim pursued.

The ECtHR noted that the measure under Article 12 (1) of the Law on Political Parties could be invoked only against candidates who have strong and proven links with dissolved political parties. The Court also noted that the dissolution of the political parties Batasuna and Herri Batasuna would have been useless if they could continue their activity through other political groups.<sup>32</sup> It therefore held that the Spanish courts had pursued goals that are consistent with the principle of the rule of law and the general objectives of the Convention, in particular the protection of the democratic order.<sup>33</sup> Therefore, the Court did not find any violations of Article 3 of Protocol No. 1 and Article 10 of the Convention, as Spanish courts had not violated freedom of expression.

### **3.4 Herritarren Zerrenda v. Spain**

Herritarren Zerrenda was a political group in the Basque country, Spain, formed in early 2004. It attempted to run in the elections to the European Parliament on 13 June 2004. The Central electoral commission accepted its candidacy on 17 May 2004. The State Counsel on 19 May 2004 submitted a request to the Spanish Supreme Court alleging that Herritarren Zerrenda had been continuing the activities of the political parties Batasuna and Herri Batasuna, which had been declared illegal and dissolved in 2003. Along the same lines, the Public Prosecutor submitted a request to the Special Division of the Supreme Court, asking the Court to prohibit the candidacy of Herritarren Zerrenda. The Spanish Supreme Court on 21 May 2004 prohibited the candidature of Herritarren Zerrenda on the ground that it had intended to continue the activities of political parties which had been declared illegal and dissolved. The Supreme Court considered a list of evidence showing that Herritarren Zerrenda had intended to continue the activities of the prohibited and disbanded political parties. It rejected arguments that the human rights of freedom of expression and freedom of association were violated and that the due process of the proceeding was not ensured.

Herritarren Zerrenda raised an appeal before the Constitutional Court claiming the violation of the right to procedural fairness, the right to a trial affording all the guarantees and rights of defence; the violation of the right to respect of privacy combined with the right to a trial affording all the guarantees and the right to freedom of thought insofar as the facts proved in the Supreme Court's rulings were based on data involving staff members; and violation of the right to participate in public affairs. The Constitutional Court upheld the Supreme Court's decision and noted that it did not regard it as disproportionate to ask political parties to take a clear position against terrorism and its instruments. The European Parliamentary elections were held on 13 June 2004. Herritarren Zerrenda called on the electorate to vote for them despite the prohibition of their candidacy. They obtained 113,000 votes in the Basque Country. All of these votes were considered null and void. Along the same lines as in *Etxeberria and Others*, the Court found no violations of ECHR Article 3, and that no separate issues derive from Article 10 of the ECHR.

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<sup>32</sup> *Ibid.* Para.51.

<sup>33</sup> *Ibid.*

## 4. Analysing the Court's reasoning

### 4.1 Freedom of Expression, Freedom of Association and the Protection of National Security

Countering terrorism has become a priority for the international community since the terrorist acts of 11 September 2001. However, the fight against terrorism seems to have been a priority for the Spanish government since the creation of the military group ETA on 31 July 1959 to combat the suppression of the Basque language, culture and political freedom under the totalitarian Franco regime. Even though Spain did not adopt new anti-terrorism legislation after the horrendous attacks of 11 September 2001, the Spanish government of Jose Maria Aznar seized the opportunity of the sensitive international climate to include the fight against the military group ETA in the context of the global war against terrorism. Accordingly, through internal EU lobbying the Aznar government succeeded in placing ETA on the list of international terrorist groups, *de facto* equating ETA with Al-Qaida. In this struggle against terrorism, some governments, including the Spanish, appear to have neglected their obligations to protect fundamental human rights. *Herri Batasuna and Batasuna v. Spain, Etxebarria and Others v. Spain* and *Herritarren Zerrenda v. Spain* embody the difficulties that arose from this war against terrorism. The European Court of Human Rights has so far delivered a number of judgments in relation to the compatibility of the dissolution of political parties with the ECHR.<sup>34</sup>

Freedom of expression and freedom of association have long been considered important. Freedom of expression has been described by the EU as ‘an indisputable part of European constitutional understanding’<sup>35</sup> and by the UN as ‘the touchstone of all of the freedoms to which the United Nations is consecrated.’<sup>36</sup> It is a human right which is widely protected in international and national laws. It is protected by Article 10 of the ECHR, which states that ‘everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’ Equally important is freedom of association, protected in Article 11 (1) of the ECHR, which provides that ‘everyone has the right ... to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.’ Freedom of Expression is also protected by: Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights (ICCPR); Article 4 of the American Declaration of the Rights and Duties of Man; Article 13 of the American Convention on Human Rights; and Article 9 of the African Charter on Human and People’s Rights. Freedom of association is also guaranteed in Article 22 of the ICCPR. The ICCPR provides further active and passive political rights in Article 25.<sup>37</sup> The UN Human Rights Committee has noted that Article 25 of ICCPR:

requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and

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<sup>34</sup> See E. Brems, Freedom of political association and the question of party closures, in W Sadurski (ed) *Political Rights under Stress in 21st Century Europe* (OUP, 2006) pp. 134–141.

<sup>35</sup> Viviane Reding, Member of the European Commission responsible for Information, Society and Media, Press conference on the occasion of the conclusion of a Framework Agreement between the International Federation of Journalists and WAZ Mediengruppe, Brussels, 9 July 2007, SPEECH/07/478, p. 2.

<sup>36</sup> G.A. Resolution 59(I), 14 Dec. 1946.

<sup>37</sup> Article 25: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.<sup>38</sup>

However, freedom of expression and freedom of association carry with them corresponding duties and responsibilities. These derive from the definitions of freedom of expression and freedom of association. Articles 10(2) and 11(2) of the ECHR state: ‘The exercise of these freedoms... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime...’ It is therefore clear that the protection of other human rights could justify interference with the rights to freedom of expression and association. Therefore, while freedom of expression and freedom of association are important, they cannot be at the expense of other human rights, such as the protection of national security or the prevention of crime. Nevertheless, the protection of freedom of expression and freedom of association are important as they facilitate democracy and foster public debate.

As such, the rights to association, freedom of expression and freedom of the press may need to be balanced with other considerations, such as the prevention of crime or the protection of national security. In response to this dilemma, the Spanish courts categorically and controversially confirmed in *Herri Batasuna and Batasuna v. Spain, Etxebarria and Others v. Spain* and *Herritarren Zerrenda v. Spain* that national security has priority over freedom of expression and freedom of association, which are a fundamental tenet of every society with a functioning normative legal order. Along the same lines, the Court noted in *Batasuna and Herri Batasuna v. Spain* that:

there is no democracy without pluralism. Indeed, one of the main characteristics of democracy lies in the opportunity it offers to debate through dialogue, without recourse to violence, issues raised by various currents of political opinion, even when they bother or disturb. Democracy thrives because of the freedom of expression.<sup>39</sup>

Therefore, the Court noted in *Batasuna and Herri Batasuna v. Spain* that ‘the exceptions in Article 11 are strictly construed; only convincing and compelling reasons can justify restrictions on freedom of association.’<sup>40</sup> Nonetheless, freedom of expression is a right which is beneficial to society as a whole. It is not simply an individual human right, such as the right to property. It is a constitutional value which should influence the whole of the law.

The protection of the freedom of expression in Article 10 also protects political expression, due to its connection with democracy. The European Court of Human Rights has stated that freedom of expression is ‘... one of the essential foundations of ... a democratic society’<sup>41</sup> and ‘is a prerequisite for the functioning of democracy’.<sup>42</sup> This is because members of the public must have information in order to decide which politician or political group they wish to support and not be dictated to support one. The public must also be free to discuss all political matters and not only those that they are allowed to support.<sup>43</sup> This suggests that everyone should be able to make free and conscious choices between different candidates and different parties, which is essential for the proper

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<sup>38</sup> Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996). Para. 26.

<sup>39</sup> *Herri Batasuna and Batasuna v. Spain*, application nos. 25803/04 and 25817/04, Chamber Judgment, 30 June 2009. para. 76. Article 3 of Protocol No. 1 of ECHR reads as follows: ‘The High Contracting Parties undertake to hold at reasonable intervals, free elections by secret ballot, under conditions that ensure the free expression of popular opinion on the choice of the legislature.’

<sup>40</sup> *Herri Batasuna and Batasuna v. Spain*, application nos. 25803/04 and 25817/04, Chamber Judgment, 30 June 2009. para. 76.

<sup>41</sup> *Handyside v. UK* 7 December 1976, A 24; 1 EHRR 737.

<sup>42</sup> *Özgür Gündem v. Turkey*, App. No. 23144/93, para. 43, ECHR 2000 III.

<sup>43</sup> Hans-Otto Sano, & Gudmundur Alfredsson, (eds), *Human Rights and Good Governance: Building Bridges*, at p. 213.

functioning of democracy and good governance in a democracy. The Court has explained the nature of political parties as follows:

It is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena.<sup>44</sup>

Political expression as a form of freedom of expression is important and must be highly protected. It follows that states do not have *carte blanche* to unjustifiably curtail everyone's right to freely choose between different candidates and different parties.<sup>45</sup> All in all, the rights to freedom of expression and freedom of association must be balanced against the protection of national security and each must be recognised and enforced with due respect to the other.

#### 4.2 A three-step approach

The European Court of Human Rights often emphasizes that contracting states may not adopt whatever measures they deem appropriate in the name of the struggle against terrorism.<sup>46</sup> The European Convention on Human Rights protects natural and legal persons against arbitrary action of their own national authorities. The second paragraphs of Articles 10 and 11 introduce limitations which allow that the freedoms of expression and association can be restricted under specific circumstances. These limitations recognize the right of Contracting States to restrict and limit the exercise of freedom when necessary in a democratic society on grounds such as national security, public safety, and the prevention of disorder or crime.

The Court employs a three-fold test when assessing whether such interference is in compliance with the ECHR. The three conditions constraining national authorities in adopting measures which restrict individual rights must be: 1) prescribed by law, 2) directed at one or more legitimate aims, and 3) necessary in a democratic society. Therefore, interference is allowed where the public interest outweighs the private interest.<sup>47</sup> However, the Special Rapporteur noted that 'counter-terrorism measures should not be used to limit the rights of NGOs, the media or political parties' and any measures affecting the exercise of rights fundamental for a democratic society must be applied in accordance with precise criteria established by law, as well as in compliance with the principles of proportionality and necessity'.<sup>48</sup> Although it is clear that freedom of expression and consequently freedom of association are not absolute and must be balanced with other interests, it is submitted that national security consideration are often given too much weight in the balancing process at the expense of fundamental human rights. The Court performs a balancing exercise to establish the priority of one right over the other when the freedom of expression or the freedom of association conflicts with other rights. The next sections will critically analyse the Court's reasoning in *Herri Batasuna and Batasuna v. Spain, Etxebarria and Others v. Spain* and *Herritarren Zerrenda v. Spain*.

#### Prescribed by Law

Law needs to have some legal basis in national law. The Spanish Law on political parties served as a legal basis for interference in the cases of *Batasuna and Herri Batasuna*, *Etxebarria*, and *Herritarren*

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<sup>44</sup> *Refah Partisi v Turkey* (Chamber) (2002) 35 E.H.R.R. 3.

<sup>45</sup> *United Communist Party and Others v. Turkey*, (1998) 26 EHRR 1211, para. 42-43. The *Socialist Party and Others v. Turkey*, Judgment of 25 May 1998, 27 EHRR 51 para. 41; *ÖZDEP v Turkey*, 31 E.H.R.R. 27, para. 37.

<sup>46</sup> *Saadi v Italy* (2008) 24 BHRC 123. 2 *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v United Kingdom* (1997) 23 EHRR 413. *Klaas v. Germany* (A/28) (1978) para. 48.

<sup>47</sup> See J.G. Merrills., (1989), *The Development of International Law by the European Court of Human Rights*, Manchester University Press.

<sup>48</sup> Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Spain, A/HRC/10/3/Add.2, 16 December 2008., Para. 12.



*Zerrenda*. Secondly, law needs to be predictable, accessible, public, clear and detailed. And thirdly, its provisions must be foreseeable.<sup>49</sup> Therefore, regarding the quality of law, the Court has stated that it has to be public, accessible, predictable and foreseeable. The Law on Political Parties was proclaimed and has been publicly available and accessible. Nevertheless, there are serious concerns about the quality of the Law on Political Parties due to its ambiguous and vague wording. The United Nations Human Rights Committee noted in its General Comment 27 that ‘the laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.’<sup>50</sup> However, the vague formulations in Article 9 of the Law on Political Parties would seem to give the Spanish authorities a *carte blanche* to prohibit all political parties, political groups and individual candidates who peacefully pursue similar objectives to violent terrorist groups. The UN Special Rapporteur reached a similar conclusion in his report on Spain by expressing concern that:

the broadly formulated provisions of the Law on Political Parties ... might be interpreted to include any political party which through peaceful political means seeks similar political objectives as those pursued by terrorist groups. In this respect, he reiterates that all limitations on the right to political participation must meet strict criteria in order to be compatible with international standards.<sup>51</sup>

Unfortunately, the Court did not address the issue of the vagueness of the Law on Political Parties in *Batasuna and Herri Batasuna*, even though the applicants argued that the Law on Political Parties did not meet the conditions of predictability and stability required by the previous jurisprudence of the Court. It is unclear why the Court did not address the parties’ arguments concerning the vagueness and unpredictability of the Law.<sup>52</sup> The Court’s decisions would have been much more persuasive if it had made an effort to explain the vagueness in the Spanish Law on Political Parties. More disturbingly, the Spanish authorities have now obtained an indirect endorsement in international law that the Law on Political Parties conforms with the ECHR.<sup>53</sup> The well-thought-through comments of the UN Special Rapporteur are now dismissed as ‘decontextualized’.<sup>54</sup> It is submitted that Article 9 of the Law on Political Parties must be defined more clearly in order to protect against arbitrary political invasions.<sup>55</sup> This would ensure that the rights and freedoms under the ECHR are always protected, and restricted only under exceptional rules.

### Legitimate aim

The Court held in *Batasuna and Herri Batasuna, Etxeberria and others*, and *Herritarren Zerrenda* that the prohibition of political parties serves a legitimate aim: the protection of national security. However, the Court had previously found that states may not in the name of the fight against terrorism adopt any measures they deem appropriate.<sup>56</sup> The Spanish government argued in *Batasuna* that the political parties concerned posed a threat to human rights, democracy and pluralism. However, it is not enough only to enumerate a legitimate aim. In other words, a state must show that a measure is

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<sup>49</sup> *Kopp v. Switzerland*, 1998-II, 27 EHRR 91, para. 72, *Sunday Times v. United Kingdom* (No. 1), April 26, 1979, para. 49, *Huvig v. France*, Judgement, 24 April, 1990, para. 26.

<sup>50</sup> UN Human Rights Committee, General Comment No. 27, [1999], para. 14.

<sup>51</sup> Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Spain, A/HRC/10/3/Add.2, 16 December 2008. Para. 14.

<sup>52</sup> *Ibid.* Para. 56-60.

<sup>53</sup> Response of the Spanish Government and observations concerning the report on Spain of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/G/2, 18 February 2009, pp. 17-20.

<sup>54</sup> *Ibid.* Pp. 18.

<sup>55</sup> See also L. Turano, Spain: Banning political parties as a response to Basque terrorism (2003), *International Journal of Constitutional Law*, p. 739.

<sup>56</sup> *Klaas v. Germany* (A/28) (1978) para. 48.

necessary to achieve the legitimate aim. Such an approach has been advocated and employed by the United Nations Human Rights Committee.<sup>57</sup> Sadly, in *Batasuna* and *Herri Batasuna* the Court failed to convincingly illustrate how the prohibition of those political parties was necessary to reach the legitimate aims of maintaining public safety, the defence of order and the protection of the rights and freedoms of others. The Court noted that:

it is not demonstrated by the applicants that their termination was motivated by other reasons than those advanced by the courts. Indeed, the [Court] cannot agree with the argument of the applicants of the Government's intention to eliminate any debate on the Basque independentist left through dissolution. In this regard, the [Court] joins the Government's comments made in the previous notes that several political parties called "independents" coexist peacefully in several Spanish autonomous communities.<sup>58</sup>

Given the circumstances, [the Court] believes that the solutions pursued several legitimate aims listed in Article 11, including maintaining public safety, defence of order and protection of rights and freedoms of others.<sup>59</sup>

It would be more convincing if the Court had described how the prohibition of the *Batasuna* and *Herri Batasuna* political parties was necessary to reach the legitimate aims of protecting national security, public safety and protecting the rights and freedoms of others. The latter criterion would seem particularly controversial as it is unclear how stripping a hundred thousand or more voters from participation in the political process by prohibiting them from voting for the political party they would normally vote for protects the rights and freedoms of others. For example, the Court observed in *Socialist Party and Others v Turkey* that the protection of territorial integrity constitutes a legitimate aim of protecting "national security".<sup>60</sup> One may observe that expressing political objectives equal to those of a paramilitary terrorist organization does not in any way imply supporting violence and terrorism in reaching the goal of an independent country. Along the same lines, the Court failed in *Etxeberria and Others* to analyze whether the Spanish court and authorities showed and proved that the prohibition of a political group was necessary to reach the legitimate aims of maintaining public safety. It superficially noted that:

Notwithstanding the opinion of the Court, it has been sufficiently proved by the Spanish courts that the issue groups claimed to continue the activities of *Batasuna* and *Herri Batasuna*, previously dissolved because of their support for violence and activities of the terrorist organization ETA.<sup>61</sup>

The Court identified *Etxeberria* as a successor to the prohibited *Batasuna* and *Herri Batasuna* political parties. However, it failed to show how banning *Etxeberria*'s participation in local elections would be necessary to achieve the aims of maintaining public security and public safety. This is even more notable given that *Etxeberria* had no previous history of violent conduct or even violent speech which would undermine Spanish public order. Neither did the political group *Herritarren Zerrenda* have any previous history of any kind of conduct endangering security or democratic institutions. All in all, it appears doubtful that banning the Basque political parties and political groups pursued even one of the "legitimate aims" set out in Article 11.

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<sup>57</sup> UN Human Rights Committee, General Comment No. 27, [1999], para. 14.

<sup>58</sup> *Herri Batasuna and Batasuna v. Spain*, application nos. 25803/04 and 25817/04, Chamber Judgment, 30 June 2009. para. 77. para. 3.

<sup>59</sup> *Ibid.* para. 64.

<sup>60</sup> *Socialist Party and Others v Turkey* (1998) 26 EHRR 121, paras. 35-36.

<sup>61</sup> *Etxeberria and Others*, Para. 54.

### Necessary in a democratic society

The freedoms protected in Articles 8, 9, 10 and 11 of the ECHR may be interfered with only if it is necessary in a democratic society. Thus, restriction must be necessary for the functioning of a “democratic society”. If interferences are not of this nature, they will not be justifiable in interfering with the freedoms protected in Articles 8, 9, 10 and 11 of the ECHR. Interference with the ECHR’s human rights must comply with two conditions. Firstly, it must correspond to a pressing social need,<sup>62</sup> and secondly and it must be proportionate to the legitimate aim pursued. In other words, determining that the measure is necessary in a democratic society requires that the measure adopted corresponds to a pressing social need in a democratic society and that the measure is proportionate to the aim concerned.<sup>63</sup>

The Court noted in *United Communist Party and Others* that one of the principal characteristics of democracy is ‘the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression.’<sup>64</sup> Moreover, ‘the protection of opinions and freedom to express them is one of the goals of freedom of assembly and association enshrined in Article 11. This is especially so in the case of political parties, given their critical role in ensuring pluralism and the proper functioning of democracy.’<sup>65</sup> Further, democracy is without doubt ‘a fundamental feature of the European public order.’<sup>66</sup> The Court noted in *Batasuna* that ‘democracy thrives because of the freedom of expression.’<sup>67</sup> The expression of people’s wishes ‘is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country’s population.’<sup>68</sup> Political parties are therefore essential for the functioning of democracy and they ‘make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society’.<sup>69</sup>

A Roman law principle states ‘exceptio probat regulam in casibus non exceptis’.<sup>70</sup> Further, another Roman law principle provides that ‘exceptio est strictissimae interpretationis.’<sup>71</sup> Along the same lines, any exceptions to the freedoms protected in Articles 8, 9, 10 and 11 of the ECHR must be construed narrowly. Therefore only grounds that are ‘convincing and compelling ... can justify restrictions on such parties’ freedom of association.’<sup>72</sup> Member States of the Council of Europe are given a margin of appreciation to determine, identify and justify whether a necessity in their democratic society exists. That said, the margin of appreciation is not a “carte blanche,”<sup>73</sup> but it allows authorities a measure of discretion in the way they embrace the Convention protections together with their own national traditions, customs and culture. The margin of appreciation requires the proper functioning of democratic society, the rule of law, and democracy. Further, the Court judicially supervises the exercise of the margin of discretion at the national level to determine whether a state violates the ECHR through a particular law or practice. The Court does not re-examine facts as a whole, but it looks at restrictions in the light of the whole case and determines whether they were “proportionate to the legitimate aim pursued” and whether the reasons submitted by the national

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<sup>62</sup> *Handyside v. United Kingdom*, 1 E.H.R.R. 737 (1976), para. 48.

<sup>63</sup> *Silver v. United Kingdom*, Judgment, 25 March 1983, 5 EHRR 347, para. 97.

<sup>64</sup> *United Communist Party and Others v. Turkey*, (1998) 26 EHRR 1211, para. 57.

<sup>65</sup> *Partidul Comunistilor (Nepecești) and Ungureanu v. Romania*, 3 February 2005, para. 44, *United Communist Party and Others v. Turkey*, (1998) 26 EHRR 1211, para. 45.

<sup>66</sup> *United Communist Party and Others v. Turkey*, (1998) 26 EHRR 1211, para. 45.

<sup>67</sup> *Herri Batasuna and Batasuna v. Spain*, para. 76.

<sup>68</sup> *United Communist Party and Others v. Turkey*, (1998) 26 EHRR 1211, para. 44.

<sup>69</sup> *Ibid.*

<sup>70</sup> English translations: Exception proves the rule in cases not excepted.

<sup>71</sup> English translation: Exceptions should only be interpreted narrowly.

<sup>72</sup> *United Communist Party and Others v. Turkey*. para. 46.

<sup>73</sup> *Brannigan and McBride v. The United Kingdom*, ECHR, 26 May 1993, para. 43.

authorities to justify them are “relevant and sufficient.”<sup>74</sup> Such assessment includes whether the national authorities applied standards in conformity with Article 11 and they objectively assessed the relevant fact.<sup>75</sup>

The Court has in its jurisprudence accepted that a political party cannot be prohibited if it meets two conditions: (1) the means employed for a political campaign must be in every respect legal and democratic, and (2) the change proposed must itself be compatible with fundamental democratic principles. Therefore a political party whose leaders incite recourse to violence, or propose a political project that does not comply with one or more rules of democracy or which seeks the destruction of a democratic society and disregards the rights and freedoms it recognizes, cannot avail itself of the protections under the ECHR.<sup>76</sup> In determining whether the dissolution of Batasuna and other political groups was necessary and corresponded to a “pressing social need”, the Court focused on the question of whether there were indications of risk to democracy and whether they were sufficient and severe. Similarly, the Court observed in *Refah Partisi v Turkey* that in identifying ‘pressing social need’ it had to consider the following criteria:

- (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a “democratic society”.<sup>77</sup>

The Court held in *Batasuna* that there was no violation of Article 11 because slogans and phrases spoken by Herri Batasuna and Batasuna leaders fostered a climate of social confrontation and implied support for terrorism activity conducted by ETA.<sup>78</sup> The Court relied on the statements of various party members as support for its findings regarding proscription and a pressing social need. Also, Batasuna did not condemn the attacks of ETA, allowing the Court to conclude that the political party complainants were instruments of the terrorist strategy of ETA.<sup>79</sup> The court listed the following acts and speeches of the members and leaders of Batasuna as evidence of the ‘pressing social need’ to dissolve and prohibit the political party:

- ‘slogans in Basque towns supporting ETA prisoners,
- phrases such as "da bide bakarra borroka" (the struggle is the only way), "zuek faxistak Zaret terroristak" (you, the fascists, you are the real terrorists) or "gora ETA militarra" (Long live military ETA),
- the statement of a representative of Batasuna in the Basque Parliament to the newspaper Egunkaria on 23 August 2002 that: "ETA is not a fighting army on a whim, but [it is] an organization that sees the need to use all the tools to cope with the state”,
- the participation of a Batasuna consultant at a rally in support of ETA,
- the recognition of ETA terrorists as honorary citizens in cities governed by Batasuna and Herri Batasuna

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<sup>74</sup> *United Communist Party and Others v. Turkey*, (1998) 26 EHRR 1211, para. 47.

<sup>75</sup> *Jersild v. Denmark*, Judgement of 23 September 1994, Series A, No.298; 19 EHRR 1 (1995), p. 26, para. 31.

<sup>76</sup> *The Socialist Party and Others v. Turkey*, paras. 46 and 47, *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, para. 46, *Yazar and Others v. Turkey*, nos 22723/93, 22724/93 and 22725/93, para. 49, ECHR 2002-II, and *Refah Partisi and others v Turkey*, para. 98.

<sup>77</sup> *Refah Partisi v Turkey* (Chamber) (2002) 35 E.H.R.R. 3, para. 104.

<sup>78</sup> *Herri Batasuna and Batasuna v. Spain*, application nos. 25803/04 and 25817/04, Chamber Judgment, 30 June 2009. para. 85.

<sup>79</sup> *Ibid.*

- the inclusion of an anagram of "Gestoras Pro-Amnistía" on the Web site of Herri Batasuna an organization outlawed by the Central Examining Court No. 5 by the Audiencia Nacional and placed on the European list of terrorist organizations (Common Position Council of European Union 2001/931/CFSP).<sup>80</sup>

The listing of the above acts and actions is not controversial as such. Nonetheless, one would have expected the Court to have explained and analyzed whether and how the acts and speeches of the leaders and members of the political parties concerned (Batasuna and Herri Batasuna) were imputable to the party as a whole, in the way that the Court had thoroughly explained in *Refah Partisi v Turkey*.<sup>81</sup> This is particularly the case because the acts and speeches were made by individual members of the parties and were never, at least officially, supported and endorsed by the parties as a whole. Nevertheless, the Court failed to give any such explanation. Not only is this omission in the Court's legal reasoning unacceptable as a matter of law, but it also leads to unacceptable results as a matter of policy. The protections of human rights and fundamental freedoms in the ECHR were passed precisely because states wanted to curtail the possibility of the arbitrary exercise of their powers. In other words, the Court immediately jumped directly from describing the alleged acts to the following conclusion without any proper analysis:

In all cases, as noted by the courts, this behaviour is very close to explicit support for violence and praise of people likely related to terrorism. Thus, these elements can be regarded as instigators of social conflict between supporters of the applying parties and the rest of political parties, especially those of the Basque Country. It recalls in this connection that acts and speeches of members and party leader applicants invoked by the Supreme Court do not preclude the use of force to achieve their purpose. Therefore, the Court considers that the arguments of the national courts have sufficient justification by confrontation that may cause violent movements in society that disrupt public order, as was already the case in the past.<sup>82</sup>

Moreover, it is unclear whether the acts and speeches imputable to Batasuna and Herria formed a whole which gave a clear picture of a model of society conceived and advocated by Batasuna which was incompatible with the concept of a "democratic society." However, it cannot be ruled out that individual proclamations, which may be indirectly viewed as support for ETA, go against a party's political programme and those slogans and statements portray objectives and intentions different from the ones it formally and substantially proclaims. Nevertheless, those individual acts could have been prosecuted individually, and no pressing social need would seem to require the prohibition of the parties as a whole.

Similarly, Judges Fuhrman, Loucaides and Nicolas Bratza noted in their Joint Dissenting Opinion in *Refah Partisi and others v. Turkey* that:

As in the case of the other two members of Refah, who were not leaders of the party and who did not act as its official spokesmen, we consider that any infringement of the law fell to be dealt with, as it indeed was, by an investigation against the individuals responsible. What we cannot accept is that the making of such statements, whether or not ultimately resulting in prosecution, could also justify the draconian measure of dissolving the entire party to which they belonged.<sup>83</sup>

It is submitted that the Court should have compared the content of the Batasuna and Herri Batasuna political programmes with the actions and positions taken by the members and leaders of the party in question.<sup>84</sup> In *Communist Party of Turkey v. Turkey* the Court stated that 'the content of the

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<sup>80</sup> *Ibid.*

<sup>81</sup> *Refah Partisi v Turkey* (Chamber) (2002) 35 E.H.R.R. 3, paras. 111-115.

<sup>82</sup> *Herri Batasuna and Batasuna v. Spain*, para. 85.

<sup>83</sup> Judges Fuhrman, Loucaides and Nicolas Bratza, Joint Dissenting Opinion in *Refah Partisi and others v. Turkey*, ECHR Third Section judgment (2001), 31 July 2001.

<sup>84</sup> *Herri Batasuna and Batasuna v Spain*, para. 80.

programme must be compared with the party's actions and the positions it defends.<sup>85</sup> In other words, the Court should have examined all the materials, meetings and speeches made by the Batasuna leaders and members in order to form a broad and comprehensive picture of the activities and role of Batasuna in Basque society.

It is known that the ECHR does not protect political speech inciting terrorism, but it does protect political speech pursuing political objectives compliant with the democratic values of a particular state. The Court noted that Article 5 of the Council of Europe Convention provides for 'the criminalization of public provocation to commit a terrorist offence,' but arguably the Spanish government never presented any direct evidence of Batasuna politically provoking or advocating third persons to commit a terrorist offence. Nothing in the programme of Batasuna would seem to warrant the conclusion that it was relying on the ECHR to engage in activities or perform acts aimed at the destruction of any of its rights and freedoms. For example, the Court in *Refah Partisi v Turkey* argued that Refah partisi's advocacy of a policy based on sharia within the framework of a plurality of legal systems was incompatible with the concept of a "democratic society" and that its prohibition may be considered to have met a "pressing social need."<sup>86</sup> On the other hand, in *Socialist Party and Others v Turkey* the Court found violations of the freedom of association as the party did not 'question the need for compliance with democratic principles and rules' and did not 'engage in activity or perform acts aimed at the destruction of any of the rights and freedoms' in the ECHR.<sup>87</sup>

A political party cannot be prohibited only on the basis that it advocates a change in a constitutional framework. This does not suffice and an additional ingredient must be present. For instance, the Court argued in *United Communist Party and Others v. Turkey* that a real threat to Turkish society or the Turkish State must be present in order to uphold the party's dissolution.<sup>88</sup> However, the Court appears to have departed from this principle in Batasuna where it held that there was:

no reason to depart from the reasoning reached by the Supreme Court finding that there is a link between the applicant and the ETA. Moreover, given the situation in Spain for many years regarding terrorist attacks, especially through the "politically sensitive" Basque country, these connections can be considered objectively as a threat to democracy.<sup>89</sup>

Given its previous jurisprudence, it is very unclear why the Court did not attempt to ascertain whether Batasuna amounted to a real threat to Spanish society and the Spanish State. Besides its worrying outcome, the Batasuna judgement is open to criticism from the point of view of the methodology of evidence standards. Here, the important question arises of how to measure future threats to a democratic society and what standard of proof is to be applied to issues of future risk. Undoubtedly, the Courts should have employed a criminal law standard when determining the threat to Spanish society. Similarly, Judge Zupančič noted in his concurring opinion in *Saadi v Italy* that "it is therefore at least inconsistent to say that a certain standard of proof . . . could be applied. The simple reason for that is, of course, that one cannot prove a future event to any degree of probability because the law of evidence is a logical rather than a prophetic exercise."<sup>90</sup> The applicable standard of proof would appear to be whether there are "substantial grounds for believing" that there is such a threat.<sup>91</sup> It is questionable whether "proof beyond a reasonable doubt" could be a more appropriate or fair standard

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<sup>85</sup> *Communist Party of Turkey v. Turkey*, para. 58.

<sup>86</sup> *Refah Partisi v Turkey* (Chamber) (2002) 35 E.H.R.R. 3, para. 134.

<sup>87</sup> *Socialist Party and Others v Turkey* (1998) 26 EHRR 121, paras. 52-53.

<sup>88</sup> *United Communist Party and Others v. Turkey*, (1998) 26 EHRR 1211, para. 54.

<sup>89</sup> *Herri Batasuna and Batasuna v. Spain*, para. 29.

<sup>90</sup> *Saadi v Italy* (2008) 24 BHRC 123. Concurring opinion of Judge Zupančič at para 1.

<sup>91</sup> *Soering v United Kingdom* (1989) 11 EHRR 439 at paras 85-91; *Chahal v United Kingdom* (1996) 23 EHRR at paras 74, 79-82.

as derived from the Court's jurisprudence on questions of fact.<sup>92</sup> It may be necessary to prove past events beyond reasonable doubt, but such a high standard may not be appropriate in the context of probable future events. It seems, however, that the application of any standard of proof to the probability of future events will be subject to a degree of speculation and therefore subject to arbitrary political discretion. All in all, the Court's decision in *Batasuna* would be more convincing if it had explained if and how a Basque political party poses a real threat to Spanish society and the Spanish State.

As concerns the proportionality of the dissolution of *Batasuna*, the Court did not bother to explain in detail why prohibiting *Batasuna* was proportionate to a legitimate aim. It simply noted that *Batasuna*'s projects were in 'contradiction' with the concept of "democratic society" and 'included a strong threat to Spanish democracy.'<sup>93</sup> It is hard to follow the Court's approach or lack of approach to the dissolution of the Basque political parties and political groups. Moreover, such radical measures as prohibiting a political party cannot pass the proportionality test, which requires that when possible less restrictive measures must be adopted to pursue the public policy. In this way, in the cases of *Batasuna* and *Etxebarria* a better approach might have been to concentrate on imposing criminal sanctions on the leaders and members of *Batasuna* whose slogans and public remarks may be understood as indirect incitement to terrorist acts. Such an approach would have offered a more balanced solution coherent with the criminal justice model of democratic states. In other words, measures as severe as the dissolution of a political party may only be applied in the most serious cases.

Overall, a measure as drastic as the immediate and permanent dissolution of a *political party or group*, such as *Etxebarria*, which was ordered before its activities had even started, and coupled with a ban on its leaders from discharging any other political responsibility, is disproportionate to the aim pursued and consequently unnecessary in a democratic society. The dissolution of the political group *Etxebarria* seems to have been ordered solely on the basis that its members were persons from the previously prohibited political party *Batasuna*. Its programme did not include anything to suggest that it was indirectly connected with terrorist organizations. In the absence of any concrete evidence to show that *Etxebarria* had opted for a policy that represented a real threat to Spanish society or the Spanish State, it appears regrettable that the Court held that the activities of members of a previously prohibited party sufficed by themselves to trigger the party's dissolution. The Court noted that:

It remains to establish whether the restriction was proportionate. In this regard, the Court believes that the national authorities had many elements to conclude that the contested political groups wanted to continue the activities of political parties previously outlawed, such as documents found in the home of a suspected member of ETA, drawn to the attention of groups and giving them instructions to follow if the party *Batasuna* was declared illegal.<sup>94</sup>

The Court further noted that the dissolution of the political parties *Batasuna* and *Herri Batasuna* would have been pointless if they had been able to continue *de facto* their activities through the political groups in this the application.<sup>95</sup> Nonetheless, it is unclear how *Etxebarria* and other political groups could pose a threat to Spanish society and the Spanish state if they had only been established a few weeks before their prohibition. It would seem unacceptable for the Spanish authorities to employ a policy of *carte blanche* prohibition, which is not justified by the facts. The Court further maintained

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<sup>92</sup> See for example the standard of proof "beyond reasonable doubt" in the context of illegal killings: *Orhan v Turkey*, 18 Jun 2002 at para 264, *Tepe v Turkey* (2004) 39 EHRR 29 at para 125. Such a standard would require "the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact": *Issa v Turkey* (2005) 41 EHRR 27 at para 76.

<sup>93</sup> *Herri Batasuna and Batasuna v. Spain*, application nos. 25803/04 and 25817/04, Chamber Judgment, 30 June 2009. para. 93.

<sup>94</sup> *Etxebarria and others v. Spain*, para. 53.

<sup>95</sup> *Ibid.* para. 43.

that the Spanish court had established 'an unequivocal link' with dissolved political parties.<sup>96</sup> Finally, the Court observed that:

the existing political context in Spain, namely the presence of political parties based on independence in the organs of government of some autonomous communities, particularly in the Basque country, proves that the measure at issue does not prohibit any manifestation of ideas of independence. Thus, the Court considers that its own jurisprudence, under which the expression of views supporting independence does not per se pose a threat against the territorial integrity of the state and national security, has been followed.

It can be understood that the Spanish authorities held that some members of the political group were previously associated with the dissolved political party Batasuna. However, it is hard to follow that a political group should bear any responsibility for the problems which terrorism posed in Spain even before it started its activities. Moreover, in *Castells v. Spain*<sup>97</sup> the Court had emphasised the importance of a free press in aiding democratic communication between the electorate and those chosen as its representatives. As far as the proportionality of the dissolution of the political groups Etxebarria and Others is concerned, it is unclear why the Court upheld the dissolution of the entire candidate list where, for example, only one candidate in the list had previously been a member of a political party declared illegal and later dissolved. The approach clearly appears disproportionate as it collectively sanctions the entire list of candidates. Accordingly, nothing warrants the conclusion that the political parties aimed at least indirectly to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms under the ECHR. All in all, the Court did not thoroughly examine whether the acts and speeches constituted a whole that gives a clear image of a model of society conceived and advocated by the party which would contradict the concept of a "democratic society".

#### **4.3 Interim conclusion**

This section has argued that the dissolution of these parties amounted to a disproportionate restriction on their freedom of association as guaranteed by the ECHR. There is nothing in their programmes to indicate that Herri Batasuna and Batasuna or Etxebarria and Others were other than democratic or were seeking to achieve their objectives by undemocratic or violent means, or that those objectives served to undermine or subvert the democratic and pluralistic political system in Spain. In fact, the Venice Commission in its Guidelines on the prohibition of political parties and analogous measures noted that:

Prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.<sup>98</sup>

It appears unclear why the Court did not refer to the Venice Guidelines in its decision. In *Batasuna* the dissolution of the party was based exclusively on the public statements and/or actions of the leaders and members or former members of the party. No reliance was placed by the Spanish courts either on the statute or programme of the party itself or on any election manifesto or other public statement issued by the party. The Spanish authorities did not explain how any provision of the statute or detailed programme undermined or would undermine the democratic character of the Spanish State as embodied in the Spanish Constitution; on the contrary, the programmes of the parties

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Castells v. Spain*, 23 April 1992, A236; 14 EHRR 445.

<sup>98</sup> European Commission for Democracy through Law (Venice Commission): Guidelines on prohibition and dissolution of political parties and analogous measures, adopted by the Venice Commission at its 41st plenary session (Venice, 10 – 11 December, 1999, at 3.



concerned expressly recognised the fundamental nature of the Spanish State. Moreover, it is clearly controversial to accept that public statements and/or actions of the leaders and members or former members of a party, whether or not ultimately resulting in prosecution, could also justify the measure of dissolving the entire party to which they belonged. It is unclear whether there is any evidence to suggest that the Basque political parties and political groups as a whole employed or encouraged the use of violence or undemocratic means to destroy the democratic system of the Spanish state. The Venice Commission's guidelines further note that:

The prohibition or dissolution of political parties as a particularly far-reaching measure should be used with utmost restraint. Before asking the competent judicial body to prohibit or dissolve a party, governments or other state organs should assess, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other, less radical measures could prevent the said danger.<sup>99</sup>

The Court's decisions in the above cases are subject to criticism. The extreme measure of dissolution may be considered correct when it responds to a pressing social need and is proportionate to the legitimate aims served. There is a lack of any compelling or convincing evidence to suggest that the parties took any steps to realize political aims which were incompatible with the norms under the ECHR, to destroy or undermine the secular society, to engage in or to encourage acts of violence, or otherwise to pose a threat to the legal and democratic order in Spain. Therefore, the dissolution of *Batasuna and Herri Batasuna, Etxebarria and others*, and *Herritarren Zerrenda* appears to be in violation of Articles 10 and 11 of the ECHR. If the preceding analysis is correct, it suggests that the Court's upholding of the Spanish prohibition of *Batasuna* was an erroneous conclusion and unnecessary in a democratic society.

### **5. National Security as a Trump Card? - The Court's decision as a matter of policy**

The Court's decisions in *Herri Batasuna and Batasuna, Etxebarria and Others*, and *Herritarren Zerrenda* have one more regrettable feature. A political party which through peaceful political means pursues similar political objectives to a military terrorist group cannot be prohibited and dissolved only because of the similarity of its objectives to those of a terrorist organization. Such an approach would undermine the proper functioning of a pluralistic democratic society. This section examines the decisions from the point of view of policy. It argues that the ECHR's decisions to uphold the dissolution of *Herri Batasuna and Batasuna, Etxebarria and Others*, and *Herritarren Zerrenda* appear not to stand on firm ground from a policy point of view either.

Democracy is a form of political system where people exercise power indirectly through their representatives. Elections play a central role in a pluralistic democratic process. A pluralistic democracy breathes hand in hand with a plurality of political parties representing the contrasting opinions among the population. Periodic democratic and pluralistic elections must be accompanied by the separation of public powers, pluralistic public debate, and faith in the media and the freedoms of expression, association, and assembly. Moreover, a democratic society requires much more than compliance with formal normative protections and democratic safeguards. Those democratic safeguards need to be employed in practice on a daily basis.

All the cases illustrated show that the Spanish authorities limited the rights to free speech, assembly and peaceful political activity of Basque political parties and political groups. The deprivation of the full-enjoyment of those rights illustrates a 'democratic' deficit which undermines the functioning of democratic society. A democratic society rests on the hallmarks of pluralism, tolerance and broadmindedness,<sup>100</sup> and does not support the repression of dissidents or opponents. The

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<sup>99</sup> *Ibid.* At 5.

<sup>100</sup> In general see *Handyside v United Kingdom*, ECHR 7 December 1976 (para. 49). For the need for pluralism within democracy regarding political parties see: *The United Communist Party of Turkey and Others v. Turkey*, ECHR, 30

exclusion of certain political groups from a democratic process contributes to an even greater rift between the different sides of society, which in turn can lead some persons to seek recourse to violence to achieve their political objectives.

Free speech, assembly and association are not only fundamentally important in their own right, but also for the fulfilment of all other rights in that they allow individuals and legal persons to hold their government accountable for its actions and call for change in the case of abuse. Thus, denial of those rights might be more dangerous than one may think at first sight. The Spanish authorities have affirmed that constraints on the freedoms of speech, association, and assembly were necessary in the fight against terrorism. However, it is questionable to overturn long-standing long-fought-for legal and democratic principles in the name of protecting citizens from terrorism.<sup>101</sup> Furthermore, the purpose of security is to protect freedom, so it would be self-defeating if security concerns arbitrarily undermined the freedoms in the ECHR.

The decision to exclude some Basque political groups from the democratic process appears to undermine the democratic nature of the Spanish state and its political pluralism. Batasuna, Herri Batasuna and the other political groups occupied only a minor part of the political sphere in the Basque country. More disturbingly, the UN Special Rapporteur noted that:

Part of the population feels that openly sharing the goals of self-determination for the Basque region, or even raising what they consider to be deficiencies in the field of human rights, in particular in the context of the fight against terrorism, would unjustly cause them to be linked to ETA.<sup>102</sup>

Public criticism of the current political and constitutional framework by a political party cannot *per se* be sufficient to justify its prohibition and dissolution. A political party which publicly argues for the independence of the Basque country is merely exercising its constitutional and international human right to freedom of political speech. In this way, pro-independence speeches, banners or posters cannot illustrate a connection between a political party or a political group and a military terrorist group which purses similar objectives by violent means. Further, a refusal to condemn a terrorist act committed by ETA appears to have been considered indirect evidence of support for ETA.<sup>103</sup> However, it must be noted that a number of Spanish parliamentary political parties still refuse to condemn the totalitarian fascist regime of General Franco. Taken together, it seems that reconciling individual rights and freedoms with the protection of national security and democratic institutions is a very demanding task, which possibly presupposes a right answer to how to most appropriately solve similar conundrums.

It also appears that the Spanish authorities have employed the Law on Political Parties as a tool of criminal law in respect of unwanted public expressions without the basic fair trial guarantees of criminal procedural law. The Spanish Supreme Court found that *Batasuna* and *Etxebarria* posed a 'grave and repeated threat to fundamental rights and democratic values,' however it failed to determine the level of this threat to the stability of democratic institutions in the Basque country or elsewhere in Europe. The Court should have discussed and examined whether the level of the threat was so high that it is justified the prohibition of political parties and political groups. Similarly, I. Cram notes that the 'level of threat posed by the anti-democratic group at the time of the ban is critical to any analysis of the legality of the restraint.'<sup>104</sup> In this way, it can be argued that the proscription of a

(Contd.) \_\_\_\_\_

January 1998 (para. 43); See also *The Socialist Party and Others v. Turkey*, 25 May 1998 (para. 41); *Freedom and Democracy Party (OZDEP) v. Turkey*, 8 December 1999 (para. 37).

<sup>101</sup> For a contrary opinion see: Response of the Spanish Government and observations concerning the report on Spain of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/G/2, 18 February 2009.

<sup>102</sup> UN Special Rapporteur, 2008 Report on Spain, para. 47.

<sup>103</sup> J Pérez Royo, *El derecho de Batasuna a no condenar*, *El País*, 20 August 2002. See also I. Cram: 'A fortiori a failure to speak by way of condemnation of another's terrorist act cannot on its own offer a sufficient basis for proscription.', p. 92.

<sup>104</sup> I. Cram, p. 88.

political party can be upheld only where there is a 'real' threat to national security or to the democratic process.<sup>105</sup> The Parliamentary Assembly of the Council of Europe noted in its Resolution 1308 that 'restrictions on or dissolution of political parties should be regarded as exceptional measures to be applied only in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country' and that 'a party cannot be held responsible for the action taken by its members if such action is contrary to its statute or activities.'<sup>106</sup>

It is important to create the conditions for mutual tolerance and solidarity within Basque and Spanish society as 'a means to avoiding conditions conducive to terrorism.'<sup>107</sup> Prohibitions on political parties do not strengthen the functioning of a democratic society but recall conduct so often found in present and past totalitarian regimes. The European Court of Human Rights and the Spanish Supreme Court would appear to have confused political objectives with the use of violent means. Responses to individual incitements should be regulated through ordinary criminal law and other legislation, and not through the prohibition of a political party. The UN Special Rapporteur noted that 'the proscription of organizations, together with the application of vaguely and broadly formulated provisions relating to terrorist crimes, ultimately undermines the strong moral message inherent in strict definitions based on the inexcusable nature of all acts of terrorism.'<sup>108</sup> He further observed that the political form of freedom of expression and 'political pluralism plays a fundamental role in the existence of a genuinely democratic society, and any measures taken by the State to limit the right to political participation must be of a strictly exceptional nature and predictable by law.'<sup>109</sup> He thereafter recommended that:

Spain brings vaguely formulated expressions in the Organic Law on Political Parties in line with international standards on the limitation of freedom of expression, so as to avoid any risk of applying it to political parties that share the political orientation of a terrorist organization, but do not support the use of violent means.<sup>110</sup>

The Special Rapporteur further called for:

'judicial proceedings that in the most scrupulous manner guarantee the procedural safeguards of persons affected by judicial measures that aim to prohibit political candidates from participating in elections, on grounds that they are linked to political parties that have been declared illegal for their connections to a terrorist organization.'<sup>111</sup>

It is understandable that States must take concrete steps to protect their populations from the threat of terrorism, but those steps should not be unreasonable and infringe upon fundamental human rights and freedoms. The balancing exercise between legitimate national security concerns and the protection of human rights has been and will remain delicate. It seems that the Court was not sufficiently aware that prioritizing national security considerations undermines the very fundamental pillars of a proper democracy. It would be much more reasonable from all perspectives to pursue the criminal conviction of individual party members for particular acts or speech. Such a measure is less severe and only those who bear individual responsibility would face the consequences of their actions. More importantly, it would seem that the Court should have acknowledged and addressed criticisms that the Spanish authorities used the Law on Political Parties in an arbitrary manner.

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<sup>105</sup> *United Communist Party and Others v. Turkey*, (1998) 26 EHRR 1211, para. 54.

<sup>106</sup> The Parliamentary Assembly of the Council of Europe, Resolution 1308 (2002) on restrictions on political parties in the Council of Europe member states, para. 11 (ii and iv).

<<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/ERES1308.htm>>.

<sup>107</sup> The UN Special Rapporteur, 2008 Report on Spain, para. 48.

<sup>108</sup> *Ibid.*, para. 54.

<sup>109</sup> *Ibid.* Para 55.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.* Para. 56.

Furthermore, the Court reduced its standard approach to argumentation to a minimum. Why this happened remains unknown. This may be explained either by the Court being mistaken on the facts, or being mistaken in conveying to the reader the reasons for it being so fully convinced of the facts. In other words, the Court's judgements would have been much more persuasive if it had followed its usual approach when addressing cases on the prohibition of political parties.

It is arguable that Spain goes too far in protecting national security at the expense of the freedoms of expression and association, and more importantly at the expense of a pluralistic democracy. However, it is also arguable that Spanish law does not give enough consideration to the freedoms of political expression and association, since a number of Basque political parties have been proscribed since the adoption of amendments to the Law on Political Parties.<sup>112</sup> The Court should therefore reconsider the priority which it gives to the different factors in the fight against terrorism. It seems unacceptable that national security considerations should have absolute priority over the freedoms of expression and association. It is staggering that such a message could have been sent out by a court of human rights.

## 6. Conclusion

This article has attempted to argue that there are a number of flaws in the Court's legal reasoning in *Herri Batasuna and Batasuna, Etxeberria* and *Herritarren Zerrenda*, both from the legal and the policy perspective. It appears that national security was given the trump card over the protection of the freedoms of expression and association. Prohibition and dissolution of political parties is one of most radical measures to be employed by democratic states. States must be mindful of the protection of fundamental human rights and must act within those limits. The dissolution of a political party is a restriction on the freedoms of association and expression and may be necessary at times to protect society's fundamental freedoms and rights. However, if the continuation of a political party would not mean a society facing an unacceptable and real threat to national security and the pluralistic democratic process, then that party's rights under the ECHR should be given priority regardless of national security considerations. Rather than basing its decisions on its own jurisprudence, the Court's decisions stand on very weak legal reasoning without exploring less severe alternative measures to combat terrorism.

Discussion on political pluralism in the Basque country and wider Spanish society is often underpinned by deeply-rooted emotions that suppress argumentative dialogue and reasoning and have led to the long-term polarization of Basque society between pro-independence and contra-independence political parties and the polarization of Spanish society between the left and the right. There are no simple answers to the fundamental questions raised by the cases *Herri Batasuna and Batasuna, Etxeberria and Others*, and *Herritarren Zerrenda*. The challenge posed by the transition from oppression to democracy is to account for the totalitarian regime system and yet to build a new society.

The extreme measure of the dissolution of the Basque political parties and political groups may not be considered as responding to a pressing social need. This article has attempted to argue that the extreme measure of dissolving *political parties* may have been avoided by employing less drastic and individualized measures. Despite the Court holding that the measure was necessary and proportionate, it may have failed to establish the factual basis and therefore also its conclusions are subject to criticism. The Court failed to persuade in its legal reasoning. There is a lack of any compelling or convincing evidence suggesting that the parties took any steps to realize political aims which were incompatible with the norms under the ECHR, to destroy or undermine the secular society, to engage in or to encourage acts of violence, or otherwise to pose a threat to the legal and democratic order in Spain. It is unacceptable in a democratic society to prohibit a political party or a political group just because it pursues the same or similar aims as a prohibited military group.

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<sup>112</sup> Isabel C. Martínez, *La izquierda 'abertzale' votará nulo*, El País, 14.2.2009,

<[http://www.elpais.com/articulo/espana/izquierda/abertzale/votara/nulo/elpepiesp/20090214elpepinac\\_14/Tes](http://www.elpais.com/articulo/espana/izquierda/abertzale/votara/nulo/elpepiesp/20090214elpepinac_14/Tes)>.

Therefore, the dissolutions of *Batasuna and Herri Batasuna, Etxebarria and Others*, and *Herritarren Zerrenda* does not appear to be justified and necessary in a democratic society as they violate Articles 10 and 11 of the ECHR. It is unfortunate that the Court gave priority not only to the protection of national security, but also most importantly to political pressures and considerations. The Spanish authorities must in the future strike a better balance by assessing the *real* level of threat to the democratic order in the Spanish state represented by political parties and by protecting fundamental human rights and freedoms.

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