

## Still Alive?

### Party Bans in Spain

Lluís Subiela<sup>1</sup>

Party banning was developed in Spain in 2002, with the aim of combating the terrorism of ETA (1958-2018), an extreme left-wing and separatist Basque organisation that murdered more than 800 people. This instrument proved useful in defeating the terrorist group and its network of support organisations, including several parties<sup>2</sup>.

Currently, democracies must face several challenges, such as polarisation, the deterioration of the rule of law, populism, demagoguery and illiberalism, the deterioration of pluralism and the rise of a decisionist, personalist and plebiscitary conception of democracy. There is less mutual tolerance and less institutional restraint on the part of those in power<sup>3</sup>. And, particularly in Spain, there are strong separatist or pro-independence movements in Catalonia, the Basque Country and, to a lesser extent, Galicia, and other regions. This territorial crisis reached its peak in October 2017 with the illegal and unconstitutional declaration of independence in Catalonia. Faced with this, there are parties (PP and Vox) that have proposed using the mechanism of banning parties. But is this viable, and would it be useful? In my opinion, it is very difficult (although not technically impossible) for a party ban to be useful in Spain in contexts other than terrorism.

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<sup>1</sup> Lluís Subiela is a predoctoral fellow and PhD candidate on Constitutional Law at the Political Department of the UNED and the Centre for Studies on Political Parties (*Ayudas para contratos predoctorales para la formación de personal investigador de la UNED* 2022). This text has been carried out within the framework of Research Project PID2021-124531NB-I00: “El Estado de partidos: raíces intelectuales, rupturas y respuestas jurídicas en el marco europeo”.

<sup>2</sup> Eduardo Vírjala Foruria, La exclusión política como instrumento de la lucha antiterrorista en España, in: Ignacio Gutiérrez Gutiérrez (coord.), *Mecanismos de exclusión en la democracia de partidos*, Madrid 2017, pp. 42, 60.

<sup>3</sup> Among others, Carlos Fernández Esquer, La democracia interna en los partidos políticos y su medición, in: María Salvador Martínez (coord.), *Estudios sobre la función y el estatuto constitucional de los partidos políticos*, Madrid 2022, pp. 175 ff.; Alicia González Moro, Plebiscitarismo y crisis del paradigma representativo. Una aproximación desde los procesos de democratización de los partidos políticos, in: *Revista general de derecho público comparado*, No. 31 (2022); Adam Krzywón, El iliberalismo constitucional ha llegado para quedarse. Las experiencias centroeuropeas, in: *Revista de Derecho Político*, No. 113 (2022), pp. 16 ff., <https://revistas.uned.es/index.php/derechopolitico/article/view/33570/25054> (last visited July 11, 2024); Steven Levitsky/Daniel Ziblatt, *How democracies die*, Harlow 2018. For a wider context on democracy: Freedom in the World 2023: <https://freedomhouse.org/report/freedom-world/2023/marking-50-years> (last visited Apr 25, 2024).

## Development of the prohibition of political parties in Spain

With the expansion of terrorism, violence and harassment by ETA that took place in the 1990s (“socialisation of pain”<sup>4</sup>), Article 515 of the Penal Code on unlawful association was considered insufficient, and the focus was put on the *Herri Batasuna* party (HB), which gave direct support to ETA, e.g. by providing social support, facilitating the use of its headquarters or by targeting<sup>5</sup>. Therefore, in 2002 a new Organic Law on Political Parties was passed and incorporated a judicial process of declaring a political party illegal before the Spanish Supreme Court.

Two new non-criminal causes for banning were included (Articles 10.2.b, c). The first is grave and repeated non-compliance with the requirement of internal democracy. Its lack of specificity has prevented it from being applied<sup>6</sup>. The second was expressly related to terrorism. The assumption is that the party’s activity violates democratic principles, with the aim of deteriorating or destroying freedoms, making the democratic system impossible or eliminating it. According to it, specific conducts must be carried out repeatedly and gravely, for example: express or tacit political support for terrorism, proposing electoral candidates or having leaders convicted of terrorist crimes or who have not publicly rejected terrorism, among others. The ruling can be appealed before the Constitutional Court<sup>7</sup>.

According to Article 6 of the Spanish Constitution, the creation and activity of political parties must be carried out with respect for the Constitution and the law. Activities of terrorism, violence and harassment are understood as contrary to the Constitution and cannot be included in the freedom of ideology. Moreover, parties must express political pluralism, which is enshrined in the Constitution as a higher value (Articles. 6 and 1). These activities would also be contrary to this idea of pluralism and, in general, to the idea of democracy.

However, Article 6 cannot be understood as the consecration of militant democracy<sup>8</sup>. This concept has, in fact, been ruled out by the Spanish Constitutional Court<sup>9</sup>. According to the Constitutional Court, the regulation of this model of

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<sup>4</sup> César García, The Strategic Communication Power of Terrorism: The Case of ETA, in: *Perspectives on Terrorism*, October 2018, Vol. 12, No. 5, p. 30, <https://www.jstor.org/stable/26515429> (last visited July 11, 2024).

<sup>5</sup> Vírgala Foruria (Fn. 2), p. 41.

<sup>6</sup> Fernández Esquer (Fn. 3), p. 182.

<sup>7</sup> Eduardo Vírgala Foruria, Los partidos políticos ilícitos tras la LO 6/2002, in: *Teoría y Realidad Constitucional*, No. 10-11 (2003), p. 256, <https://dialnet.unirioja.es/servlet/articulo?codigo=1039024&orden=262755&info=link> (last visited July 11, 2024).

<sup>8</sup> María Salvador Martínez, *Partidos Políticos. El estatuto constitucional de los partidos y su desarrollo legal*. Madrid 2022, p. 92.

<sup>9</sup> Spanish Constitutional Court, 12.03.2003, STC 48/2003, 117, 7, <https://hj.tribunalconstitucional.es/en/Reso%20lucion/Show/4823> (last visited Apr 25, 2024).

party ban differs from militant democracy because what is pursued are determined activities contrary to the Constitution and not ideas or aims<sup>10</sup>.

The passing of the Organic Law on Political Parties was highly controversial<sup>11</sup> and although it was appealed before the Constitutional Court, it was eventually found to be in line with the Constitution<sup>12</sup>. In general, criticism focused on the fact that the law does introduce, despite all, a model of militant democracy, not compatible with the Constitution<sup>13</sup>. The Spanish model has sometimes been described as ‘attenuated militant democracy’. There was also criticism of some specific elements of the law, e.g. the suspension of party registration by the Ministry of the Interior, although it did not question its constitutionality<sup>14</sup>.

Once the issue was resolved by the Constitutional Court and the constitutionality of the law was declared, the political groups concerned appealed to international bodies to prevent illegalisation. However, their demands were not accepted. According to the European Court of Human Rights’ interpretation of the Convention (Articles 11 and 10), states must ensure that a plurality of political parties representing the different views of the population participate in elections. Furthermore, for the limitation of the right of association to be in conformity with the Convention, it must be aimed at the protection of the rights and freedoms of others, national and public security, the defence of public order and the prevention of crime<sup>15</sup>. All this was fulfilled in the case of the parties related to ETA. Moreover, considering the direct support that these parties provided to ETA and the disruption they caused to the free, democratic competition and peaceful coexistence, the ECtHR considered that the requirement of imperative social necessity was also met and that the measure was proportional. All the declarations of illegality that were appealed before the ECtHR<sup>16</sup> were found to be in accordance with the convention<sup>17</sup>.

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<sup>10</sup> STC 48/2003 (Fn. 9), 118, 7.

<sup>11</sup> Vírgala Foruria (Fn. 2), p. 42.

<sup>12</sup> STC 48/2003 (Fn. 9).

<sup>13</sup> José Antonio Montilla, Algunos cambios en la concepción de los partidos. Comentario a la STC 48/2003, sobre la Ley Orgánica 6/2002, de partidos políticos, in: *Teoría y Realidad Constitucional*, No. 12-13 (2003), p. 585, <https://dialnet.unirioja.es/servlet/articulo?codigo=1038561&orden=252263&info=link> (last visited July 11, 2024).

<sup>14</sup> Vírgala Foruria (Fn. 2), pp. 42, 44.

<sup>15</sup> Mercedes Iglesias Báñez, La prohibición de partidos políticos en la jurisprudencia del Tribunal Europeo de Derechos Humanos, in: Ignacio Gutiérrez Gutiérrez (coord.), *Mecanismos de exclusión en la democracia de partidos*, Madrid 2017, p. 123.

<sup>16</sup> European Court of Human Rights, 30.6.2009, Batasuna, <https://hudoc.echr.coe.int/eng/?i=001-93475> (last visited 25 Apr, 2024).

<sup>17</sup> Eduardo Vírgala Foruria, STC 138/2012, de 20 de junio, sobre constitución de *Sortu*: La ¿definitiva? legalización de la Izquierda *Abertzale*, in: *Revista Española de Derecho Constitucional*, No. 96 (2012), p. 305, <https://www.cepc.gob.es/publicaciones/revistas/revista-espanola-de-derecho-constitucional/numero-96-septiembrediciembre-2012/stc-1382012-de-20-de-junio-sobre-constitucion-de-sortu-la-definitiva-legalizacion-de-la-izquierda-2> (last visited July 11, 2024).

## The case of Batasuna and other parties related to ETA

Beyond the doctrinal debate, this mechanism was useful in dismantling ETA's political arm and, together with other actions, bringing about the end of terrorism in 2011 and the dissolution of the organisation in 2018. Numerous parties, parliamentary groups and electoral candidacies linked to ETA (HB, EH, Batasuna, ANV, PCTV, ASB, D3H, SA, NSA, Askatasuna, etc.) were outlawed and the tacit and expressed support that these political groups gave to ETA disappeared, including political legitimisation and normalisation, the use of their headquarters, targeting, financial support or provision of jobs for ETA members both within the party and the public institutions<sup>18</sup>.

In 2011, a new political party, Sortu, was created from the social milieu that had previously been linked to Herri Batasuna. It joined other Basque pro-independence left-wing parties in the broader Bildu coalition (today, EH Bildu). At first, the Supreme Court ordered Sortu to be outlawed, but this decision was reversed by the Constitutional Court<sup>19</sup>, as it ruled that the express rejection of the use of terrorist violence included in the statutes, founding declarations and projected activities of the new party was sufficient for it to be understood in accordance with the law<sup>20</sup>.

## Party ban beyond terrorism

Since the territorial crisis in Catalonia, especially from 2017 on, there have been occasional proposals to ban parties, either for being contrary to the Constitution or for being contrary to the unity of Spain.

In January 2024, right-wing Vox presented a reform of the Party Law in parliament to introduce as a cause of illegality that a party's activity threatens the unity of Spain and the constitutional order<sup>21</sup>. Specific illegal activities would be defined as the support of public authorities for activities that seek to undermine or destroy the unity of Spain or if this is established in the party's statutes, programmes or declarations. The centre-right People's Party presented a reform of

<sup>18</sup> Outside this context, the extreme left-wing political party PCE(r), linked to the terrorist organisation GRAPO, was also outlawed.

<sup>19</sup> Spanish Constitutional Court, 20.06.2012, 138/2012, <https://hj.tribunalconstitucional.es/es/Resolucion/Show/22975> (last visited Apr 25, 2024).

<sup>20</sup> Vírjala Foruria (Fn. 2), p. 67.

<sup>21</sup> Grupo Parlamentario VOX, Proposición de Ley Orgánica para garantizar la unidad de España. (122/000018), (2023), [https://www.congreso.es/es/proposiciones-de-ley?p\\_p\\_id=iniciativas&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&\\_iniciativas\\_mode=mostrarDetalle&\\_iniciativas\\_legislatura=XV&\\_iniciativas\\_id=122%2F000018](https://www.congreso.es/es/proposiciones-de-ley?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_iniciativas_mode=mostrarDetalle&_iniciativas_legislatura=XV&_iniciativas_id=122%2F000018) (last visited 25 Apr 2024).

the Penal Code<sup>22</sup> (amendment to the 2023 Amnesty Law proposal) to include the illegal organisation of a referendum and the illegal declaration of independence as crimes. If a party or association was held responsible for these crimes, the proposed penalty was dissolution. Both proposals were rejected in parliament.

Vox's proposal would be clearly unconstitutional because it does not focus on the means by which constitutional modifications are proposed but seeks to prevent a party from promoting an idea contrary to that of the unity of Spain. The activity does not necessarily have to be unconstitutional or illegal; it is sufficient that it is contrary to the idea of Spain. In Spain, there is no militant democracy and therefore ideas contrary to the Constitution cannot be pursued, only activities. Nor, of course, would it be in line with ECHR jurisprudence. Banning the mere expression of rejection of the unity of Spain is contrary to ideological freedom and pluralism. The People's Party's proposal was technically more precise and fit better with the limits set by the Constitutional Court and the ECHR, as it focused on activities (declaring independence or carrying out acts aimed at this). This proposal also contained penalties for persons carrying out such activities. However, I believe that the provision of this punishment means that the concrete measure of dissolution does not meet the requirements of proportionality and imperative social need, established by the ECHR.

## Conclusion

Party ban in Spain was effective in the fight against Herri Batasuna and terrorism. Fortunately, in Spain today, there is no terrorism threatening democracy linked to a specific political party (the social problems arising from that experience are another matter). Today, the Basque radical left-wing and pro-independence parties comply with the law. This is the understanding of the Constitutional Court, most of the doctrine<sup>23</sup> and a large part of society. However, Spanish democracy presents other problems and risks, some of them shared with other European countries. But problems such as polarisation, populism and institutional deterioration cannot be solved by this mechanism. Currently, the outlawing of parties has only been proposed for (especially Catalan) pro-independence parties.

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<sup>22</sup> Proposición de Ley Orgánica de amnistía para la normalización institucional, política y social en Cataluña, 11.01.2024, [https://www.congreso.es/es/busqueda-de-publicaciones?p\\_p\\_id=publicaciones&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&\\_publicaciones\\_mode=mostrar-TextoIntegro&\\_publicaciones\\_legislatura=XV&\\_publicaciones\\_id\\_texto=\(BOCG-15-B-32-4.CODI.\)](https://www.congreso.es/es/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_publicaciones_mode=mostrar-TextoIntegro&_publicaciones_legislatura=XV&_publicaciones_id_texto=(BOCG-15-B-32-4.CODI.)) (last visited 25 Apr 2024).

<sup>23</sup> Virgala Foruria (Fn. 2), p. 73.

Although there were events of the 2017 crisis that were being investigated as terrorism<sup>24</sup> (with the consequences that this could have in terms of banning parties), this investigation was dismissed in July 2024<sup>25</sup>, so there seems to be no scope for an eventual ban on Catalan pro-independence parties for supporting terrorism. At present, without a reform of the constitution that would introduce militant democracy, the banning of parties in Spain seems to be a difficult instrument to apply. However, this is not necessarily a bad thing, given the exceptional nature of this instrument and the necessary ideological freedom required by any pluralist democracy.

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<sup>24</sup> Katalonien: Spanisches Parlament lehnt Amnestie-Vorhaben von Pedro Sánchez ab, Die Zeit vom 30.01.2024, <https://www.zeit.de/politik/2024-01/spanien-parlament-rueckschlag-amnestie-sanchez> (last visited Apr 25, 2024).

<sup>25</sup> As of 11 July, the court decisions are not yet openly available. See the press releases of the Judiciary (in Spanish): <https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/La-instructora-del-caso-Tsunami-Democratic-en-el-Tribunal-Supremo-acuerda-el-archivo-de-la-causa-en-la-que-investigaba-a-Puigdemont-y-Wagensberg> (last visited Jul 11, 2024), and <https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Audiencia-Nacional/Oficina-de-Comunicacion/Notas-de-prensa/El-instructor-del-caso-Tsunami-Democratic-en-la-Audiencia-Nacional-archiva-la-causa-tras-la-decision-de-la-Sala-de-lo-Penal-de-anular-la-prorroga-acordada-en-julio-de-2021> (last visited Jul 11, 2024). Moreover, Katalanische Separatisten: Terrorismusverfahren gegen Puigdemont und Rovira eingestellt. <https://www.faz.net/aktuell/politik/ausland/terrorismus-verfahren-gegen-puigdemont-und-rovira-eingestellt-19845367.html> (last visited Jul 11, 2024).