The banning of political parties (the Spanish case)

by Eduardo Vírgala

Article 6 of the Spanish Constitution of 1978 sets out two limits on the actions of political parties. Firstly, they must observe the Constitution and the law during their founding and while carrying out their activities, and secondly, their internal structure and operation must be democratic. Therefore, political parties in Spain are free to carry out their activities provided they observe the Constitution and the law, which means a party may ideologically be committed to a complete political transformation. No control may be exercised over a party's aims and objectives (ideology), as the Constitution makes no mention of having to align party aims with any of its provisions.

Article 6 of the Constitution was not implemented into legislation until 2002, although this was not a case where a legal void had been created. As a statute, Spanish Law of political parties of 4 December 1978 had been in force from just a few days prior to the Constitution that provided for the dissolution of a party where its activities "were contrary to democratic principles" – although without really specifying how these activities would be anti-democratic, it lacked the minimum requirements of certainty and security.

In 2002, the governing Popular Party and the main party in opposition, the Socialist party, agreed to pass Organic Law on Political Parties to prevent the continuation of a terrorist-linked political movement in the Basque Country. Under various party denominations (HB-Popular Unity, EH-Basque Citizens and Batasuna-Unity) this had acted since 1978 as the accomplice of the ETA terrorist group to intimidate social and political opponents. The Supreme Court (judgment of 27 March 20003) outlawed the HB, EH and Batasuna parties. It found all the:

> *strict criteria that both international treaties and national, ordinary and constitutional case law and the European Court of Human Rights's case law require for determining the restriction of a fundamental right,*

as provided for by law and required for a democratic society given

> *the fully demonstrated fact that the defendant parties are manifestations of the cited 'tactical separation' strategy employed by terrorism on frequent occasions, and, as a result of which, the frequent calls – made in internal documents or public acts – to use violence, mean that the defence of the fundamental rights of others, a vital component of democracy, requires the aforementioned ruling of prohibition and dissolution.*

This resulted in the restriction of a fundamental right that is sufficiently justified in pursuance of the benefit of

> *an immediate protection of democracy and the fundamental righs of others, meaning that, in this case, it is evident that all the conditions are present to warrant and make completely legitimate the legal restriction of the founding and forming part of political parties.*

Appealed on grounds of violation of constitutional rights, the Supreme Court judgment was confirmed by Constitutional Court in 2004. The Constitutional Court confirmed the legality of the dissolution of the three parties, and established a criterion which would be determinant in subsequent judicial proceedings on the effects the condemning of terrorism had on the banning of a political party. In these judgments, the Constitutional Court examined whether not condemning terrorism could be grounds for banning a party.

On this point, the Constitutional Court said that "not condemning terrorist actions is also a tacit or implicit manifestation of a particular attitude towards terror" and that in the context of 30 years of terrorism "a party not condemning a terrorist attack, as an obvious ploy for standing out in contrast to the condemnation made by other parties, takes on an evident weight".

> *The Constitutional Court immediately went on to say that:*
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> *it has also been proven in the original proceedings that the non-condemnation is added to the various, serious and repeated acts and conducts from which a commitment to terror, and against the coexistence organised in a democratic state, can be reasonably deduced. On this premise, no qualitative distinction is made*

between the public authorities, which legitimately monopolise the forces of the state – and a terrorist group – whose violence amounts only to criminal acts, by which it aims to reduce or displace this group's responsibility. The legal consequence of the foregoing must be, as it has been, the withdrawal of the status of party from any political organisation found to be outside the scope of the institution provided for in Article six of the Spanish Constitution.

Six years later, the European Court of Human Rights validated this prohibition. From a legal point of view, the judgment represented a definitive recognition of the Spanish Organic Law on Political Parties and its judicial application, which, in turn, amounted to a strengthening of the Spanish democracy and of the adequate functioning of its legal and judicial mechanisms in the fight against terrorism and its political arms.

In the six years following its banning, Batasuna's attitude remained unchanged. It collaborated with ETA and protected the terrorist group's violence, which meant that its successive reincarnations were declared illegal, on justified grounds, by the Supreme Court (Basque Nationalist Action and Basque Land Communist Party in 2008). However, after 2011 the circumstances were totally different. The failure in 2006 of the negotiations between Spain and ETA, and the widely held perception in Basque society that this failure was ETA's fault, saw the Basque Patriotic Left movement, represented by Batasuna until this time, rethink its strategy. This contributed in no small measure to the 2009 judgment of the European Court of Human Rights. From this point on, the debates were characterised by disagreements between ETA and significant factions of Batasuna.

In the end, the option for exclusive political participation and abandoning what was referred to as the political-military strategy won out. The fruits of this were the statements of the leaders of the old Batasuna made from mid-2009 that culminated with a statement in the city of Bilbao in January 2011 in which language unheard of from this faction since the founding in 1978 of Herri Batasuna was used to declare a complete breakaway from previous political activity and to announce the founding of a new political party, Sortu (create or arise in English). This was followed by a complete ceasefire by ETA in October 2011.

In its 2012 judgment, the Constitutional Court said that the Sortu statutes were drafted taking into account the Organic Law on Political Parties and constitutional case law on said legislation. The Constitutional Court specifically mentioned that said statutes:

make these provisions their own by including in Article 3.B the literal content of Article 9 of the Organic Law on Political Parties, precept in which the legislator describes in detail the serious and repeated types of conduct that can lead to the banning of a political party, with said statutes including the provision that any member engaging in any such conduct is a very serious offence sanctioned by expulsion from the party. Attention must also be drawn to the requirement for being a candidate on any of the Sortu political party's electoral lists of adopting its underlying ideology and commitment to political action and the rejection of violence, including that of the ETA terrorist organisation, and the use of exclusively pacific and democratic means for achieving political aims.

All this constituted counter-evidence sufficient, in principle, to counteract the probative value of other elements of proof from which it could be inferred that the new political party seeking registration in the Registry of Political Parties may want to continue or follow on with the activity of political parties legally banned and dissolved.

With regard to the acts of the new party's leaders, in all their statements they have repeatedly expressed their commitment to political means and the unconditional rejection of violence. In what can be seen as a dynamic vision of the Basque Patriotic Left movement, the Constitutional Court determined that the foregoing should not be disqualified by the presence at certain acts, such as in Bilbao, of former Batasuna leaders. What matters is the current opting for exclusively pacific means and the rejection of violence.

As there is no evidence corroborating the existence of the elements set out to establish the continuation of a banned party, the Constitutional Court concluded that

it cannot be inferred that [ETA and Batasuna] have set up the Sortu political party for its ends or that this party has let itself be used by the terrorist organisation and the banned political party so as to constitutionally require, in this case, restricting its right of association.

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