Political Parties and Terrorism: Why ban \textit{Batasuna}? 

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Abstract  
This article examines the 2003 ban of radical Basque nationalist parties \textit{Herri Batasuna}, \textit{Euskal Herritarrok} and \textit{Batasuna} for their integration in the terrorist group \textit{Euskadi Ta Askatasuna}. It does so by examining the political context in which proscription took place and testing two hypotheses developed from the broader literature on party bans addressing the question: Why do democracies ban political parties? Case study analysis on Spain supports the two hypotheses - that democracies ban anti-system parties when alternative forms of marginalization are not effective and that ‘intolerant democracies’ are more likely to ban political parties than ‘tolerant democracies’.
Introduction
In 2003, the Spanish Supreme Court banned Herri Batasuna (HB), Euskal Herritarrok (EH) and Batasuna, three Basque separatist parties linked to the terrorist group Euskadi Ta Askatasuna (ETA). Since then, the return of Batasuna - effectively successor to both HB and EH - to electoral politics under a different guise has been repeatedly blocked by the courts. The effects of proscription are far-reaching. A banned party may no longer contest elections, loses all entitlements such as access to state funding, and its assets are to be confiscated and sold off by the state (Virgala, 2003-4: 622).

Prior to proscription, ETA’s political wing (henceforth Batasuna) contested elections over some twenty years. At its peak, it was able to win up to five parliamentary seats (231,722 votes) in Spanish general elections (HB, 1982) and fourteen seats (224,001 votes) in the Basque parliament (EH, 1998). In 2011 municipal elections, the electoral coalition Bildu, widely identified with radical Basque nationalists but formally composed of independents and candidates from two legal parties, won 1,137 councillors in the Basque Country and Navarre and became second most voted party in the Basque Country with 26% of the vote.

The long wait to ban HB, EH and Batasuna raises the question: What changed to make policymakers later consider proscription appropriate? The case also permits examination of hypotheses addressing the broader question: Why do democracies ban political parties? Political parties are endowed with primary representative functions and embody fundamental rights of association and expression. A decision to ban a party is therefore a grave decision, even if justified by supporters as necessary to defend liberal values and democracy itself. In this context, it is pertinent to ask why democracies ban political parties; even more so, given that not all democracies deal with the extremist parties by banning them.

There is an extensive literature on the illegalization of political parties. It is dominated by law (Kirchheimer, 1961; Gordon, 1986; Fox and Nolte, 2000; Sajó, 2004; Karvonen, 2007; Corcuera et al, 2008) and political philosophy, where the dilemma of ‘tolerating the intolerant’ has been an issue for centuries (Locke [1689] 1991, Mill [1859] 1998, Rawls, 1972; Waldren, 1981; Scanlon, 2003). Political scientists have mostly focused on the impact of proscription and its effectiveness in relation to alternatives like marginalization of extremists through the electoral system, ostracism and collusion by mainstream parties (Husbands, 2002; Hainsworth, 2008; Norris, 2005: Bale, 2007). In this literature, official justifications for proscription tend to be taken at face value and there has been no systematic, comparative attempt to look behind official rationales. Nevertheless, existing studies permit development of plausible hypotheses that help to explain why democracies ban political parties in general and why Spain banned HB, EH and Batasuna in particular.

After a brief introduction on ETA, its political wing and the legal framework for the proscription of political parties in Spain, I identify possible explanations for the Spanish state’s change of policy on proscription. I discuss the political context in which proscription occurred in Spain. I then consider the validity of two hypotheses developed from the broader literature to explain the proscription of EH, HB and Batasuna in 2003, namely that democracies ban parties when alternatives are not effective and that ‘intolerant democracies’ ban parties.
ETA, Batasuna and the radical Basque nationalist left

**Euskadi Ta Askatasuna** (ETA, Basque Homeland and Freedom) was founded in 1959 during – and as a response to the repression of - the dictatorship of General Francisco Franco. ETA was formed by a small group of Basque youths dissatisfied with the civil war generation of Basque nationalists and the dominant *Partido Nacionalista Vasco* (Basque Nationalist Party, PNV). The group sought to establish an independent socialist state, encompassing Basque provinces in Spain and France (Jáuregui, 2002; Muro 2005, 571-89). General Franco’s death in 1975 and the ensuing democratic transition prompted one faction - ETA político militar (ETA political military) - to form a political party, *Euskadiko Ezkerra* (Basque Left), which took part in democratic elections, constitutional and Basque autonomy statute debates, and eventually renounced violence (de la Granja, 2003: 136).

The largest faction – ETA militar (ETA military) – continued to conceive the Basque Country as an occupied territory and pursued armed struggle to achieve national liberation. Soon known simply as ETA, it rejected new democratic institutions established in the 1978 Constitution for not recognizing a Basque right to self-determination, and a 1979 Autonomy Statute devolving political power to new Basque institutions for being an obstacle to independence. In response it mounted a massive campaign of terror against the democratization process. Since its first confirmed killing in 1968, ETA has killed 829 people and has injured kidnapped and extorted thousands of others.

In the early 1960s, ETA pursued revolutionary war and military defeat of state security services in Basque territories (Ibarra, 1987: 58-61). By 1965, it adopted a ‘spiral of violence’ (or action-repression) strategy, where violence was used to provoke increased state repression and eventually popular insurrection against the Spanish state (ibid). Consolidation of democracy and significant support for new institutions of Basque self-government1 prompted a new strategy where violence was employed to force state authorities to negotiate from a weak position and accept demands of the Alternativa KAS, including: total amnesty; expulsion of state security services from Basque territory; improved living and working conditions for Basques; recognition of Basque national sovereignty, right to self-determination and independent statehood; and adoption of the Basque language (*Euskera*) as official and primary language (ibid, 99-100).

This orientation to violence is grounded on an interpretation of Spanish democracy as repressive and ‘anti-Basque’ (Muro, 2005: 584-5; Mata, 1993: 279-287). Spanish democracy is seen as a continuation of Francoism and at best a ‘pseudo-democracy’: For the paramilitaries and their supporters, dictatorship and democracy contained strong anti-Basque elements with real power, including the Church, army and mass media (Muro, 2005: 584-5; Mata, 1993: 280-2). While the utility of violence is now openly disputed in the radical Basque nationalist movement more generally, in the first decades of the democratic period, it was widely seen as an effective instrument for pushing the government to negotiate independence; shaping broader political, economic and social conditions in the Basque Country; communicating the intensity of dissatisfaction with the status quo; and keeping the Basque nationalist project alive through constant agitation and consciousness-raising (Mata 1993: 279-83). These views led many radical
Basque nationalists to rationalize ETA’s violence by comparing it with violence employed by state (Ibid, 285-6).

In 1975, radical Basque nationalists established the Koordinadora Abertzale Sozialista (KAS, Patriotic Socialist Coordinator) (Llera 1992; Mata, 1993: 95-131). Although it initially involved both ETApm and ETAm, disputes about participation in the 1977 elections prompted ETApm and supporters to leave (Domínguez 2006: 335). KAS came to include the movement’s leading political party (Herriko Alderdi Sozialista Iraultzailea, HASI, dissolved in 1992), trade union, youth and women’s organizations.

KAS was to establish the line of action for participating groups, for Herri Batasuna (HB) and the whole social tapestry of groups supporting ETA - religious, cultural, ecological, women’s, students’ and among others. In 1978, a coalition of parties, including HASI, formed HB as a vehicle to represent ETA and the izquierda abertzale in elections.

Euskal Herritarrok (EH) emerged in 1998 as an electoral coalition, dominated by HB. It was refounded as Batasuna in 2001.

Collectively, ETA and this wide circle of supporters was known as the Movimiento de Liberación Nacional Vasco (Basque National Liberation Movement, MLNV) or more generally, the izquierda abertzale (radical nationalist left) (Domínguez, 2006: 274; Llera, 1992: 183-6). It was both a social movement and an instrument by which ETA sought to achieve independence through negotiation with the Spanish state (Mata, 1993: 95-131). Its presence could be felt in many spheres of social life – including sports, Basque language schools and bars (Herriko Tabernas) (Mata, 1993: 104). Various scholars have associated the movement’s radical nationalism with ‘political religion’ observed in an elaborate set of symbols, liturgy and rituals, including public commemoration of the so-called gudari (Basque soldier) who sacrificed life or personal freedom for Basque independence (Casquete, 2009, see also Isaskun, 2002).

ETA was its catalyst, theorist, source of cohesion and enforcer, a power which, according to Mata, derived from a legitimacy, or the ‘symbolic capital’, generated by its life and death struggle with state security forces; its ability to intimidate dissenters; and tight control over the composition of key bodies, including HB (1993: 112). The MLNV embodied a division of labour (desdoblamiento), where ETA remained the military vanguard but others held different roles (Mata, 1993: 111). HB was to represent the MNLV in the electoral arena (Mata, 1993: 124). However, its role was not so much to pursue power through access to public office, although HB and its successors won many votes and governed in various municipalities. Rather, HB was conceived as a tactical instrument pursuing the ‘accumulation of forces’ (acumulación de fuerzas): Its principal raison d’être was to strengthen the MLNV and the cause of independence by taking on various social grievances and becoming a focal point for Basque radicalism of all kinds (Mata, 1993, 124-7). The ‘symbiotic relationship’ between HB, KAS and ETA was reflected in the presence of ETA in KAS; the presence of KAS organizations in the directorate (mesa nacional) of HB; and the presence of various ETA convicts among HB, EH and Batasuna’s leadership, elected representatives and candidates (Mata, 1993: 123-7; Muro, 2008: 127-31)

The proscription of political parties in Spain

The Spanish Constitution does not explicitly permit the dissolution of political parties. However, article 6 requires that, while parties can be freely created, they must ‘respect
the Constitution and the law’ and be ‘democratic in their internal structure and functioning’. Furthermore, as a specific form of association, political parties are subject to article 22 which explicitly prohibits secret and paramilitary associations and declares that ‘associations which pursue ends or use means classified as crimes are illegal’. Illicit associations, defined in article 515 of the Spanish Penal Code, includes terrorists, other violent groups and those promoting or inciting hate, violence or discrimination against others (de Otto, 1985: 67-8, Esparza, 2004: 117-20).

The Organic Law on Political Parties (LOPP) adopted in June 2002 sets out three grounds for banning parties: illicit association as defined in the Penal Code, non-democratic internal functioning and structure; and conduct threatening to undermine the liberal democratic system. This last justification for proscription – soon used to ban HB, EH and Batasuna - permitted the courts to dissolve parties which ‘violated democratic principles in a repeated and grave form, or aimed to undermine or destroy the regime of liberties, or injure or eliminate the democratic system’ (LOPP, article 9.2). Conduct deemed to violate democratic principles, outlined in article 9.2a-c, was:

- promoting, justifying or excusing of attacks on people’s life or integrity, or exclusion or persecution of people because of their ideology, religion or beliefs, nationality, race, sex or sexual orientation
- Encouraging, promoting or legitimizing violence as a means to achieve political goals, or destroying conditions necessary for democracy, pluralism and political liberties
- Complementing or supporting politically, the activities of terrorist organizations which aim to subvert the constitutional order, gravely alter public peace, create a climate of fear, or enhance the effects of fear and intimidation generated by terrorist violence (article (9(2) a-c)).

In the 1980s, the judiciary overruled government attempts to exclude HB from the political arena by denying it formal registration as a political party (Esparza, 2004: 145). The 2003 ban on HB, EH and Batasuna was therefore the first time democratic Spain had banned parties. The government and Public Prosecutor sought to establish that these parties were subject to strategy and mandates of ETA (Vírgala 2003-4: 614). A special chamber of the Supreme Court, which has jurisdiction in cases where parties violate democratic principles, concurred. It ruled that HB, EH and Batasuna, or its leading members, had explicitly or tacitly supported, excused or minimized the significance of terrorist actions; tried to neutralize and isolate opponents of terrorism; used terrorist symbols; collaborated with organizations supporting terrorism; and promoted or participated in acts of homage to terrorists (Tajadura and Vírgala, 2008: 70-2). This ruling was later endorsed by both the Spanish Constitutional Court and the ECHR.

To block successor parties, the Supreme Court subsequently denied registration to two parties (Abertzale Sozialisten Batasuna and Sortu); dissolved to parties (Acción Nacionalista Vasca and Partido Communista de las Tierras Vascas); and disqualified the two party lists for particular elections (Accion Nacionalista Vasca and Askatasuna) (Pérez-Cruz and Ferreiro 2009; Tajadura and Vírgala, 2008). Some five hundred lists of candidates presented by electoral groupings have been disqualified for local, provincial, autonomous community and European Parliament elections (including Autodeterminaziorako Bilgunea, Herritarren Zerrenda, Aukera Guziak, Abertzale Sozialistak, Democracia Tres Millones) (Iglesias 2008; Pérez-Moneo 2005). In 2009 and 2011 respectively, the Constitutional Court rejected Supreme Court rulings that
Iniciativa Internacionalista-La Solidaridad Entre los Pueblos and Bildu were instruments of ETA, but endorsed all other rulings against the mentioned successor parties, coalitions and electoral groupings.

**Why Ban Batasuna in 2003?**

Regimes in transition from authoritarianism to democracy, such as Spain after Franco’s death in 1975, face challenges which make party bans more compelling (Bourne, forthcoming). Transitions are typically characterised by political tension, polarisation and uncertainty, and the threat of counter-revolution or takeover by anti-democratic forces (Karl and Schmitter, 1991; Huntington, 1991: 109-164). This has led some new democracies, such as Germany, Italy, Austria, Russia and Latvia, to ban parties associated with the old regime or other potentially destabilising forces (Bourne, ibid). Other new democracies, however, elected not to do so, including Spain in the 1970s and early 1980s.

Studies on party bans in Africa (Hartmann and Kemmerzell, 2010: 648) and Huntington’s comparative work on democratic transitions (1991: 211-231) suggests ‘modes of transition’ may account for different orientations to proscription: Party bans are *more* likely in transitions involving opposition-led change and installation of a new set of political rulers and *less* likely in more consensual transition process. In the latter, ‘more parties are involved in the transition itself and are stakeholders that cannot be excluded by legal fiat’ (Hartmann and Kemmerzell, ibid).

Spanish practice accords with this hypothesis. Democratization has been widely characterised as consensual, founded on compromise between regime reformers, led by Prime Minister Adolfo Suárez and Franco’s appointed successor King Juan Carlos, and opposition socialist, communist and predominantly Catalan minority nationalists (Carr and Fusi, 1981; Preston, 1987). Even though radical Basque nationalists associated with ETA actively and violently sought to undermine the democratization process (Domínguez, 2006) transition leaders explicitly rejected constitutional provisions which might endorse a ‘militant’ approach to the proscription of extremist parties (Blanco, 1990: 124-9). Ferreres explains this preference as ‘a reaction against forty years of dictatorship, during which all political parties were illegal’ and as a protection against the ‘wishes of some conservative forces during the transition to democracy who would have liked to exclude the communist party and other leftist organisations from the new democracy’ (2004: 141). However, by the time HB, EH and *Batasuna* was banned, Ferreres argued, there had been a paradoxical reversion to an ‘underlying tendency to repression in [Spanish] culture…as memory of Franco’s dictatorship recedes’ (2004: 153). Vidal also associates the decision not to ban the parties with the conditions of democratization, suggesting that earlier ‘excessively tolerant attitude(s)’ to ‘enemies of democracy [like *Batasuna*]’ reflected Spain’s weak democratic tradition (2009: 249).

The political context of Basque politics changed significantly in years prior to the proscription. In the mid-1990s, ETA and its supporters unleashed a wave of violence on the streets of the Basque Country and widened the targets of terrorist attacks beyond police and security service personnel to journalists, civil servants, judges, academics and politicians from the main political parties (Muro, 2008, 155-7). It aimed to ‘socialize the pain’ of nationalist struggle, create social tensions and force Basque citizens to openly take sides (ibid). However, the brutal kidnapping and assassination of
Popular Party councilor, Miguel Ángel Blanco mobilized millions in the Basque Country and beyond against ETA, bolstered a Basque peace movement and prompted closer cooperation between mainstream parties on security policy (ibid). With the support of the opposition Socialists, the Popular Party government of José María Aznar took a tougher line on ETA and its supporters, culminating in the 2000 Agreement for Liberties and Against Terrorism, and ultimately the LOPP.

Furthermore, in 1995 ETA adopted a new strategic framework, the Alternativa Democrática, heralding a period of sharp polarization in Basque politics (Domínguez, 2006: 410-11, 431; Muro 2008). The new strategy opted to advance sovereignty through joint action with other Basque nationalist parties and groups, later formalized in the 1998 Lizarra Agreements. This produced a short-lived Basque ‘nationalist front’, involving both radicals and moderates, produced a temporary ETA ceasefire but deepened tensions with the so-called ‘constitutionalists’, who were intent on maintaining the status quo against the nationalists’ independence agenda. It also ended a decade-long period of cohabitation between the statewide Socialists and moderate Basque nationalists in the government of Basque institutions. According to Blanco, the Lizarra process convinced Spanish political elite that it was no longer realistic to hope for integration of extremists through the electoral process (2004: 48).

The consolidation among policy-makers and the judiciary of a new, more comprehensive concept of ‘the terrorist’ is also relevant (Esparza, 2004: 19; Tajadura and Virgala, 2004: 53-5). Prior to proscription of HB, EH and Batasuna, Judge Baltazar Garzón led the Audiencia Nacional (a tribunal empowered to try important cases including terrorism) in the development and application of a new conception of ETA as a ‘complex structure’ integrating both terrorist commandos and supporting organizations and networks (Aviles 2010: 48; Tajadura and Virgala 2008: 53). Application of the concept lead to closure of the radical Basque nationalist daily newspaper Egin and radio station Egin Irratia in 1998 and the illegalization of the youth groups, Jarrai/Haika and Segi, for integration in ETA in 2005. The coordinating body, KAS and its successor, EKIN, were banned, in 1998 and 2001 respectively, for forming part of a terrorist group, as were the international affairs association Xaki, and the ETA prisoners’ lobby, Gestoras Pro Amnistia. Moreover, prior to the application of the LOPP and judicial suspension of HB, EH and Batasuna in the Supreme Court, the Audiencia Nacional suspended all of Batasuna’s political activity for three years (later extended to five) as a precautionary measure during investigations into its involvement in ETA. The breakdown of ETA’s 14 month ceasefire in 1999 and September 11 2001 attacks in the United States and helped harden attitudes on terrorism (Esparza, 2004: 19).

Such context-specific or local variables undoubtedly contribute to a deeper understanding of the reasons why a specific democracy bans political parties. To explain variation across democracies, however, it is necessary to formulate hypotheses that shine light on why some democracies ban parties but others do not. In the following two sections, I develop two such hypotheses to assess their utility for explaining proscription of HB, EH and Batasuna in Spain.

Democracies ban parties when alternatives are not effective
Many have cautioned against the use of proscription. The authoritative *Guidelines on the Proscription and Dissolution of Political Parties and Analogous Measures* drawn up in 1999 by Venice Commission, for instance, sees it as ‘a particularly far-reaching measure [which] should be used with utmost restraint’ and urges governments to consider using ‘less radical measures’. Nor is it not certain that proscription is an effective instrument. While some argue that proscription may be punishing for the targeted party (Tilly, 2005: 218), others argue that it may lead to radicalisation, a growth of militancy and readiness to use violence (Minkenberg, 2006: 36). The party is not a suitable mechanism for the ‘civic re-education’ of extremists (Husbands, 2002: 64).

Moreover, there are many measures short of a ban which democrats use against those who challenge the political status quo (Husbands, 2004; Capoccia, 2001; Pedahzur, 2004; Hainsworth, 2008). If willing to tolerate participation of anti-system parties in the public sphere, and particularly in elections, mainstream parties may collude to keep extremists out of political office, prevent their members from obtaining employment in sensitive civil service positions and criminalize controversial or offensive speech acts and symbols. Electoral rules, party funding, and media access regimes may be designed to disadvantage new and small parties, including anti-system parties. Competitors may try to steal their policies, members and even elected representatives. The state may support (financially or otherwise) civil society initiatives against messages and activities of anti-system parties or implement longer-term educational and social initiatives, such as anti-racism campaigns and ‘civics’ classes. Strategies of integration may also be employed: A realistic prospect of participation in government, or some form of influence over state policy, may provide incentives for anti-system parties to soften its party line. Authorities may address their grievances and thereby limit their electoral appeal.

Electoral rules may be a particularly potent tool for marginalising anti-system parties. Various authors have observed, for instance, that proscription of anti-system parties may be more necessary in countries like Israel - which uses proportional representation, a single nationwide constituency and low threshold (1.5%) - than in countries where small parties face higher hurdles to win seats, such as in the United States, with its plurality, single member district system, or Germany, which employs a 5% threshold for parliamentary representation (Navot, 2008: 747; Gordon, 1987: 395). Similarly, the marginalising effects of the double ballot system on the electoral fortunes of the National Front in France have also been widely noted (eg Hainsworth, 2008: 124; Norris, 2005: 107). Observations about the effects of electoral rules on anti-system party success have been confirmed for a larger set of cases in Norris’ work on electoral systems and the far right (Norris, 2005). In addition to obstacles at the nomination stage, Norris argued that electoral system type (majoritarian, combined or proportional) was critical in constraining the legislative influence of extreme right parties (ibid: 114). Legal thresholds also exerted a critical effect on legislative representation.

Some have even argued that alternatives to proscription may be more effective than, or have an equivalent effect to proscription. Sartori has argued that in some instances electoral thresholds, plurality electoral systems and small electoral constituencies may have an effect equivalent to that of a party ban (2001: 99). Husbands’ suggests that ‘criminal prosecution and imprisonment of individual members of the leadership [may be] more effective or may by default amount to the same thing [as proscription]’ (2002:
In the case of party bans in Belgium, Bale has argued that withholding state funds may be as effective as proscription (2007: 114).

These considerations the following hypothesis to explain the proscription of political parties, namely:

1. Parties are banned only if alternative forms of marginalization are not effective.

Effectiveness can be defined in two ways. Anti-system parties may undermine the legitimacy of democratic regimes (Sartori, 2001, 132-3), but they pose their greatest threat when able to influence or control government. Or in other words, they are most dangerous when they have what Sartori calls ‘coalition potential’: they actually govern, enter a coalition government and/or support a government, enabling it to take office or stay in office (ibid: 123). More subtle effects of anti-system parties on mainstream parties are captured by the concept ‘blackmail potential’, which occurs ‘whenever [a party’s] existence, or appearance, affects the tactics of party competition…of governing oriented parties’ (ibid, 123). Blackmail potential can be measured by an anti-system party’s ‘veto power’ or its ability to vote down legislation in parliament (ibid, 123-4). In short, measures other than proscription can be considered effective if they prevent targeted parties from obtaining ‘coalition potential’ or ‘blackmail potential’ at state or other territorial levels with significant lawmaking powers.

A second measure of effectiveness focuses on the evolution of the targeted party’s ideological programme and orientation to violence. Anti-system parties can and do change their spots, as the evolution of various West European communist parties and the notable transformation of Italy’s two mass parties of the extremes attests (Ignazi, 2004). In short, measures other than proscription, particularly strategies of mainstream parties to isolate, exclude or neutralize the targeted party, can be considered effective if they lead the targeted party to moderate its programmatic objectives, unambiguously eschew violence and accept the legitimacy of liberal democratic institutions (at least in the medium term).

How effective were alternatives to proscription in Spain?

As Table 2 demonstrates, the electoral system has not prevented HB, EH or Batasuna from obtaining ample representation in Basque political institutions and at least a modest presence in the Spanish parliament.

Table 2: Electoral Results, HB, EH, Batasuna and PCTV
Spanish parliament (Congress of Deputies)

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<th>Elections</th>
<th>Votes</th>
<th>% votes</th>
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<tr>
<td>1979</td>
<td>172,110</td>
<td>0.96%</td>
<td>3</td>
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<tr>
<td>1982</td>
<td>210,601</td>
<td>1%</td>
<td>2</td>
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<tr>
<td>1986</td>
<td>231,722</td>
<td>1.15%</td>
<td>5</td>
</tr>
<tr>
<td>1989</td>
<td>217,278</td>
<td>1.06%</td>
<td>4</td>
</tr>
<tr>
<td>1993</td>
<td>206,876</td>
<td>0.88%</td>
<td>2</td>
</tr>
<tr>
<td>1996</td>
<td>181,304</td>
<td>0.72%</td>
<td>2</td>
</tr>
</tbody>
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Basque parliament

<table>
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<th>Election Year</th>
<th>Votes</th>
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Election of the 350 deputies in Spain’s lower chamber, the Congress of Deputies, occurs using a closed list variant of proportional representation (Gunther et al., 2009). There are 52 multimember constituencies corresponding to provincial boundaries and a three percent threshold applied at constituency level. In addition to the relatively large number of constituencies, proportionality is reduced by the d’Hondt method of seat allocation and large differences in constituency size. However, disproportionality largely affects the left, rather than minority nationalist parties, like HB, which tend to have a geographically concentrated support bases.

Since the first democratic elections in 1977, minority governments have been formed at state level in six out of ten parliaments, mostly supported by minority nationalist and regionalist parties. Despite its small share of the vote, HB could be considered politically relevant because during four of the five parliamentary terms where it contested elections, parliamentary arithmetic gave HB at least a theoretical ability to veto legislation (blackmail potential, in Sartori’s terms). However, ETA’s strategic decision not to participate in legislative institutions derived from the 1978 Spanish Constitution meant it did make use of this opportunity (Domínguez, 2006: 279).

The 75 Basque parliament deputies are elected using a closed list variant of proportional representation with multimember constituencies based on three historic territories (Álava, Guipúzcoa and Vizcaya) (Llera, 1999). Each historic territory returns 25 deputies to the parliament, which reflects historic, foralist traditions of provincial autonomy, but which also produces great inequality of votes given large differences in population among them (Llera, 1999: 7). Nevertheless, ‘the Basque electoral system is the most competitive, most open to opportunities for small parties and the least disproportionate [in Spain]’ (ibid: 9). In the context of a highly fragmented and polarized party system, HB (or EH or Batasuna) had little difficulty coming second after the first electoral contest, in third place after the next five elections and fourth in the last two elections it contested.

In the Basque Autonomous Community, HB influence mostly took the form of ‘blackmail potential’, until 1999-2009 when it took the form of ‘coalition potential’. A radicalization of moderate Basque nationalist parties in the context of the Lizarra process led moderate nationalists (principally the PNV) to abandon a pattern of coalition government formation cutting across the Basque nationalist – non-Basque nationalist political cleavage in favour of predominantly Basque nationalist coalition government. In this period, the parties linked to ETA became ‘a “referee” in many parliamentary votes, at times blocking bills and projects and thus virtually paralyzing the Basque parliament’ (Mata 2005, 85) and a partner of governing nationalist parties.
During the late 1980s and early 1990s, Spanish parties achieved an unusual degree of unity on core issues of state terrorism policy and Basque self government and this lead to a sustained period of political isolation for ETA and HB (Domínguez 2006; Mees, 2003). Agreement was articulated in a series of pacts, the most important of which was the 1988 Pact of Ajuria Enea, which was signed by all Basque political forces except HB. The significance of this pact for ETA-HB was the distance marked by PNV, which was ETA and HB’s most effective ally in any Basque nationalist front (Domínguez, 2006: 340-5 and 361-2). However, in the long-term, collaboration among Basque nationalist and state-wide parties to isolate ETA and HB was unsustainable. In 1998, ETA reached a secret agreement with the PNV and another Basque nationalist party, Eusko Alkartasuna (Basque Solidarity, EA) – later formalized in the 1998 Lizarra pact - where in exchange for an ETA ceasefire, mainstream Basque nationalist parties would cut ties with statewide parties, abandon acceptance of the institutional status quo and pursue new sovereign institutions for the Basque Country (Mees, 2003:139-164). The Basque nationalist front was short lived, but damage to relations between Basque and non-Basque nationalist parties meant there has been no return to the era of Ajuria Enea.

In sum, the electoral system has not served as an effective alternative to proscription. ETA’s political wing has been successful in elections at various territorial levels. It has had many opportunities to influence public policy through parliamentary politics, but has not always chosen to exercise this influence. Efforts isolate Batasuna politically have not been sustainable in the longer-term, due to deep divisions between state-wide and Basque nationalist parties.

As the political wing of a terrorist group, the political fate of Batasuna has been closely linked to the effectiveness of state security operations against ETA. In the early 1980s, the Grupos Antiterroristas de Liberación (GAL, Antiterrorist Liberation Groups), a group later shown by the courts to be the creation of senior figures in the interior ministry and security services, assassinated 29 people they believed to be members of ETA (Bew et al, 2009: 200-205; Domínguez, 2006: 312-4). More conventional methods included major security service operations in Anglet (1987), Sokoa (1986) and Bidart (1992), which led to the detention of hundreds of alleged ETA members and the capture of crucial information about its finances and organization. More recently, police were able to shut down most commandos responsible for a wave of ETA attacks in 2000-1 and dismantled ETA’s logistics network and found major stores of weaponry in 2004 (Domínguez, 2006: 412-18). The capture in February 2010, of Ibon Gogeaskoetxea, leader and military head of ETA, was the fifth time in 2 years that the police were able to dismantle ETA’s leadership.⁶ Cooperation with France since the mid-1980s has been crucial for achieving these results.

As mentioned above, the proscription of Batasuna coincided with the illegalisation of many other organizations linked to ETA and the incarceration of many leaders of the radical Basque nationalist left. Furthermore, Spanish central governments have tried to initiate, or have responded to overtures from ETA for a negotiated end to violence. In 1981, government negotiations with one faction of ETA – ETA político-militar – led it to renounce violence and to channel its political activities through the political party, Euskadiko Ezkerra (Mees 2003: 62-66). However, all other attempts at dialogue have so far failed to bring ETA to abandon violence (Bew et al, 2009: 206-237; Dominguez 2006). Notable efforts at dialogue include around a dozen meetings between 1986-9, culminating in the ‘Algerian conversations’; a series of meetings between 1998-9
leading to the ‘Zurich conversations’; and most recently, a series of meetings in 2005-7 between Spanish government and ETA representatives, and between Basque parties (PNV, Basque socialists and Batasuna). During these encounters, ETA has always insisted that recognition of a right to self-determination for Basque citizens in France and Spain was a precondition for a permanent cessation of violence. Hitherto, this is a condition the central government has been unwilling to accept. Dialogue has also faltered over ETA’s willingness to initiate or sustain a ceasefire (ibid).

Together, these measures appear to have lead to a significant decline in ETA’s capacity to conduct acts of violence. Successive police and security operations have, by almost all accounts, undermined ETA’s military capabilities (Alonso 2010; Buesa 2009; Bew et al 2009: 230). More importantly, there has been a decline in positive evaluations of ETA in Basque society more generally (Llera, 1999) and the legitimacy of violence is being increasingly questioned in the radical Basque nationalist left itself. For most of the democratic period, ETA has been able to maintain its leading role over the radical Basque nationalist left (Domínguez, 2006; Muro 2008). However, critiques emerging from dissidents in HB and among some ETA activists in prison – over conduct of various negotiations, rapprochement with PNV, use of prisons privileges and specific high profile attacks, such as the kidnap and assassination of PP councilor Miguel Ángel Blanco – have been harder to suppress (Domínguez, 2006).

Nevertheless, the detrimental effects of counter-terrorism measures, declining support and internal crises, did not lead ETA or its political wing to unambiguously eschew violence before 2003 when HB, EH and Batasuna were banned. Up until then, ETA had declared ceasefires of varying duration on eight occasions -1981, 1988, 1989, 1992, 1996, 1997, 1998, 1999 (Buesa, 2009: 245) - mostly coinciding with efforts to initiate or conduct negotiations with the central government. None of these produced an agreement whereby ETA or HB, EH or Batasuna were willing to abandon violence. This supports the hypothesis that proscription was a measure taken when other measures had not been effective.

‘Intolerant’ democracies ban political parties

In 1995 (republished in 2000) Gregory H Fox and Georg Nolte, developed a distinction between ‘tolerant’ and ‘intolerant’ democracies based on a) prevailing conceptions of democracy embedded in state constitutional and legal orders and b) practice in relation to party bans. In their theory, a distinction between ‘procedural’ and ‘substantive’ democracy is central. A ‘procedural model’ draws on Schumpeter’s (1947) conception of democracy as an institutional arrangement for choosing leaders and determining the political preference of majorities. The views of all citizens are given equal consideration and the primacy of majority rule as a basis for legitimacy limits state authority to select among competing views. The individual’s capacity for reason, a continual process of self-examination and knowledge of alternatives strengthen public commitment to democracy, but cannot ensure it will always emerge victorious. In the procedural model, tolerance is a transcendent norm of democratic society. This ‘rough approximation of actual state practice’ (ibid: 406) takes more concrete form in specific characteristics of democratic legal-constitutional systems, the most important of which is the absence of substantive limits on Acts of Parliament, or absence of restrictions on the scope of constitutional change (see table 1 below) (Ibid 406-8.)
In a ‘substantive democracy’, by contrast, democratic procedure is principally seen as a means for creating a society where citizens enjoy core rights and liberties. It draws on Mill ([1859] 1998), Rawls (1972) and others in its insistence that rights cannot be used to abolish other rights, and that a democracy need not tolerate the intolerant when its core values are at stake. An unalterable democratic core deserves special protection against possible incursions. The most important characteristic of a substantive democracy’s legal constitutional system is the inclusion of specific prohibitions on amending core constitutional commitments to democracy or other core features of the constitutional order (see table 1 below).

<table>
<thead>
<tr>
<th>Table 1: Procedural versus Substantive Democracies</th>
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<tbody>
<tr>
<td><strong>Procedural</strong></td>
</tr>
<tr>
<td>No substantive limits on Acts of Parliament; or</td>
</tr>
<tr>
<td>No restrictions on the scope of constitutional amendment; or</td>
</tr>
<tr>
<td>Most constitutional scholars will consider proscription of parties unconstitutional</td>
</tr>
</tbody>
</table>

Secondly, Fox and Nolte distinguish between states which actively (or militantly) employ measures against such actors and those which do not (passive or tolerant), even when their legal system may permit them to do so. When combined with the above-mentioned distinctions between active-militant and passive-tolerant state practices, four categories emerge: tolerant procedural, militant procedural, tolerant substantive and militant substantive democracy. The model is summarized in Figure 1.

### Figure 1: Fox and Nolte’s Model of ‘Tolerant’ and ‘Intolerant democracies’

<table>
<thead>
<tr>
<th>Passive-tolerant</th>
<th>Substantive democracy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tolerant procedural democracy</strong></td>
<td><strong>Tolerant substantive democracy</strong></td>
</tr>
<tr>
<td>Britain, Botswana, Japan</td>
<td>France, Canada, India</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Active-militant</th>
<th>Substantive democracy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Militant procedural democracy</strong></td>
<td><strong>Militant substantive democracy</strong></td>
</tr>
<tr>
<td>United States (1940s, 1950s)</td>
<td>Germany, Israel, Costa Rica</td>
</tr>
</tbody>
</table>

Fox and Nolte’s analysis provides the most developed and influential classification of democratic state orientations to party bans. Its principal advantage is that it generates the hypothesis and, on the basis of empirical case studies, the prediction, that procedural
democracies are less likely to ban political parties. The very definition of a procedural democracy seems to lead to the conclusion that this type of democracy is unlikely to ban a political party, given a commitment to ‘open debate and electoral competition among all ideological factions…as a touchstone of legitimacy’ (ibid, 389). In contrast, alternative approaches associated with concepts like ‘militant’ or ‘defending’ democracy are useful descriptive devices but have limited utility for explaining party bans.⁷

The concept of ‘militant democracy’ is usually traced to Karl Loewenstein’s (1937) appeal for robust responses to fascism in Europe. Over the postwar period, the meaning of this term has tended to expand from a narrow focus on measures to prevent fascist and communist parties using democratic entitlements to gain control of the state (eg, Loewenstein, 1937; Kommers, 1976: 238) into shorthand for a much wider range of measures employed against all kinds of extremist threats (eg. Sajó, 2004; Thiel, 2009; Macklem, 2010). Various scholars have rejected militant democracy as an explanatory concept, on the grounds that it is too vague, too imprecise or too narrow in its predominant focus on legal instruments (Mudde, 2004: 197-201; Pedahzur, 2004: 109-10; Thiel, 2009, 384). However, in the study of party bans, the most significant problem with the concept of militant democracy in much current usage is that it has been stretched (Sartori, 1970) to such a degree that it is no longer possible to identify an alternative, non-militant democracy. In other words, if all democracies are in some sense militant democracies, as some explicitly state but many imply (Thiel, 2009:384; Vidal, 2009: 260), efforts to explain variation in the choice of measures employed against political extremism cannot be explained by the fact of their so-called militancy.

Ami Pedahzur’s work on ‘defending democracies’ provides a more elaborate and comprehensive approach distinguishing between more belligerent ‘militant’ responses to extremism and less-belligerent ‘immunized’ responses (Pedahzur, 2004: 111). An ‘immunized’ route will deal with subversive acts in a more comprehensive and liberal manner, will renounce extensive use of legal and administrative restrictions on extremists, will try to involve civil society groups and to inculcate democratic values through education (ibid: 115-16). In contrast, a state taking a ‘militant’ route is willing to employ measures which may undermine democratic standards, will make extensive use of special police and security services and has little interest in promoting the democratic socialisation of citizens through education or providing opportunities for civil society initiatives (ibid). While one might reasonably expect a state taking the ‘militant’ route to be more likely to ban a party because of its preference for high intensity and narrowly focused measures, Pedahzur’s case study analysis clarifies that this is not the case: Ban proceedings in Germany and Israel were conducted in accordance with strong commitments to liberal values, and for that reason were characteristic of an ‘immunized’ response to extremism (ibid: 119-120). Nevertheless, there are problems with Fox and Nolte’s model which suggest the need for further development along the lines of Figure 2 below. In the first place, combination of the two variables – procedural versus substantive and inactive-tolerant versus active-militant – generate inconsistent expectations about political outcomes. As noted above, the definition of procedural democracy as ‘open to debate and electoral competition among all ideological factions’ (Fox and Nolte, 2000: 389) generates the expectation that procedural democracies are less likely to ban political parties. And yet an orientation of active-militancy acknowledges the empirical reality that procedural
democracies do in fact ban parties. This problem is particularly apparent in Fox and Nolte’s category of militant procedural democracy (see figure 1 above). Another problem is a form of what Sartori calls mislabelling (1991: 247-8). Fox and Nolte’s use of the term ‘tolerant’ as a synonym for a passive orientation to proscription produces an uncomfortable dissonance when associated, for instance, with French practice (tolerant procedural) which has frequently proscribed parties and groups in the postwar period (ibid, 412). This example is not consistent with common sense or philosophical notions of tolerance which involves at the very least ‘putting up with what you oppose’, even when another person’s life choices or actions may shock, enrage, frighten or disgust us (McKinnon2006: 4).

Fox and Nolte’s model can however be reworked to address these problems (see Figure 2 below) (see Bourne, 2011 for more details).

**Figure 2: Tolerant and Intolerant Democracy**

![Diagram of Tolerant and Intolerant Democracy]

- **When ban, only do so for anti-system behaviour**
  - Passive
  - Spain
  - Britain

- **When ban, do so for anti-system behaviour and/or anti-system ideologies**
  - Permissive
  - Japan
  - Germany
  - Italy
  - Passive

- Activist - Intolerant
- Abstentionist - Tolerant
This new typology retains Fox and Nolte’s categories of procedural and substantive democracy which take concrete form in distinctive legal-constitutional arrangements (see table 1). However, it introduces a new variable which distinguishes between states that may a) ban parties only for anti-democratic or anti-system behaviour and b) those which may also, or only, ban parties for holding anti-democratic or anti-system ideologies. The line between what constitutes anti-system ideology and anti-system behaviour may sometimes be rather fuzzy. Nevertheless, it is not unusual for scholars to contrast measures employed against extremist parties according to those that address: the ‘Sein or ‘being’ of a party of group – the ideological character of the party…– and its Handeln or ‘acting’ – which mainly regards unconventional, illegal or violent nature of political behaviour and strategies (Capoccia, 2001: 13; See also Mudde, 2004: 196 and Issacharof, 2007: 1409-10.).

The principal advantage of this addition is that it provides a more nuanced understanding of the conditions under which a procedural democracy can ban a political party and yet continue to claim that all political programmes, even anti-democratic ones, ought be aired in the course of democratic competition. It is also important to be aware that this distinction entails a caveat, ‘when they do ban parties’ democracies will do so for either anti-system behaviour etc…. This caveat helps retain the integrity of a model which explicitly accounts for the fact that either procedural or substantive democracies may choose not to ban political parties.

Cross cutting the vertical and horizontal axis is a third variable which retains Fox and Nolte’s distinction between states which actively employ available legal rules to ban extremist political parties on the one hand, and those which have no such rules or have them but do not implement them in practice. In Figure 2, this variable is indicated by contrasting background patterns. However, the new model does away with Fox and Nolte’s confusing associations between inaction and tolerance by relabeling categories. It distinguishes between democracies that actively employ the tool of proscription against extremist parties and those that that abstain from employing this tool. The second, abstentionist category includes two subcategories: democracies that adopt a permissive stance by choosing not to adopt or use measures permitting proscription of extremist parties at all; and democracies that remain passive in the face of extremist parties, even though equipped with legal instruments for proscription.

This model has several advantages. It permits elaboration of a more meaningful conception of what constitutes a broadly ‘tolerant’, and a broadly ‘intolerant’ response on the matter of banning extremist parties. Thus, a ‘tolerant democracy’ includes states taking an abstentionist stance, including either passive or permissive orientations, while an ‘intolerant democracy’ is one taking an activist stance by actually banning parties either for anti-democratic actions or ideas.

More importantly, the model generates predictions about conditions under which a democracy will ban an extremist party. The model shows that intolerant democracies are more likely to ban political parties than tolerant democracies. Thus:

2a. A procedural democracy will ban a party which can be shown to undertake anti-system or anti-democratic behaviour (such as violence)
2b. A substantive democracy will ban a party which can be shown to undertake anti-system or anti-democratic behaviour and/or espouse anti-system or anti-democratic ideologies.

**Is Spain an ‘intolerant’ democracy?**

As mentioned above, Article 6 of the Spanish constitution requires that political parties must ‘respect the Constitution and the law’ and be ‘democratic in their internal structure and functioning’. Fox and Nolte described Spain as a substantive democracy (2000: 418-19). However, the majority of Spanish legal scholars characterize the Spanish constitutional order as an ‘open’ or ‘procedural’ democracy, rather than a ‘substantive one’. Four arguments articulated by Jiménez Campo (1981) and de Otto Pardo (1985) has been particularly influential in establishing this position. Firstly, during parliamentary debates on the draft 1978 Spanish constitution deputies explicitly rejected establishing a ‘substantive model’ of democracy along the lines of the German Basic Law. Secondly, the constitution contains no express provisions authorising measures against unconstitutional parties. Thirdly, according to article 168, the Constitution is open to ‘total’ revision. It would not, therefore, be logical to prohibit efforts to attain what the constitution ultimately permits. This means parties wanting to change the constitution, including those who wanted to destroy its liberal democratic character, can articulate this preference without violating the constitution. Finally, a decision to place limits on political parties would undermine constitutional commitments to equality (article 14), especially equality among those citizens who chose to participate in politics through parties and those who did not. Measures imposing limits on parties – and not imposing parallel limits on public powers – would also contravene article 9.1 requirements for equal subjection to the Constitution and the Law. This ideological liberty, however, did not mean parties are free to act as they choose. Early Constitutional Court rulings established that political parties must pursue their objectives through means permitted by the Constitution (de Otto, 1985: 45).

Parliamentary approval of the LOPP reopened debate on this question. One issue was whether the Constitution permitted proscription of political parties for activities other than those spelt out in the Penal Code (article 22.X) or a party’s undemocratic internal structure and functioning (article 6 of the constitution). Pérez Royo, for instance, argued that these were the only grounds for banning a party and that proscription of parties for conduct threatening to undermine the liberal democratic system, spelt out in article 9.2 of the LOPP (see above) had no constitutional basis. In contrast, Blanco (2004) considered the LOPP to be in accordance with earlier Constitutional Court jurisprudence permitting dissolution of parties for such activities and the accepted and unchallenged provisions of the previous law on political parties (Law 54/1978) permitting dissolution of parties for activities contrary to democratic principles. Nor did he think that it contradicted the logical intuition that democratic activity was by its nature activity ‘respectful’ of the constitution and the law and thus constituted an appropriate application of article 6 of the Spanish Constitution (Ibid, 54).

Forced to address the question in 2003, the Constitutional Court confirmed the view that the Spanish legal order was an open or procedural order and that the LOPP did not transform it into a substantive one. One of the principal justifications for this view was based on the distinction between the prohibition of anti-democratic (or anti-system) ideologies and anti-democratic (or anti-system) behaviour. The Constitutional Court argued that Spain was not a substantive democracy because only ‘conduct’ were
contemplated as grounds for proscription, not a party’s ultimate objectives. In so doing, the Constitutional Court endorsed the position of legislators written into the Preamble of the LOPP that ‘any project or objective is compatible with the Constitution, so long as it is not defended by an activity which violates democratic principles or fundamental rights of citizens’. In sum, Spain ought to be regarded as a ‘tolerant’ democracy of the passive kind until it banned HB, EH and Batasuna in 2003, when it became an ‘intolerant’ democracy.

Conclusion

The illegalisation of parties presents a dilemma for democracies and may have profound consequences for the enjoyment of liberties, representation and political competition. In the postwar period, however, it is an instrument that has often been used against extremists challenging democratic institutions and values. In this paper, I have examined the political context in which Spanish authorities decided to ban HB, EH and Batasuna in 2003 and sought to develop two hypotheses derived from other studies on the proscription of political parties to address the more general question, why do democracies ban political parties.

I conclude that while the conditions of democratization in Spain in the 1970s were not conducive for proscription, from the mid-1990s, an intensification of ETA-directed street violence and broader range of terrorist targets, increased polarization among Basque and state-wide political parties and the consolidation of a conceptualization of the ‘terrorist’ among policy-makers and the judiciary provided a new political context in which proscription was considered more appropriate by policymakers. The hypothesis that democracies ban parties when alternatives are not effective helped explain the proscription of HB, EH and Batasuna in 2003: The electoral system at state and Basque levels was not an effective tool of marginalization; efforts to politically isolate HB, EH and Batasuna were only successful until the late 1990s, and various counter-terrorist measures which weakened ETA did not lead this organization or its political wing HB, EH and Batasuna to renounce violence prior to proscription in 2003. The hypothesis that intolerant democracies ban political parties, or more specifically that procedural democracies ban parties which can be shown to undertake anti-system or anti-democratic behaviour also helped explain the Spanish case: The Spanish Constitutional Court confirmed, despite the view of some Spanish jurists, that Spain was an ‘open’ or ‘procedural’ democracy which permitted parties to pursue any political ideas, including those that sought to revise the democratic core of the Constitution, so long as these ideas were pursued using democratic means. The Courts accepted that HB, EH and Batasuna were an integral part of the terrorist group, ETA.

Further research is needed to confirm the relevance of these hypotheses. There is no shortage of further case studies. In the post war period, many democratic states – including Germany, Greece, The United States, the Netherlands, Bulgaria, Latvia, Lithuania, Russia, Turkey and Israel - have banned either communist, fascist, racist, ethnic, religious or separatist parties for threatening the liberal democratic system, national security or the territorial integrity of the state.

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1 In the 1979 referendum on the Basque autonomy statute 94.6% voted yes, but with abstention rate of 41.14%.
2 Before it was banned, Batasuna ran 49 municipalities and had 891 local councilors in the Basque Country and Navarre.
3 This replaced the earlier Law 54/1978 passed just before the new 1978 constitution.
4 Supreme Court Sentence of 27 of March 2003.
5 In 1997, the entire leadership of HB was sentenced to seven years prison for collaborating with an armed group, although the sentence was later annulled. HB had tried to broadcast a video elaborated by ETA during the 1996 election campaign (Esparza 2004: 146).
6 El Mundo “Detenido en Francia Ibon Gogeaskoetxea, máximo jefe del ‘aparato’ militar de ETA”, 28 February 2010
7 Thiel makes a similar point (2009: 389)
9 Sentence of the Spanish Constitutional Court 48/2003 of 12 March