

Basque historical titles and self-determination: A path towards co-sovereignty at domestic and EU levels

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Txosten honek Euskal Herriaren estatus politiko-legala du aztergai, Espainiako konstituzio legeria eta Europako Batasun/Komunitateko legeria eraikitze, garatze eta praktikan jartzeari dago- kionez. Era berean, Euskadiren Estatutu Politikorako Proposamenaren funtsezko eduki eta noraino- koari heltzen zaio lan honetan, proposamen hori Eusko Legebiltzarrak 2004ko azkenetan onartua eta Espainiako Gorteeek 2005ean arbuiaua izanik.

Giltza-Hitzak: Europar Batasuna. Europako eskualdeak. Ordezkaritza politikoa. Autodeterminazioa. Eskubide historikoak. Burujabekidetasuna.

En este informe se trata el estatus político-legal del País Vasco en lo referente a la construc- ción, desarrollo y puesta en práctica de la legislación constitucional española y de la legislación de la Comunidad/Unión Europea. Se aborda igualmente el contenido fundamental y el alcance de la Propuesta de Estatuto Político para el País Vasco que, aprobado por el Parlamento Vasco a fina- les de 2004, fue rechazado en 2005 por las Cortes españolas

Palabras Clave: Unión Europea. Regiones de Europa. Representación política. Autodeterminación. Derechos Históricos. Co-soberanía.

On traite dans ce rapport du statut politico-légal du Pays Basque en ce qui concerne la cons- truction, le développement et la mise en pratique de la législation constitutionnelle espagnole et de la législation de la Communauté/Union Européenne. On aborde également le contenu fonda- mental et la portée de la Proposition de Statut Politique pour le Pays Basque qui, approuvé par le Parlement Basque à la fin de 2004, a été refusé en 2005 par les Cortes espagnoles.

Mots Clés: Union Européenne. Régions d'Europe. Représentation politique. Autodétermination. Droits Historiques. Co-souveraineté.

When, among the happiest people in the world, bands of peasants are seen regulating affairs of State under an oak, and always acting wisely, can we help scorning the ingenious methods of other nations...?

Jean-Jacques Rousseau, *The Social Contract*

1. FOREWORD

The subject of study dealt with in this report is the complex legal and political status of the Basque Country where the construction, development and enforcement of Spanish Constitutional Law¹ and EC-EU Law² are concerned. This question also comprises the essential content and main remit of the Proposal for a Political Statute for the Basque Country (PSBC) approved by the Basque Parliament at the end of 2004 (and rejected in 2005 by the Spanish Parliament).³

The Basque Country, like many other sub-national bodies, is facing difficult legal and institutional challenges in relation to the EU, due to the obstacles against active participation that it is currently encountering at all levels of the EU.⁴ Within the scope of the Spanish case, we can infer that the reason lies in the highly centralist reading of constitutional reality as constructed by successive central governments.⁵

The decentralised structure of the Spanish legal system is well known, although at the same time it shares the attributes of a real federal State and a mere assumption of symbolic regional realities.⁶ If we focus, for example,

1. It is very important to recall the results of the 1978 referendum on the Spanish Constitution within the Basque territories. The constitutional referendum within the territories of Alava, Guipuzcoa and Vizcaya produced a 57% percentage of abstention, with an 11% figure of votes cast against the text, from the whole electoral roll. In Navarre the abstention reached 37% and the vote against the Constitution comprised 11% of the whole electoral roll.

Source: Spanish Ministry of Domestic Affairs, <http://www.elecciones.mir.es>

2. Just as a first example it is more than appropriate to quote the article of J. M. CASTELLS ARTECHE, "Europa-Euskal Herria", *Euskonews & Media* no. 31, <http://www.euskonews.com>

3. See, in general, the Preface to, and article 1 of the PSBC. The full text in English is available as well at:

http://www.nuevoestatutodeeuskadi.net/docs/dictamencomision20122004_eng.pdf.

4. To correct that situation, a whole new regime is proposed in article 65 of the PSBC.

5. G. JÁUREGUI states this approach quite clearly in his work "La actividad internacional de la CAPV. La implicación europea", *Euskonews & Media* no. 36, <http://www.euskonews.com>

6. E. L. MURILLO DE LA CUEVA understands that, in other contexts, we have seen a much more proactive willingness to contemplate sub-national participation in the process. The difference is that with certain other EU entities there has been a simultaneous development within the context of a long-term process, while in Spain the domestic building of a new constitutional system as a whole has not accompanied its adequate integration to European reality. Consequently, for Murillo de la Cueva, the advances in decentralisation have not coincided with a similar process at the European level. See his study *Comunidades Autónomas y política europea*, IVAP-Civitas, 2000, pp. 38 and 39.

on the case of the Basque Country, it is clear that the autonomous governments have an important number of legislative powers of the highest significance, whose virtue and usefulness may become overlapped due to the unilateral cession of sovereignty made by the Spanish government since becoming a member of the European Community.⁷

Unfortunately, what the bare facts indeed tell us is that, during this whole process, the Spanish autonomous communities in general, and the Basque territories in particular, have not been taken into account, in many cases being taken by surprise by the proceedings and political will of the successive Spanish central governments.⁸ Meanwhile, the Rome Treaty has also contributed to the situation in that their amendments leave only residual possibilities of participation for sub-state bodies, whether at institutional level or before the Court of Justice of the European Communities (CJEC).

In addition to this, and regardless of the initial cession of sovereignty that took place, the EC has increasingly assumed more competencies in different policy areas and has exercised an undeniable influence on the executive powers and space for legislative development of the autonomous communities, and this, of course, includes the Basque Country and Navarre,⁹ whose levels and margins of political and legal scope have been conside-

7. The concept I use generally throughout this study is 'European Community' (EC), and not European Union, because it is the principles that inspired the EC that have been duly applied and constituted an impediment to the Historical Rights being enforced in a particular direction; equally, the EC is the body mentioned to date in the EC Treaty, which is basically due to the fact that it is indeed the EC that currently possesses legal personality and not the EU.

8. Therefore a bilateral system of guarantees is proposed through articles 14, 15 and 16 of the PSBC.

9. The common 'foral' roots of both the current Basque Country and Navarre are clearly stated within the First Additional Clause of the Spanish Constitution, together with its later development in terms of legal approaches. However, in response to arguments against the historical and legal existence of Euskal Herria, the same Basque Act for Autonomy (Organic Act 3/1979, also approved by the Spanish Parliament), stresses in its first article:

El Pueblo Vasco o Euskal Herria, como expresión de su nacionalidad, y para acceder a su autogobierno, se constituye en Comunidad Autónoma dentro del Estado español bajo la denominación de Euskadi o País Vasco, de acuerdo con la Constitución y con el presente Estatuto, que es su norma institucional básica.

The territorial concretion of the aforementioned was ratified by the Spanish Parliament within articles 2.1 and 2.2 of the Basque Act for Autonomy:

Art. 2.1: *Álava, Guipúzcoa y Vizcaya, así como Navarra, tienen derecho a formar parte de la Comunidad Autónoma del País Vasco.*

Art. 2.2: *El territorio de la Comunidad Autónoma del País Vasco quedará integrado por los Territorios Históricos que coinciden con las provincias, en sus actuales límites, de Álava, Guipúzcoa y Vizcaya, así como la de Navarra, en el supuesto de que esta última decida su incorporación de acuerdo con el procedimiento establecido en la disposición transitoria cuarta de la Constitución.*

See as well the Judgements of the Constitutional Court of Spain 94/1985, of 29-7, and 99/1986, of 11-7.

rably reduced, without any kind of co-operation agreement being proposed as a consequence by central Government until a good way into the nineties.¹⁰

So we are facing a complex but, as a consequence, rather more interesting issue. One relevant event in the Spanish context took place in September 1997, when the Spanish government, while negotiating the Amsterdam Treaty, avoided signing an annex Statement to the new Treaty proposed by Germany, Austria and Belgium, in which participation of sub-national entities within EC institutions would be assumed by positive law. It is obvious that this has special political and legal consequences in countries such as those above, or in Spain, all of them with a clear decentralised structure, and among whom the enforcement of the community principle of subsidiarity should become a basic piece of the framework and exercise of competencies, either among the EC and the States, or at the sub-national levels.¹¹

In the light of all we have described, the situation has become irreversible as far as the Statement is concerned. Spain, therefore, is today the single decentralised country of the EC that is not a signatory of the aforementioned Statement fostering regional or sub-national participation in the EC framework context. This could have been avoided beforehand by locating at least one representative of the Spanish autonomous communities inside the State delegation negotiating the Treaty. That is indeed what was done by Germans, Austrians and the regions in Belgium.¹² In the Spanish case the approach was different, demonstrating an absolute lack

10. In this context it is important to distinguish the concepts of 'cooperation' and 'participation' as quoted by E. L. MURILLO DE LA CUEVA in his work *Comunidades Autónomas y política europea, op. cit.*, pp. 60, 61, 63 y 65. In this author's opinion, participation is constitutionally assumed by sub-state entities, on the basis of general interest and in order to permit specification of the scope of competencies for central government in each area. Participation is based upon general interest as is the integration of Spanish regions within the same State. On the other hand, cooperation is a principle that seeks to employ techniques of relation and linkages between governments and/or administrations, which should be developed within the structures of the government while enforcing their own competencies. In fact, the constitutional importance of cooperation should not be likened to participation. A fluid relation between all administrations should be assumed in EC matters. Although cooperation is a useful element for closer participation, it should never be a substitute for the latter. Whatever the case, the cooperation agreements between the central Government and the Spanish Autonomous Communities do not have any constitutional or even legal nature, and therefore there is no path whatsoever available to pursue their real compliance. That would be, ultimately, the main distinction between the Spanish case and constitutional approaches in Germany, Belgium or Austria. See my work, *Los Derechos Históricos de Euskadi y Navarra ante el Derecho Comunitario*, Donostia-San Sebastián: Eusko Ikaskuntza, 2003.

11. See J. LOUGHLIN, "The regional question, subsidiarity and the future of Europe", in *Whose Europe? National models and the Constitution of the EU*, edited by K. Nikolaidis and S. Weatherill, Oxford, 2003.

12. E. L. MURILLO DE LA CUEVA, *Comunidades Autónomas y política europea, op. cit.*, p. 143, includes as well, together with those three States, the recent case of the United Kingdom.

of political will on the matter, the tendency always being to avoid any kind of sub-national participation in the State delegation at the EU Council of Ministers.¹³

As a result of this peculiar situation, both the Basque territories and Navarre suffer a serious lack of representation within the EC institutions; it would only be possible for them to possess *locus standi* before the Court of Justice of the EC through indirect possibilities awarding legal persons the right to apply to the Court, because sub-state bodies do not have direct legitimation.

Obviously, the proposal designed during this study advocates direct participation by the Basque Country and Navarre in the EC,¹⁴ not in independent terms, but in harmony with other Spanish interests based upon the EC and constitutional principles of solidarity.¹⁵ This would mean participation of the Basque Country and Navarre within the Committees of the Commission, and within the Council of Ministers as well as in the different working groups, as bodies that are permanent designers of new policies and regulations, and both of which are bodies with powers in the gestation of future treaties.¹⁶ In short, a real example of a new path towards co-sovereignty as stated within the proposal for a new Political Statute for the Basque Country approved by the Basque Parliament (PSBC).¹⁷

All these previous considerations are only a preliminary sketch for the different reflections that, *lege ferenda*, inspire the content of this study. It is therefore important to consider, if only briefly, some historical data concerning the legal framework that explains and presents the problem of Historical Rights in the different territorial contexts of Euskal Herria (The Basque Land).¹⁸ There are many perspectives in this context through which we could

13. A. MANGAS MARTÍN has also referred to this matter. See “La participación directa de las Comunidades Autónomas en la actuación comunitaria: fase preparatoria”, in P. PÉREZ TREMPES (coord.), *La participación europea y la acción exterior de las Comunidades Autónomas*, Marcial Pons/Institut d’Estudis Autonòmics, Barcelona, 1998, p. 542.

14. Relations with Navarre and the Basque provinces within French territory (Lapurdi, Basse Navarre and Zuberoa) are also reflected by the PSBC in articles 6 and 7. This is a direct implication arising from the recognition of Basque Historical Titles in the First Additional clause of the Constitution.

15. In the same sense we have the opinion of E. L. MURILLO DE LA CUEVA, *Comunidades Autónomas y política europea*, *op. cit.*, pp. 133, 143 and 146. This author argues for a new implementation of autonomic participation based upon criteria of exclusive competencies in relation to interests affected by EC decisions.

16. See E. L. MURILLO DE LA CUEVA, *op. cit.*, pp. 123 and 124.

17. Plenary session of 30-12-2004. Proposal later rejected by the Spanish Parliament (February 2005). See the full text of the Proposal passed at the Basque Parliament in its English version (PSBC).

http://www.nuevoestatutodeeuskadi.net/docs/dictamencomision20122004_eng.pdf.

18. Preface and articles 1 & 2 of the PSBC.

analyse the meaning of the historical rights or titles of the Basque territories. Any of them might be considered valid, as long as the bases are solid and reasonable. However, I should underline here that my study chooses to follow the premises and their historic or legal evolution as a true example of a legal framework that has been active until today, and still governs a good part of the public legal relationships of the Basque territories with the central State, such as the domestic structure of the Basque territories and their particularities vis-à-vis the rest of the common Spanish provinces.¹⁹

2. A PIECE OF HISTORY

The particular nature of the ‘foral’ Basque regime has been constantly present within any historic analysis of our constitutional and legal texts.²⁰ As a starting point, I also have to underline the curious and relevant observation made by LOPERENA²¹ regarding the very similar terms of the First Additional Clause of the Spanish Constitution (1978) and the Act of 25-10-1839.²² If, as quoted by this author, the Act of 25-10-1839 confirms the Basque and Navarrese ‘*Fueros*’ (Rights) at the same time and through a common system, the First Additional Clause of the Constitution confirms and also respects the historical rights of those territories.²³ All the aforementioned contains basic legal consequences for a contemporary and practical interpretation of the various perspectives and consequences deriving from the concept of Historical Rights.²⁴

19. This is the point of view of many previous authors. Among them, mention should be made of T. R. FERNÁNDEZ, in his work *Los Derechos Históricos de los territorios forales*, Madrid, 1985, as a true and fair view of the whole process.

20. In a surprising sense, a most important historic landmark was probably set by Antoine D’ABBADIE, as has been recently explained to us by G. MONREAL in his interesting work “El ideario jurídico de Antoine d’Abbadie”, *Euskonews & Media* no. 16, <http://www.euskonews.com>.

21. D. LOPERENA, *Derecho histórico y régimen local de Navarra*. Pamplona: Gobierno de Navarra, 1988, p. 37.

22. Act of 25 October 1839.

Artículo 1º. Se confirman los Fueros de las provincias Vascongadas y de Navarra sin perjuicio de la unidad Constitucional de la Monarquía.

Art. 2º. El Gobierno tan pronto como la oportunidad lo permita, y oyendo antes a las provincias Vascongadas y a Navarra, propondrá a las Cortes la modificación indispensable que en los mencionados fueros reclame el interés general de las mismas, conciliándolo con el general de la Nación y de la Constitución de la Monarquía, resolviendo entretanto provisionalmente, y en la forma y sentido expresados, las dudas y dificultades que puedan ofrecerse, dando de ello cuenta a las Cortes.

23. D. LOPERENA, *Derecho histórico y régimen local de Navarra*, op. cit., p. 37.

24. This is a concept that, in the French Basque Country, within a different perspective and without any constitutional clause at all, is also present in the words of M. LAFOURCADE with regard to the peculiar identity of the French-Basque territories (‘Iparralde’ in Basque): *Dans une Europe en pleine mue, les Etats-nations, constructions artificielles, semblent aujourd’hui dépassés. Les revendications identitaires des minorités sont universelles. Pour éviter toute homogénéisation culturelle, chaque peuple doit prendre conscience de sa réalité et, pour cela, connaître son passé*

Another curious aspect leads us once more to the Constitution that is presently in force, for a brief mention of its Second Derogatory clause in relation to all the above. This indeed represents a paradox within the whole analysis. When the Second Derogatory clause of the Constitution annuls the Act of 25 October 1839 for Alava, Guipuzcoa and Vizcaya, the Constitution shows the difficulties experienced by central governments when interpreting the Basque and Navarrese regimes, as well as the problems of a section of Basque nationalism in its understanding of the relationship of the Basque territories with the State itself, according to the Constitution.²⁵ As an outcome of all these disagreements, we might be facing one of the most important paradoxical items within the process of Spanish constitutionalism.

If the Second Derogatory clause of Constitution annuls the Act confirming the 'foral' system of 1839, it incurs in a direct and express contradiction of the recognition of and respect for the 'foral' Historical Rights assumed by the First Additional clause of the Constitution. The approach is difficult to understand if we do not take into account the political perspective previously mentioned. But the failing might have an even wider reach, because the Derogatory clause only affects Alava, Guipuzcoa and Vizcaya, as Navarre is not mentioned at all. Should we understand, then, that the Act confirming the 'foral' system of 25-10-1839 is still in force for Navarre? There might be various legal answers too, if we forget the political course of the disagreements and fights that have coloured Basque reality up until now. Similar fights and disagreements were also the order of the day during the constitutional process, using arguments that were more political than legal in most of the cases.²⁶

et retrouver son identité qu'il doit conserver tout en s'adaptant à la société moderne. Or, le peuple basque, plus que tout autre, possède des caractères propres qu'il a préservés tout au long de son histoire, du moins en Iparralde jusqu'à la Révolution de 1789.

*Son système juridique, qui servait de fondement à son organisation sociale, ne fut pas influencé par le Droit romain qui, partout ailleurs en Europe occidentale, modifia profondément la tradition juridique populaire. Conçu par et pour une population rurale, il a été élaboré à partir des maisons auxquelles s'identifiaient les familles et qui, comme elles, se perpétuaient à travers les siècles, donnant à la société basque une grande stabilité (see her work "Iparralde ou les provinces du Pays Basque nord sous l'ancien régime", *Euskonews & Media* no. 3, <http://www.euskonews.com>).*

25. We have to remember here that the Act to "confirm the 'fueros'", of 25 October 1839, was considered by a sector of Basque nationalism as an abolishment ruling, even though its sense and aims were simply to adapt the particular regimes in the Basque territories to the new Constitution at that time.

26. An interesting example of this was quoted by V. TAMAYO SALABERRÍA in her impressive work *La autonomía vasca contemporánea. Foralidad y estatutismo 1975-1979*, Oñati: IVAP, 1994, p. 617. The author recalls a relevant event from our 'foral' and constitutional history during the debate in the Spanish Parliament on the First Additional Clause of the Constitution about the Basque Historical Rights. At that time, the representatives of the Spanish Socialist Party (PSOE) refused to concede more explicit recognition of the Historical Rights of the Basque territories.

In my view, the Historical Rights of the Basque Country constitute the logical transit from the historic concept of 'Fueros' to the constitutional integration of certain territories which maintained during the whole of that process a voluntary, uninterrupted political and juridical public will of identity.²⁷ The common point for both figures is the nature of agreement between two parties throughout history.²⁸ What differentiates them are the current difficulties in recognising that situation from the State and EU perspective. One of our jurists, HERRERO DE MIÑÓN, has brilliantly demonstrated possible regimes for integration of the Basque Historical Rights within constitutional reality, while leaving to one side all sorts of political disagreements upon which many of the other studies were based.²⁹

The words of NIETO ARIZMENDIARRIETA are also clear in this respect.³⁰ But my aim here is not to go deeper into the historic analysis of the concept of Historical Rights, but to mention, at least briefly, some of the paradoxes and deep possibilities of this singular legal institution at a domestic level, in order to go further into its particular integration at the EU level as well.

27. This is the core idea of the First additional clause of the Constitution and the whole PSBC.

28. Authors like T. URZAINQUI clearly disagree with the idea of agreement, whereas they consider absolutely evident that the Basque territories were conquered in their entirety through military and violent means at different moments of history. See his enormous historical and legal works clarifying the identity of Navarre as the Historical Basque State, while 'Euskal Herria' continues as its cultural global identity, principally through language. In other words, both are the same body with different titles:

T. URZAINQUI and J. M. OLAIZOLA, *La Navarra marítima*, Pamplona: Pamiela, 1998.

T. URZAINQUI, *Recuperación del Estado propio*, Pamplona: Nabarraide, 2002.

T. URZAINQUI, *Navarra sin fronteras impuestas*, Pamplona: Pamiela, 2002.

T. URZAINQUI, *Navarra Estado europeo*, Pamplona: Pamiela, 2004.

29. M. HERRERO DE MIÑÓN, "La titularidad de los Derechos Históricos vascos", in *Revista de Estudios Políticos*, no. 58, 1987. Charged with drafting and reporting on the 1978 Spanish Constitution he was the first to interpret Basque Historical Titles in terms of the right to self-determination, understood as voluntary integration within a different political-legal framework.

M. HERRERO DE MIÑÓN and E. LLUCH, "Constitucionalismo útil", in *Derechos Históricos y Constitucionalismo útil*, Bilbao: Fundación BBV, 2000.

M. HERRERO DE MIÑÓN, "Autodeterminación y Derechos Históricos", in *Derechos Históricos y Constitucionalismo útil*, Bilbao: Fundación BBV, 2000.

M. HERRERO DE MIÑÓN, *Derechos Históricos y Constitución*, Madrid: Taurus, 2000.

M. HERRERO DE MIÑÓN, *El valor de la Constitución*, Barcelona: Crítica, 2003.

M. HERRERO DE MIÑÓN, "España y Vasconia: presente y futuro (consideraciones en torno al Plan Ibarretxe)", in *Jornadas de Estudio sobre la Propuesta Política para la convivencia del Lehendakari Ibarretxe*, Oñati: IVAP, 2003.

30. E. NIETO ARIZMENDIARRIETA, "Reflexiones sobre el concepto de Derechos Históricos", *RVAP* no. 54, 1999, pp. 142 y 143.

3. SPAIN AND THE FAILURE OF THE RULE OF LAW

Until the situation we find ourselves in today, like any relevant democracy the Spanish system has enjoyed, since 1978, the tools that define the concept of a State under the rule of Law. The main pillars of this system are, of course, separation of powers and respect for Human Rights, both of which act as the real guarantee of individuals within their relations.³¹

During recent years, due in the main to the policies and regulations enacted by José María Aznar (former Spanish Premier) and followed by the Popular Party (PP) and the Socialist Party (PSOE), we have witnessed serious dangers of involution where the separation of powers is concerned, and the dividing lines in this area in Spain have become somewhat diffuse. We have, therefore, been able to perceive a clear tendency to foster a sort of "one-way thinking" in Spain, vis-à-vis minorities who are not well regarded by central government. Let us analyse this through some examples.

3.1. Regarding the separation of powers

It is necessary to remember here that during Aznar's era, even the former President of the Constitutional Court of Spain (Mr Jiménez de Parga) took part in the political debates, including those directly pending under the Constitutional Court. He communicated future judgments of the highest court in Spain to us all in advance, in particular for claims pending and relating to Basque issues, such as the banning of Batasuna (left wing party for Basque independence), *inter alia*. There is an alarming situation of the separation of powers within the Spanish context, mainly due to the role of Mr Aznar, within the term of his mandate (1995-2003). As we will see, this is particularly obvious in matters linked with Basque politics.³²

According to modern political theories and to recent constitutional developments in the European Union, a Constitution is not at all a single recognition of State unity or formal sovereignty as was proposed by Aznar for the case of the Basque nation (Euskal Herria) under the Spanish regime. Nevertheless, any State has the right and the tools to defend its sovereignty under the rule of Law and according to international law. But meanwhile, the real essence of a Constitution pursuant to modern Law is vested in Human Rights and democratic principles.³³ That is also very clear within the proposal for a Constitution of the EU. Human Rights are of course a *sine qua non* requirement for western countries which are directly obliged by EU and

31. See, in that sense, articles 9, 10 & 11 of the PSBC, which assume the widest possible approach towards protection and control of Human Rights.

32. To avoid these sorts of situations, and prevent them from occurring, the PSBC stands for a whole bilateral system of control and guarantees in articles 14, 14 & 16.

33. Arts. 9, 10 & 11 PSBC.

International Law to comply with their respective legal frameworks. I cannot honestly think of anybody who believes in democracy arguing against freedom of expression, political participation or any other fundamental right whatsoever recognised by international and domestic instruments.

Spain and its Constitution are obliged as well to follow these rules (article 10 of the Spanish Constitution, the 1950 European Convention on Human Rights and the 1966 International Covenant on Civil and Political Rights, *inter alia*), but it is also clear that the Spanish Government according to its recent policies has been acting in breach of these rules at the domestic level. There are, at least, two current examples, whilst the Spanish Constitution and the current regulations have been in force, that demonstrate that the separation of powers in Spain has disappeared or is about to do so. All these questions are also, in my view, an open path for self-determination according to international law in force:

3.1.1. The banning of Batasuna

According to the Spanish constitutional system, a political party may only be banned through a criminal judgment (articles 6, 22 and 55 of the Spanish Constitution, Spanish Criminal Code and articles 14.7, 15 and 25 [rights for political participation] of the International Covenant on Civil and Political Rights, 1966). None of those requirements have been fulfilled; Batasuna was banned by means of an administrative *ad hoc* judgment, an *ad hoc* court and through the interpretation of a legal framework promoted only for those purposes. Even before the Constitutional Court gave its OK to the final appeal, its President, Mr Jiménez de Parga, accepted and assumed that judgment in front of the press stating that it was a political necessity.

There is, indeed, a constitutional procedure for banning political parties on grounds of possible eventual criminal behaviour by any of its members. To make this point is not to defend Batasuna, but highlights the fact that the Constitution establishes guarantees.

3.1.2. Closure of the Basque newspaper *Egunkaria*

This is a very similar situation; a restriction on the right of public expression and information is only possible in the Spanish system through a criminal judgment or by a government declaration of state of alarm, or exception. None of those situations occurred (articles 20 and 55 of the Constitution, the criminal code and articles 9 and 19 of the International Covenant on Civil and Political Rights, 1966).

Could it be that in certain issues there is an exceptional enforcement of the Law, even though the Spanish Constitution does not accept such a thing? Could it be that in some places there is a kind of undercover exceptional state? I sincerely believe that the people who live under the threat of ETA survive under exceptional circumstances; in a different sense, in Spain the

Basque issue and Basque society experience a particular and, sometimes, exceptional regime that has come into being over recent years. But, of course, one thing is an exceptional regime promoted by a terrorist organisation and another is an undercover exceptional regime promoted by a government. They are very different things.

3.2. With regard to the enforcement of the rule of Law

The legal and political structure of a State is not something eternal. Nowadays, the undeniable legal issue is the requirement of protection and assumption of Human Rights and democratic principles. A possible solution to these questions could be present, to a certain extent, within the Proposal for a Political Statute for the Basque Country (PSBC) approved by the Basque Parliament (30-12-2004) but rejected by the Spanish Parliament without any kind of previous negotiation (February 2005)³⁴: "Sharing sovereignty, democratic principles and also Human Rights" is the essence of the PSBC and its drafted text to amend the current regime.³⁵ The rest of the issues pending could perfectly well be the subject of negotiation in a democratic system. In a sense, this is also the general consideration made by the Supreme Court of Canada in 1998 regarding the case of Quebec.³⁶

The precarious situation of the Spanish rule of Law could be divided into three different branches: Human Rights, separation of powers and involution in decentralisation. Curiously, there are general examples of the three issues within Spain, but mention must be made, too, of some remarkable occurrences associated with the perception of the Basque issue held by the PP and the PSOE. Another of the main examples is also connected with the powers and duties of the legislative (in particular the Basque Parliament) and the original idea of the former Spanish Premier to avoid any debate on the Proposal of the Basque President either in the Basque or the Spanish Parliament. Aznar's Government insisted before the Constitutional Court on the unconstitutionality of debate on the question in the Spanish Parliament. It was not a regulation or an Act, but a single political proposal for open debate, so according to the Spanish Constitution there was no space for unconstitutionality. Fortunately, the Constitutional Court refused Aznar's thesis in its

34. In this case very clearly, once again, in breach of the Spanish Constitution, specifically, article 151.2. In the same sense, this also went against the provisions recognising a right to negotiate this text through article 137 of the Spanish Parliament Statutory Regulation.

35. See the full English version of the proposal approved by the Basque Parliament (PSBC).

http://www.nuevoestatutodeeuskadi.net/docs/dictamencomision20122004_eng.pdf.

36. More specifically in the principle of the right to negotiate a possible different status for Quebec recognised by the Canadian Supreme Court (Decision of 20-8-1998). See as well arts. 12 & 13 PSBC with a very concrete approach to self-determination based upon the principles stated by the Canadian Supreme Court in 1998 (the right to a bilateral negotiation on the Basque political status).

Judgment of 21-4-2004 and, therefore, accepted the possibility of debate, as it could not decide on the question posed in such terms; and it would only deal with the question at stake if a Law were to emerge as a result of the debate to reform the regime in force.

At the same time, Aznar's government approved an incredible amendment in the criminal code in order to prosecute the Basque President for his intention of calling a referendum in the Basque Country on the mentioned Proposal, once this were approved by the Basque Parliament.³⁷ In both cases, the single objective of Aznar was to prevent this debate in parliament and, moreover, obstruct the competences and "sovereignty" of the legislative, not only in relation to the Basque autonomous legislative, but also where the Spanish Parliament was concerned, as it was to be the next body to analyse the proposal of the Basque President. Of course, Aznar's intention was not at all to discuss the constitutionality of this proposal, but rather to avoid this debate in both Parliaments. To be frank, for him there was no need at all for either of the Parliaments. As a matter of fact, to actually recognise the sovereignty of the people was and might still be very disturbing for Aznar, in spite of the clear statement made in this respect in article 1.2 of the Spanish Constitution.

Regarding the *ad hoc* amendment to the criminal code, the objectives and considerations are very similar. Inclusion of this criminal offence because of the Basque President's intention to call a referendum is a direct violation of articles 9 and 25 of the Spanish Constitution, and of 15 and 19 of the International Covenant on Civil and Political Rights (1966). For the former Spanish President it did not really matter because he was "entitled" to create such a new criminal offence.

There are some more examples that could be subjected to analysis, but let me just point out the very difficult situation affecting the Basque language (Euskara) in the territory of Navarre, with serious restrictions imposed on its use and proven violations of the Constitutional Spanish framework, carried out by Aznar's party, in clear breach of article 27 of the International Covenant on Civil and Political Rights (1966).³⁸

None of these situations encouraged any advance towards a resolution of the Basque conflict on both sides of the Pyrenees, while there is an important part of Basque society whose political participation is severely curtailed at Spanish and EU levels. We should underline, at this point, that Batasuna's lists in the 2004 elections for the European Parliament were legal in France but not in Spain – another peculiar case for EU law and its new "constitutional" approach. In this complicated context, it is likely that a very significant section of Basque society will keep on demanding self-determination in line

37. See the proposal of the Basque Parliament on this matter through article 13 PSBC.

38. Regarding Euskera (the Basque language) see the proposal of the Basque Parliament in article 8 PSBC.

with new developments in International Law and with the recognition of Basque Historical Rights or Titles expressed by the 1978 Spanish Constitution. Indeed, Spain's non-compliance with its own constitutional system constitutes more than a legal reason to continue down the path of Basque self-determination. Meanwhile, the tragic events of Madrid during 11 March 2004 proved to Spanish society the functioning of falsehood and absence of democratic principles in the leadership of Aznar and his government during the days that followed the bombs. Under Spanish rule of Law during those hours there were only three "bodies" telling the truth to the whole country concerning responsibility for the attacks: Al Qaeda, ETA and Batasuna (through Mr Arnaldo Otegi). This is indeed a very high price to pay for a young democracy such as Spain's. In the end, society spoke loud and clear and Aznar was removed by society itself, which should always and must continue to be sovereign in any democracy.

4. BASQUE HISTORICAL TITLES WITHIN THE SPANISH CONSTITUTION AND THE EC-EU CONTEXT³⁹

First Additional Clause of the Spanish Constitution:

La Constitución ampara y respeta los derechos históricos de los territorios forales.

La actualización general de dicho régimen foral se llevará a cabo, en su caso, en el marco de la Constitución y de los Estatutos de Autonomía.⁴⁰

As quoted by HERRERO DE MIÑÓN and T. R. FERNÁNDEZ, the Basque Historical Rights are much more than a mere accumulation of competencies and public bodies. They represent a real legal and political concept, previous to our current constitutional reality and, in that sense, not liable to derogation through any unilateral decision, once the legal nature of contract or agreement has been proven.⁴¹ Co-sovereignty is also present in this idea. Moreover, according to HERRERO DE MIÑÓN, these titles are indeed a constitutional recognition of the right of the Basque Country to self-determination

39. See X. EZEIZABARRENA, *Los Derechos Históricos de Euskadi y Navarra ante el Derecho Comunitario*. Donostia-San Sebastián: Sociedad de Estudios Vascos, 2003, together with the interesting foreword to the book by M. HERRERO DE MIÑÓN.

40. *The Constitution protects and respects the Historical Rights of the "foral" territories. The general updating process of this regime shall be enacted, when appropriate, within the framework of the Constitution and the Acts of Autonomy.* The four foral territories quoted, within the context of this article, had been defined by the Spanish Constitutional Court as Alava, Guipuzcoa, Navarre and Vizcaya.

41. See their works, M. HERRERO DE MIÑÓN, *Derechos Históricos y Constitución*, Madrid: Taurus, 1998 and T. R. FERNÁNDEZ, *Los Derechos históricos de los territorios forales*. Madrid: Civitas, 1985.

in terms of a possible voluntary integration or an open demand for a different political status for the Basque territories.⁴²

In this sense, I would also like to include the words of J. Cruz ALLI (former President of Navarre), during his speech in the debate in the Spanish Senate on the General Commission of Autonomous Communities in 1994. He warned the Senate and the Spanish Premier of the possible consequences deriving from a breach of those agreements due to the actions of the Spanish Government, namely, against the common institution of the Historical Rights of the Basque Country and Navarre; specifically, with regard to a constitutional conflict presented by the central Government and another autonomous community, against some competencies of the government of Navarre in terms of its Historical Rights as expressed in the First Additional Clause of the Constitution.⁴³

To consider the EC-EU system to be the global sum of different approaches by the various states to the question of integration, the domestic particularities of which are expressed in their respective Constitutions, might be the right formula, in my view, for the EC-EU to accept all the above. It would be a productive way of testing the political will of states, both at an internal national level and in relation to the specific constitutional ambit of the EC-EU.

In order to get this into focus and assume its real dimension we may use the institution of Human Rights as an example. They are an inherent prerequisite for membership of the EC-EU system and characteristic of every single one of the Member States. Article 6.1 of the TEU is clear in this sense (article 2 in the Project of Constitution). This is an essential matter because the EU assumes *ab initio* that the nuclear part of its legal regime is not going to be controlled by the EC-EU itself, but through the common constitutional traditions of the Member States. This is indeed directly linked with sovereignty and the rights of individuals who are entitled to demand these rights before any administrative or jurisdictional body.

So, the real existence of a sum of constitutional agreements seems here to be a suitable procedure for recognising those Human Rights at the EC-EU level, even though the EC-EU itself lacks the tools to protect them directly. There is a principle of mutual trust for the protection of Human Rights at

42. See M. HERRERO DE MIÑÓN, *Derechos Históricos y Constitución*, Madrid: Taurus, 1998. See as well my latest work *La ciaboga infinita. Una visión política y jurídica del conflicto vasco*, Alberdania, 2005.

43. *Diario de Sesiones del Senado* (Spanish Senate), V Legislatura, Comisiones, No. 128, 1994, pp. 62 and 63, Comisión General de las Comunidades Autónomas (26-9-1994). J.C. ALLI's speech proved again the peculiar nature of Historical Rights and the eventual consequences of their breach by central Government, contributing at the same time some other historic references. (*Diario de Sesiones del Senado*, V Legislatura, Comisiones, No. 129, 1994, p. 31, Comisión General de las Comunidades Autónomas, 27-9-1994.)

each domestic level. If this is so in such a core matter in our legal systems, there should be a similar principle of mutual trust to recognise and assume the participation of sub-state entities within the whole process, especially in the case of entities possessing powers of legislation and enforcement, or that even take collective Historical Rights as the fundamental starting point for the powers with which they are vested. Such entities, and the Basque Country and Navarre in particular, are singular both in terms of the material content of their competencies, and of the procedures they are endowed with for upgrading them.⁴⁴ Such a process took place without significant problems within the context of Human Rights, whereas previously there was a huge distance between the different systems for protection within each Member State. Today, at last, there is a growing mutual impact in this area through the enforcement of the general principles of Law and the jurisprudence of, principally, the European Court of Human Rights.

This has not been an obstacle against the EC-EU system developing certain frameworks for the protection of Human Rights in matters directly linked with the principles and objectives of European Law. Thus, Human Rights continue to be a relevant part of the EC-EU tradition as a core point with at least three sources of recognition and assumption of Human Rights:

- a) EC-EU Law with the limits mentioned.
- b) International Law, particularly through the ECHR.
- c) The domestic Law of each Member State.

It was actually the existence of a common constitutional tradition that substantially helped to produce the developments mentioned in Human Rights. And this may serve as well to adopt similar approaches in cases where the Historical Rights of certain sub-state entities might be lacking in protection, even though they have direct constitutional recognition as in the Spanish case. This lack might also be considered as a breach of EC-EU Law so long as those Historical Rights do not contravene European Law. Indeed, as against the previous theoretical distance between the Spanish Constitutional Court and the CJEC, we are now facing a mutual situation of interlinkages within the context of Human Rights. And this process was based upon the implementation in both bodies of the general principles of Law as an interpretative pillar for all matters relating to European Law. Non-existence of a real positive charter of Human Rights at the EC-EU level, despite the recognition expressed in TEU article 6, did not prevent the EC-EU from assuming its responsibilities in this area, even through CJEC jurispru-

44. Historical Rights that would find their limits in Human Rights (arts. 9, 10 & 11 PSBC); rights that are recognised within the EC-EU context and as a relevant part of their tradition. Even more so now with the constitutional project pending. That is the real will behind the proposal for a new status (PSBC).

dence that was also inspired, *inter alia*, by the common general principles of Law of the Member States.

So, if in a matter such as Human Rights, the importance of the domestic regime is extremely clear for real protection at EC-EU level, the European bodies, Member States and, eventually, the CJEC should also take up the challenge to define the extent to which Basque Historical Rights should be considered, in this case before the EC-EU, in order to perceive where their limits lie. In brief, to find those common grounds and limits would be a task of the CJEC, whose opinions would undoubtedly follow the grounds supported by the Spanish Constitutional Court, just as that body did in direct enforcement of article 10.2 of the Spanish Constitution.⁴⁵

Within this process, the domestic jurisdictional bodies have been adapting themselves to the portrait made by the CJEC of the relationship between the EC-EU and the domestic level. The conclusion is clear and may suggest to us some considerations in order to adequately interpret the figure of Basque Historical Titles in relation to the whole European system:

1. The CJEC made clear that European law has direct prior enforcement effects. This means that any damage or impact caused by a Member State to citizens and in breach of EC-EU Law will produce liability to be assumed by the Member State.

2. To enforce compliance with the above, the domestic courts have a leading role – expressed at its highest level via Constitutional Courts or similar figures – in the constitutional monitoring of possible violations, and in ensuring the pre-eminence of the domestic Constitutions, as well as the practical implementation of EU Law. That is indeed the task of domestic jurisdictions (i.e. the Spanish Constitutional Court, for the cases of Human Rights and Basque Historical Rights).⁴⁶

However, current reality does not provide real consideration for those Historical Rights within the EC-EU as a substantive part of one of the agreements or covenants that are now present at the EC-EU. This is because of a lack of political will at the Spanish domestic level. An example of this situation is the way Germany, Belgium or Austria dealt with the issue in an absolutely different way from Spain.

45. Article 10.2 of the Spanish Constitution: *Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce, se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificados por España.*

46. Both the Spanish Constitutional Court and similar European domestic bodies are obliged to guarantee European Law, and must even request, for example, a preliminary ruling from the CJEC when they need an interpretative ruling from the European Court (article 234 of the EC Treaty). See also arts. 14, 15 & 16 of the PSBC.

Finally, implementation at the European level of constitutional reality within every social, territorial and legal ambit makes it vital to distinguish the existence of these sub-state complexities that are not easily defined under the general concept of “Regions”. We find here that domestic realities with a constitutional recognition within Member States may require peculiar treatments in order to implement that constitutional scope and singular approach. This can be seen in particular for entities with legislative powers, such as in the cases of the Basque Country and Navarre in accordance with, *inter alia*, their Historical Titles and within some of the most significant competencies in force.⁴⁷

5. CONCLUSIONS

The Basque Historical Titles have been unable to present their peculiarities at the EC-EU level, while some other sub-state entities did so within their respective Member States. In the cases of the Basque Country and Navarre in Spain, their respective scopes of competencies have sometimes been disregarded by the EU-EC system. Even though many authors recognise the federal approach of the European Treaties, this is not so easily seen from the perspective of the Historical Rights analysed here. The principle of respect for the national identities of the Member States (Article 6 of the EU Treaty)⁴⁸ should be a useful tool for granting the legitimacy of the Spanish constitutional agreement on Historical Rights expressed in the Spanish Constitution in terms of a real path towards co-sovereignty between Spain and the Basque territories.

“Useful constitutionalism”, in the terms of HERRERO DE MIÑÓN and LLUCH, requires an implementation of this question at the EC-EU level, and that is clearly granted by the Spanish Constitution.⁴⁹ HERRERO DE MIÑÓN reaffirms his support for this idea in very clear terms.⁵⁰ A similar approach is

47. It is obviously necessary to distinguish the situations and specificities of the German *Länder*, Basque Country or Navarre for example, and some other cases such as those of the French *départements* or the British counties. The case of Basque Historical Rights demands at least three main approaches (article 65 PSBC):

- a) More participation of the Basque and Navarrese Parliaments in the EC-EU institutional activities;
- b) Participation of both delegations within the EU Council of Ministers;
- c) Direct right of standing (*locus standi*) of both entities in appeals to the CJEC in matters affecting their respective competencies.

48. Article 5 for the Project of Constitution.

49. M. HERRERO DE MIÑÓN & E. LLUCH, “Constitucionalismo útil”, in *Derechos Históricos y Constitucionalismo útil*, Bilbao: Fundación BBV, 2000, p. 17.

50. M. HERRERO DE MIÑÓN, “Autodeterminación y Derechos Históricos”, in *Derechos Históricos y Constitucionalismo útil*, Bilbao: Fundación BBV, 2000, pp. 219 & 220; see *Ibid.*, p. 221.

followed by J. Cruz ALLI, who even suggests linkages to connect with the EC-EU process.⁵¹

In that sense, the proposal for a new Political Statute approved by the Basque Parliament (30-12-2004), assuming the right to self-determination through Historical Titles and bilateral negotiation remains a unique opportunity in order to resolve the situation of the Basque territories within the Spanish Constitution and, in particular, where the EU constitutional process is concerned. The path followed already by Germany, Belgium or Austria and their sub-state entities offers clear examples of real participation, integration and co-sovereignty in terms of national and European solidarity.

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51. J.C. ALLI, "Paz y Fueros. Los Derechos Históricos como instrumentos de pacificación", in *Derechos Históricos y Constitucionalismo útil*, Bilbao: Fundación BBV, 2000, p. 329.

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