

CONFERENCE ON MASS MEDIA  
GENERAL CONCLUSIONS OF THE DEBATE ON  
THE CLOSING DOWN OF BASQUE MEDIA

I

Freedom of expression is the cornerstone of a democratic society. As a basic individual and collective right, the right to receive any information and get to know the expression of differing views constitutes the core content of the right to freedom of expression, and is thus recognised in Article 10 of the European Convention on Human Rights (ECHR) and in Article 20 of the Spanish Constitution.

II

The right to freedom of expression is not an absolute right. Its recognition and exercise must be made compatible with the recognition and exercise of other basic rights. Generally, while freedom of expression is recognised, its importance in a democratic society means that its restriction, as established by international and European rules, is only authorised under exceptional circumstances, and for very serious reasons and with strict compliance at all times, not only with the principle of legality, but equally with the principles of necessity and proportionality (Arts. 10.2 and 15 of the ECHR, and Art. 20 of the Spanish Constitution).

III

Within the confines of this exceptional nature and in strict compliance with these very principles, preventive or precautionary measures are not incompatible with the recognition of basic rights, but by their very nature, their scope and limits of application are subject to strict supervision by the highest courts. This has to be emphasised especially in the case of the media and publications, for which prior censorship constitutes an especially unendurable attack on freedom of expression, and this is why it is prohibited under Article 20 of the Spanish Constitution.

From the perspective of the European Court of Human Rights, the guiding criteria for such measures are as follows:

- Legality: the measure should be clearly authorised by law and indicate precisely when and how rights can be limited in a preventive or precautionary way, to enable the citizen to anticipate not only the applicability of the precautionary measure, but also its scope.

- Necessity: the measure should not only be appropriate for preventing the continuation or perpetration of criminal acts, it should also be the least restrictive of the basic rights among all the possible ones.
- Proportionality: in view of the above considerations, the measure to be adopted should be the outcome of due consideration of the rights and interests at stake.

#### IV

In the case which we are being asked to assess –in other words, the closing down of the media *Egin*, *Egin Irratia* and *Euskaldunon Egunkaria*–, the problems stem from the closing down of the media, as a result of the application, as a precautionary measure, of the incidental consequence provided for by Art. 129 of the Penal Code. Putting aside other possible considerations of legality, the precautionary measure to close down a medium of communication involves the sacrificing of the basic right to freedom of expression, both from the individual perspective as well as from its collective angle, in other words, the right to receive any information and get to know the expression of differing views.

The unnecessary nature of this measure was already debatable at the very moment it was imposed, when there were alternative types of precautionary intervention that did not entail the interruption of the activity of the medium of communication. As regards the lack of proportionality of the precautionary measure, the closing down, although temporary in theory, signifies in practice (and not only due to its excessive duration) a permanent denial of the constitutional right to freedom of expression, which constitutes an infringement of Arts. 10 and 15 of the ECHR and of Art. 20 of the Spanish Constitution.

As if the above were not enough, the lack of constitutional backing for the application of Article 129.2 of the Penal Code to certain media has to be highlighted. The Spanish Constitution of 1978, which provides more guarantees on this point than the ECHR, only authorises the suspension of the right to freedom of information and expression in the event of a state of emergency or siege or (Art. 55.1), but not in cases of terrorism (Art. 55.2). The lack of constitutional authorization for closing down media had already been upheld by the Constitution Court in its ruling 199/1987, which held that the measure involving the provisional closing down of a medium of communication provided for by the [Spanish] Constitutional Act of Parliament 9/1984 for cases of

terrorism would entail a limitation of the core content of the rights recognised in Art. 20 of the Spanish Constitution, or a suspension of them. However, legislators are prevented from doing this by Art. 55.2 of the Spanish Constitution.

*Therefore, the application of Article 129.2 of the Penal Code to proceed with the precautionary closing down of the media Egin, Egin Irratia and Euskaldunon Egunkaria:*

- 1. Infringes Art. 20 of the Spanish Constitution, because it involves the consequence, in practice, of the actual suspension of the basic right to freedom of the press, a right that cannot be suspended, save in the event of a state of emergency or siege (Art. 55.1 of the Spanish Constitution).*
- 2. It infringes Articles 10 and 15 of the ECHR, owing to its disproportionate nature when other less burdensome measures existed, and which resulted, in practice, in the dissolution of media that would not be able to see light again, irrespective of the final result of the criminal processes in which the measure has been implemented.*

*This is the conclusion reached, without prejudice to the respect due to judicial decisions and to the necessary defence of citizens by the State, when dealing with terrorism within a democratic, constitutional framework.*

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Note: This report was presented by the university lecturers listed below. This took place at the end of a Conference organised by the Human Rights Directorate of the Ministry of Justice of the Government of the Basque Autonomous Community, in collaboration with the Basque Institute of Criminology.

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