Constitutional Court Judgment No. 62/2011, of May 5 (Unofficial translation)

The Constitutional Court, in full bench, composed of the Honour Judges Mr. Pascual Sala Sánchez, as President, Mr. Eugeni Gay Montalvo, Mr. Javier Delgado Barrio, Ms. Elisa Pérez Vera, Mr. Ramón Rodríguez Arribas, Mr. Manuel Aragón Reyes, Mr. Pablo Pérez Tremps, Mr. Francisco José Hernando Santiago, Ms. Adela Asua Batarrita, Mr. Luis Ignacio Ortega Álvarez and Mr. Francisco Pérez de los Cobos Orihuel, has pronounced

IN THE NAME OF THE KING

the following

JUDGMENT

In the amparo appeal number 2561-2011 brought by the Bildu-Eusko Alkartasuna/Alternatiba Eraikitzen electoral coalition, represented by the Court Representative Mr. José Guerrero Tramoyeres and assisted by the attorney Mr. Carlos Ginto Monzón, against the decision of May 1, 2011 issued by the Special Chamber of the Supreme Court as established in Article 61 of the Organic Law on the Judiciary, which upholds contentious-electoral appeals numbers 2-2011 and 4-2011, filed, respectively, by the State Solicitor's Office and the Public Prosecution Service. The State Solicitor and the Public Prosecution Service have been party to the proceedings. The judgment has been drawn up by Judge Luis Ignacio Ortega Álvarez, who expresses the opinion of the Court.

II Grounds

1. The present amparo appeal challenges the decision handed down by the Special Chamber of the Supreme Court as established under Article 61 of the Organic Law on the Judiciary of May 1, 2011, in connection with accumulated contentious-electoral proceedings numbers 2-2011 and 4-2011 that, upholding the appeals lodged by the State Solicitor and the Public Prosecution Service, declared unlawful and null and void the resolutions issued by the local electoral boards of the provinces of Álava, Guipúzcoa, Vizcaya, and Miranda de Ebro (Burgos), and by the Navarra Electoral Board, proclaiming the candidate lists presented by the electoral coalition Bildu-Eusko Alkartasuna/Alternatiba Eraikitzen for the local elections, the General Historical Region Boards (in Spanish: Juntas Generales de los Territorios Históricos) elections and the Navarra Regional Parliament elections to be held on May 22, 2011.

The coalition appealing the decision and petitioning for protection of fundamental rights challenges the decision on the grounds … that will be analyzed below, and accuses the decision of infringing its right to political participation (Article 23 of the Spanish Constitution ["Constitución Española" in Spanish: CE)]), in respect of freedom of ideology (Article 16 CE), freedom of expression (Article 20.1 CE) and the right to association (Article 22 CE) and Articles 10 and 11 of the European Convention on Human Rights (ECHR), as the party was denied the right to present its candidacy in the above-referenced elections. The State Solicitor and the Public Prosecution Service oppose the upholding of the amparo appeal, on the grounds also referred to in the background provided.

2. Prior to analyzing the arguments put forth by the appellant, we first wish to address the question of whether the amparo appeal was filed out of deadline, as put forth by the Public Prosecution Service (Article 49.4 of the Elections Law 5/1985 of June 19, and Article 2.1 of the Constitutional Court Resolution of January 20, 2000, approving regulations on the processing of

appeals petitioning for protection of fundamental rights as referred to in the Elections Law). If the appeal were deemed to be filed out of deadline, it would have to be deemed inadmissible [Article 50.1 a) of the Organic Law of the Constitutional Court]. The Public Prosecution Service maintains that notice of the appealed decision was provided to the appellant at 6:31 a.m. on May 2, and that the appeal was filed at 4:06 p.m. on May 4, and therefore the two-day period in which to file the appeal for protection as from notification of the decision had elapsed.

Without the need for a more extensive reasoning, the argument that the appeal was filed beyond the deadline can be rejected by merely noting that, based on a reading of the rules cited by the Public Prosecution Service, the two-day period for lodging the electoral appeal is set and therefore is counted by the number of days and not by the number of hours, and that the amparo appeal was filed within the General Registry of this Court prior to conclusion of the last day of the deadline.

In addition, as the State Solicitor has pointed out, even when a claim for protection cites infringement of various precepts set out in the European Convention on Human Rights, it is not this Court's remit when hearing the appeal to examine whether the international texts which bind Spain in matters of human rights are observed per se, but to ascertain the observance or the infringement of the constitutional precepts that recognize the fundamental rights and public freedoms protected by the Constitution (Articles 53.2 CE and 41.1 of the Organic Law of the Constitutional Court), without ignoring the fact that, due to the mandate of Article 10.2 CE, such precepts should be interpreted in conformance with the Universal Declaration of Human Rights and international agreements and treaties on the same issue ratified by Spain [for all references, see Judgment of the Constitutional Court (in Spanish: Sentencia del Tribunal Constitucional, STC) 126/2009, May 21st, FJ 3 a)].

Moreover, this Court wishes to reiterate the difficulty of inserting such a complex supposition as that considered in Article 44.4 of the Elections Law in the electoral justice process regulated in Article 49, characterized by swiftness, urgency, time limitations, and the concentration of the allegations and evidence stages, and initially intended for minor matters. As already stated, these characteristics must be considered necessary by virtue of the Constitution and proportionate to the extent they respond to the reasonable aim that an electoral process must be carried out effectively within the legally-established term (STC 48/2000, February 24th, FJ 3; and STC 85/2003, May 8th, FJ 10). Consequently, the Court reiterates that in respect of the alleged complexity of the case provided for in Article 44.4 of the Elections Law, "the legislator should make a special effort to secure the best procedural efforts" that would combine the procedural guarantees established in Article 24 CE with these characteristics of swiftness, urgency, time limitations and concentration of the allegations and evidence stages in the subject procedures (for all references, STC 85/2003, May 8th, FJ 9; STC 68/2005, March 31st, FJ 4; STC 110/2007, May 10th, FJ 3; and STC 44/2009, February 12th, FJ 6).

3. The appellant argues, in short, that the challenged decision is contrary to constitutional case law concerning the significance, nature and quality of the circumstantial evidences that allow to recognize, in constitutionally acceptable terms, an intent to fraudulently evade the court-ordered dissolution of a political party through use of candidate lists conceived to ensure the factual presence of the dissolved party in public institutions. In its opinion, quite to the contrary, the Supreme Court based its quashing of the presented candidacies on circumstantial evidences that do not have, in constitutional terms, the evidential value they were attributed, as they are not sufficiently conclusive for supporting a conviction which has such serious repercussions vis-à-vis the right to political participation (Article 23 CE), freedom of ideology (Article 16 CE), freedom of expression [Article 20.1 a) CE] and the right to association (Article 22 CE). In reality, the fundamental claim, woven throughout the amparo appeal, lies in the violation of the right of the parties forming part of the coalition to participate in public matters to defense and promote

political ideas which deserve the same constitutional guarantees as the fundamental rights of individuals.

In accordance with the precedent first laid down in STC 85/2003 of May 8th and steadily consolidated in various decisions issued by this Court in respect of presented candidacies in order to ensure the material continuation of political parties that had been disbanded due to their ties with terrorist organizations (STC 176/2003, October 10th; STC 99/2004, May 27th; STC 68/2005, March 31st; STC 110/2007, May 10th; STC 112/2007, May 10th; STC 43/2009, February 12th; STC 44/2009, February 12th; and STC 126/2009, May 21st), the appreciation of the grounds set out in Article 44.4 of the Elections Law, which in the wording given in Law 3/2011, of January 28, is expressly applicable not only to the candidate lists filed by electoral groups, but also to those presented by political parties, federations and coalitions of parties, requires that the Court reasonably and sufficiently accredit, in a process carried out with all guarantees, an intent to defraud in order to ensure continuity of an outlawed party, through subjective, organizational-functional or financial means. In short, it is necessary to determine that the candidate lists presented by a political party, federation or coalition of parties or by elector groups are aimed at circumventing the effects of a court order to disband a party, so as to ensure its continuance. This illegal and constitutionally-prohibited continuity between a banned political party dissolved in the courts and a political party that has not been outlawed but that aims to succeed it, or candidate lists that attempt to ensure its presence in democratic institutions, can only be considered duly accredited in accordance with prevailing law (Article 12 of the Organic Law on Political Parties, and Article 44.4 of the Elections Law), if "various substantial similarities" are present: "a) firstly, substantial similarity of the 'structures, organization and operation'; b) secondly, the substantial similarity of 'persons who make up, govern, represent or administer candidacies'; c) thirdly, the similarity of the 'origin of the means for funding or materials'; and d) lastly, 'any other relevant circumstances, such as their willingness to support violence or terrorism, which make it possible to identify such a continuity or succession' " (STC 85/2003, May 8th, FJ 25, reiterated, among others, in STC 126/2009, May 21st, FJ 8).

The aforementioned STC 85/2003 of May 8 also states that "in the case of attesting to a conspiracy to defraud, it is clear that judicial conviction of its existence should arise from the basis of various aspects of evidence which should be employed in each case in order to discern whether a demonstration of an element of financial continuity is sufficient, or whether the concurrence of an element of personal continuity is necessary, which, furthermore, should be significant in number or quality. What is decisive in any case is that the criteria for accreditation used lead to the substantiated conviction that the electoral groups which their candidacies are denied operate materially as components of a de facto party and not as true instruments of political participation whose ultimate purpose is the exercise by the private individuals grouped therein of their right to be elected" (FJ 26; see also STC 99/2004, May 27th, FJ 16; STC 68/2005, March 31st, FJ 11; and STC 110/2007, May 10th, FJ 12). We have declared that "such considerations with equal conceptual basis are applicable to the case of the material continuity of a dissolved party attempted by instrumentation of candidacies formalized by one or various legal political parties" (STC 126/2009, May 21st, FJ 8).

In any case, it is not sufficient to have proof of a fraudulent intention but rather, in the words of STC 68/2005 of March 31, "evidence of the intention to defraud is not, however, sufficient to be certain of that continuity," with it therefore being necessary "for the evidence in the proceedings to also illustrate the fact that this intention was actually materialized", that is, that it culminated in the articulation of a candidacy exploited to serve the electoral interests of the banned political party (FJ 13; also, STC 126/2009, May 21st, FJ 8).

4. In addition, with respect to this Court's task of reviewing and trying a matter, reiterated case-law establishes (as quoted by the parties appearing in the matter, in their respective briefs) that

we must limit ourselves to “examining whether the conviction of the Special Chamber of the Supreme Court as established in Article 61 of the Organic Law on the Judiciary has infringed the right of the appellant to participate in public affairs” (STC 43/2009, February 12th, FJ 11), on the understanding that “we only need to revise the comment of that Chamber in those cases in which, from the proper interpretative criteria assumed by the Supreme Court, the conviction reached conflicts with a constitutionally relevant right; in this case, the right to be elected. In short, since the effectiveness of the exercise of the fundamental right is in play, this Constitutional Court, pondering the individual rights in question and the general interest of the legal system, and subjecting electoral processes to the rule of law, should verify that revision in accordance with a decisive standard, the content of which should depend on the joint observance of a plurality of magnitudes and references which permit inference, in a reasonable and non-arbitrary way, [that the candidacies excluded from the] electoral procedure have acted, in fact, as entities continuing the activity of the banned political parties” (STC 85/2003, May 8th, FJ 29; reiterated, among others, in STC 68/2005, March 21st, FJ 11 and STC 126/2009, May 21st, FJ 7).

In any case, the overall valuation of the circumstantial evidences should be based on elements which in themselves merit the consideration of valid evidence, either because they are so directly, or because, together with other elements of evidence, they may attain that consideration. Consequently, if it is not possible to attribute the value of evidence to the various basic elements, the sum of elements lacking this virtuality cannot attribute a value of evidence to the overall body of proof. Furthermore, the actual judgment on the evidential value of a specific element must be in line with fundamental rights, which prohibits attributing a value of evidence of a fraudulent maneuver to something which is simply a manifestation of a fundamental right. At the same time, the attribution of the value of evidence to a specific element of fact cannot be established in an evaluative inference that is excessively open. In summary, it may thus be affirmed, and specifically in the interests of this case, that the effectiveness of the exercise of the right to be elected, requires that, when contemplating the reasonability of inferring that there has been fraudulent use of the candidacy presented by the appellant coalition, such inference should be sound and not excessively open. This should be taken into account when identifying the potential fraudulent use of the candidacies presented by the appellant coalition (STC 85/2003 of May 8, FJ 29; STC 99/2004 of May 27, FJ 17; STC 112/2007 of May 10, FJ 9; STC 44/2009 of February 12, FJ 14; and STC 126/2009 of May 21, FJ 7). As this is the case, the overall appreciation by this Court of the evidentiary elements on which the appealed decision was based cannot, in any way, prevent the consideration from a constitutional perspective of the validity, soundness and quality of the different circumstantial evidences taken into account. Logically, this cannot exclude the individualized examination of some or all of these, when it is necessary in order to dispel any possible doubts that could constitutionally be raised by its validity, soundness or quality.

5. The legislative context surrounding the case law summarized above, referring to the court's appreciation of the case set out in Article 44.4 of the Elections Law and the scope of the review of legal judgments corresponding to this Court, has recently been modified. These modifications must be taken into account and considered in this particular case.

In that regard, Law 3/2011 of January 28 reformulated several precepts set out in the General Elections Law 5/1985 of June 19 in order to prevent “in view of accumulated experience, from the moral and political conviction that democracy can, with the means of the rule of law, create for itself legal instruments to defend itself, and taking into account the case law handed down by the Supreme Court, the Constitutional Court, and the European Court of Human Rights,… unlawful political formations or those that justify or support terrorist violence from being able to use new ways to fraudulently take part in electoral processes and obtain institutional representation” (preamble).

Achieving this objective, firstly, and of special interest in this case, was the purpose of the addition of paragraph c) to Article 49.5 of the Elections Law, which establishes the possibility that parties legitimated to file contentious-electoral appeals —including the Government and the Public Prosecution Service— against candidacies presented by political parties, federations, coalitions or electoral groups that in effect continue or succeed the activity of a political party declared illegal, disbanded or suspended by a court, can also file, during an electoral campaign, a contentious-electoral appeal against the candidacies presented up to the forty-fourth day after the call for candidacies, if during the campaign they became aware of circumstances that, as per Article 44.4 of the Elections Law, would preclude presentation of the candidacy. The appeal must be resolved by the Special Chamber of the Supreme Court, as established in Article 61 of the Organic Law on the Judiciary, within three days from the date it was filed. The Supreme Court's decision may be subject to an amparo appeal before the Constitutional Court, whose decision must be issued by the last day of the electoral campaign.

Secondly, Law 3/2011 of January 28 includes a new paragraph 4 bis under Article 108 of the Elections Law, setting out that "from the time of voting to the announcement of the election results, the Government, through the State Solicitor and the Public Prosecution Service, may file at the Special Chamber of the Supreme Court, as established in Article 61 of the Organic Law on the Judiciary, a well-founded brief announcing the presentation, within a maximum of 15 days, of a petition to ban or the supplementary proceedings provided for in Articles 11 and 12.3 of the Organic Law on Political Parties, requesting the preliminary suspension of the announcement of results for an election in which the subject party or coalitions or federations involving that party had presented their candidacy. In addition, the preliminary suspension of an announcement of the result of an election in which groups of electors had presented their candidacy where these groups could have ties to the party subject to the petition for banning or the supplementary proceedings, or to a party declared illegal in a final court decision. The Chamber must issue a decision on the suspension within two days from the date the request was filed."

The Article also states that "once the request for suspension or the supplementary proceedings are presented, the Chamber, upon considering whether it may be admitted for processing, shall make a pronouncement on the continuity of the preliminary suspension until the end of the proceedings. If the preliminary suspension is extended and the decision handed down upon culmination of the proceedings declares the political party illegal or that it effectively succeeds another already-banned political party, the Chamber shall also order that the candidates participating in the candidacy or coalition should not be announced as elected officials."

The Article concludes that "at any point during the term of office of individuals elected as part of candidate lists presented by groups of electors, the government, through the State Solicitor and the Public Prosecution Service, may file with the Special Chamber of the Supreme Court, as established in Article 61 of the Organic Law on the Judiciary, the request for suspension or supplementary proceedings provided for in Articles 11.2 and 12.3 of the Organic Law on Political Parties, requesting that the court declare the ties between these groups and a banned political party or political party whose prohibition is being sought." In respect of individuals elected as part of candidate lists presented by electoral groups that fall under or could fall under Article 44.4 of the Elections Law, it is also necessary to bear in mind that Law 3/2011 of January 28 introduced modifications in Article 11 of the Organic Law on Political Parties, whereby, in reference to the case at hand, not only the affected political party but also the "individuals elected as part of candidate lists presented by electoral groups" should be summoned to form part of the legal proceedings (Article 11.3 of the Organic Law on Political Parties), as well as to consider declaring in the judgment the "existence or non-existence of ties between the banned political party and the candidate lists presented by the elector groups" (Article 11.7 of the Organic Law on Political Parties).

In summary, Law 3/2011 of January 28 expands Article 6.4 of the Elections Law to include a new case for incompatibility, stating that "in any event, individuals elected as part of candidacies presented by political parties or federations or coalitions of parties subsequently declared illegal in a final court decision, as well as individuals elected as part of candidacies presented by groups of electors declared to have ties with a party banned through a final court decision, shall be considered incompatible." This new cause of incompatibility "shall take effect in fifteen calendar days from the date on which the standing Electoral Administration informs the interested political party of the incompatibility, except where the interested party voluntarily submits to that Administration an express and clear statement of separation and rejection with respect to the causes that led to the declaration of illegality of the political party or the party forming part of the federation or coalition through whose candidate lists he or she was elected; or, where applicable, of the party that had been declared to have ties with the elector group as part of whose candidate list he or she was elected."

Likewise, the following paragraph prescribes that "if during the term of office attained after having explicitly made the foregoing statement, the elected individual were to retract those statements by any means or reveal any contradiction of the content thereof through facts, omissions or statements, that individual shall definitively be deemed incompatible with the post as regulated in this section. The incompatibility shall take effect as from the date notification is made by the standing Electoral Administration either on its own behalf or carrying out instructions from the Government through the State Solicitor or the Public Prosecution Service."

In respect of appeals, the precept establishes that "the affected party and, where applicable, the Government through the State Solicitor and the Public Prosecution Service, may lodge an appeal before the Special Chamber of the Supreme Court as established in Article 61 of the Organic Law on the Judiciary, in the terms set out in Article 49 herein."

Article 6.4 of the of the Elections Law concludes that "the same incompatibility shall apply to those individuals forming part of the candidate lists of the political faction declared illegal that are called to cover vacant seats, including temporary replacements."

Although no other considerations are necessary at this point, and for the sole purpose of the subject matter of this amparo appeal, with this comprehensive outlay of the reforms enacted in the of the Elections Law, we wish only to emphasize that, "in the light of accumulated experience," as stated in the introduction to Law 3/2011 of January 28, and of the multiple attempts, in many forms and means, of legally-banned political parties to contravene the resolution declaring them illegal by participating in candidacies presented by different parties in order to access representative institutions, the legislators merely intended to outfit our legal system with new instruments to thwart these fraudulent attempts by banned political groups. The possible appreciation that certain electoral candidate lists presented by political parties, federations or coalitions of parties or groups of electors could continue or succeed the activity of a political party legally banned and dissolved or suspended is not limited in time, as was the case prior to approval of Law 3/2011 of January 28, to the moment candidacies are presented or challenged. Rather, while this appreciation also continues to be possible at that electoral moment, after the reforms introduced, the occurrence or not of the case foreseen in Article 44.4 of the Elections Law can also be appreciated in the circumstances and conditions, and with the above-referenced consequences, during the electoral campaign [Article 49.5 c) of the Elections Law], from the date of voting to the announcement of election results (Article 108.4 bis of the Elections Law) and even during the term of office (Article 6.4 of the Elections Law). This set of a posteriori control instruments included in our legal system by the subject legal reforms, aimed at identifying the occurrence or not of the case established in Article 44.4 of the Elections Law and therefore avoiding the possible defrauding of a ruling declaring a political party to be illegal and breaking it up, requires, from a constitutional perspective and taking into account the relevance of the legal grounds at stake, at the moment candidacies are presented or challenged,

a sufficient soundness and quality of the circumstantial evidences underpinning a legal decision to quash candidacies presented by political parties, federations or coalitions of parties or groups of electors that fall under the case foreseen in Article 44.4 of the of the Elections Law, and greater rigor in this valuation, in all cases in which these instruments can be applied, but also, without any question, in the case at hand.

The conclusion reached in no way prevents us from emphasizing, as does the State Solicitor in its brief of allegations, that the purpose of the aforementioned of the Elections Law reforms is not to replace the mechanisms provided for in the original wording of Article 44.4 of the Elections Law, but rather to deal with two different cases, so that those reforms do not deprive the provision set out in Article 49.1 of the of the Elections Law of its validity nor, consequently, eliminate the possibility of fraudulent evasion mechanisms for which, when verified ex ante, the rule of law has the obligation to cleanse through the instrument provided for in that respect (Articles 44 and 49.5 of the Elections Law).

6. In the present case, the Special Chamber of the Supreme Court as established in Article 61 of the Organic Law on the Judiciary based the conviction that led it to quash the candidacies presented by the coalition appealing herein on material evidence from which it deduced: a) an intent by ETA/Batasuna to fraudulently evade the ruling banning that same political party, advocating a strategy of convergence with the Basque nationalist left (izquierda abertzale) that would allow it to have an electoral presence under the coverage of legal and otherwise untarnished political parties; b) the materialization of that intention in the candidacies presented by the appellant coalition in different electoral processes, which allegedly had reached an agreement with Batasuna to facilitate its presence in elections through these candidacies; and c) the non-applicability of the statements rejecting terrorism violence (Grounds 12 and 13).

Given the position of the appealed decision, we must examine whether the circumstantial evidences taken into consideration in the aforementioned decision may have in constitutional terms the evidential value attributed to them; that is, if they have the substance required to sustain a conviction that leads to such a serious consequence as the loss of the right to political participation guaranteed under Article 23.2 CE and, with this, of the political pluralism on which the constitutional legal system of our democratic nation was based. We must reiterate that, as stated since STC 85/2003, May 8th, "the dissolution of a political party does not entail the deprivation of the right to vote or to stand for election of those who were its promoters, leaders or members. Such a consequence may only derive from a judicial procedure specifically focused on the conduct or the circumstances of physical persons who, in the terms established under law, may only be stripped of the fundamental right recognized in Article 23.1 CE if the cases specifically established in Article 6 of the Elections Law are present" (FJ 23). In any case, no dissolution of parties is admissible in our system unless it is to dissolve those parties that no longer apply their mission to be privileged instruments of political participation in democratic institutions, and instead become an appendage to terrorist organizations that, making an abstraction of the ideology they seek to defend, use violence for that defense, beyond the boundaries of democratic procedures and pacific means of participation in organized coexistence (STC 126/2009, May 21st, FJ 9).

Therefore, based on the principle that in our constitutional system "any scheme is compatible with the Constitution, provided that it is not defended through an activity that infringes democratic principles or fundamental rights," being true up to that point that "the Constitution is a framework of sufficiently broad agreements to encompass political options of a widely differing spectrum (STC 11/1981, April 8th, FJ 7)" (STC 48/2003, March 12th, FJ 7; reiterated in STC 126/2009, May 21st, FJ 9), it is necessary to be extremely rigorous when assuming proof of fraudulent evasion of orders to dissolve political parties, in order to mitigate the risk of ultimate detriment to the very ideological plurality promoted and protected by the Constitution as a fundamental value of the system. The risk, in short, is that when confusing the ideology

professed by a party with the means defended or used to promote the ideology, the rights of whoever shares that same ideology could be infringed, even when it cannot be demonstrated that violent means are used to defend the position or that it defends the ideology as a pure instrument of those who make terrorist violence their natural means for action. As declared in STC 126/2009, May 21st, this risk occurs in this case when "the connections noted are established with a single reference to the Basque nationalist left (izquierda abertzale)," given that "our system does not exclude any ideology, either for its content or its basis, or the means used by those who ultimately wish to defend it," which "if they are violent, shall be unacceptable as such, however without any prejudice to the ideology which they seek to serve" (FJ 9).

7. The appealed decision deems that grounds for Article 44.4 of the Elections Law are present in the candidate lists of the appellant coalition, based exclusively on objective elements and disregarding subjective elements, namely information concerning hypothetical ties between candidates or, more precisely, between the candidates referred to in the appealed decision as "independent members" of the ETA/Batasuna framework, given that, as the Supreme Court reasons, "the ties provided (by the claimants) are either so remote that they are practically irrelevant, or the authenticity thereof is uncertain (the defendant has opposed numerous examples of allusions to candidates that, according to the claim, are untrue or openly erroneous) and therefore lack the necessary soundness to consider them free from doubt, or else refer to personal situations or activities that simply do not warrant any adverse decision from the perspective of interest at present." In short, in its decision, the Chamber restricts itself to objective means and elements (Ground 10). As the appellant coalition and the State Solicitor indicate in their respective briefs, this is constitutionally possible provided there is sufficient soundness to rule out that the legal conclusion reached is unreasonable, arbitrary, illogical or excessively open.

Although the appealed decision discards the subjective circumstantial evidences, it is necessary to specify the considerations made in the decision in respect of those evidences, in order to base objective circumstantial evidences on them or at least to bring them to light for that purpose. In effect, after discarding the existence of subjective ties between the "independent members" featured on the candidate list and the ETA/Batasuna framework, in no way can it be accepted that the inexistence of these ties becomes, as argued by the State Solicitor and the Public Prosecution Service in their claims, and the latter reiterates in the brief it submitted against this amparo appeal, another item of proof that the candidate lists presented by the appellant coalition aim to fraudulently evade the decision declaring the subject party illegal, by holding space in those lists of candidates for candidates proposed by Batasuna. Nor can it be stated, as the appealed decision states, that this argument by the appellants "carries undeniable force of logic." In other words, it is in no way admissible to convert the inexistence or weakness of subjective circumstantial evidences into an insinuation of an objective circumstantial evidence. To do so, as the claimants suggest in the proceedings giving rise to this appeal, and as the Supreme Court appears to uphold, is tantamount to arguing —against all logic— that the absence or weakness of a given item of proof therefore affirms precisely the opposite of what would be derived from that absence or weakness of that item. The rule of law and, in particular, the demands of due process do not allow, in any way, the inexistence of circumstantial evidences adverse to the exercise of a fundamental right to constitute, inverting the sense, an argument to hinder the exercise thereof. Thus, as the Supreme Court ruled out the existence of the subjective ties of "independent members" on the candidate list, it cannot be inferred from only the quantitative or qualitative presence on these lists and in the absence of objective circumstantial evidences accrediting this or from which it can be deducted, that they have been incorporated in the lists of candidates by banned political parties in order to continue their plans.

8. As stated in the appealed decision, the objective elements on which the Chamber based its conviction to quashing of the list of candidates presented by the appellant coalition were primarily obtained from reports issued by the security forces and from the corresponding documentation, which contains a body of press writings. These circumstantial evidences are classified in the decision, based on the source of the information, as: a) documents and statements; b) telephone conversations; and c) meetings. The Chamber carried out an overall assessment of these documents (Grounds 11 and 12).

The appealed decision considers proven the intent by ETA and the banned political party Batasuna to fraudulently evade a ruling was duly evidenced, as this Court has already done on other occasions (STC 112/2007, May 10th, FJ 8), in respect of the attempts by the terrorist organization and the banned political parties to participate in electoral processes in the Basque Country and the Community of Navarra, with the exception of elections to the Spanish Parliament, based on documents submitted in the proceedings giving rise to this appeal. These documents, prepared by ETA, are as follows: a) "Democratic Process: Reflection on Alternatives for the Democratic Solution to the Conflict and for Recognition of Euskal Herria," setting out the core points of ETA's strategy in respect of the Spanish government and other political parties, indicating, inter alia, that "a political alliance must be formed with Eusko Alkartasuna" and defining the objectives of such an alliance; b) "Earen Proposamenaz II.RTF," in which ETA establishes an alliance with Eusko Alkartasuna; and (c) "Herri Antolatuaren Independence Strategy Baterantz – A strategy for independence from the organized nation. The national strategy as a driver for the liberation process," dated December 2008, containing, as highlighted in the contested decision, a proposal for creation of an "independent alliance" giving rise to the constitution of an "independent popular block" citing, over the course of the text, the organizations Eusko Alkartasuna, Aralar, AB and the trade union Eusko Langileen Alkartasuna in respect of their rejection of ETA's armed actions; and, lastly, d) Batasuna's document titled "Akordio Elektoralerako Oinarriak" (Bases for an electoral agreement. Theoretical framework of the agreement), signed by Batasuna and in which, according to the appealed decision, the objective is to open a dialogue with Eusko Alkartasuna and Aralar for the 2011 regional elections.

Based on the above-referenced documents, it is a reasonable deduction that, in effect, ETA and the banned political party Batasuna, as affirmed in the decision, have advocated a "strategy to converge with other forces of the Basque nationalist left that allow them to have a presence in elections under the coverage of legal political parties" and, moreover, that the terrorist organization ETA and the banned party have focused "their efforts on seeking electoral agreements" with the political parties Eusko Alkartasuna and Alternatiba. Nevertheless, this basis is not sufficient for reaching the conclusion that the appellant coalition was used in this regard or that the coalition or the parties forming part of it had allowed their candidate lists to be used for that purpose and therefore it would be necessary, under the Constitution, to limit the right to political participation at stake in the present appeal for protection. These are third-party actions or, in this case, third-party documents, that only evidence the strategy of the terrorist organization and the banned political party. The documents do not demonstrate that the electoral coalition in question was an instrument in this strategy. As indicated above and as reiterated in Constitutional case law, STC 126/2009, May 21st, sets out that "in any event, it would not be sufficient to have proof of existence of a fraudulent intention but rather, in the words of the STC 68/2005, March 31st, 'evidence of the intention to defraud is not, however, sufficient to be certain of that continuity' between dissolved parties and electoral groups or, in this case the coalition of appellant parties, with it therefore being necessary 'for the evidence in the proceedings to also illustrate the fact that this intention was actually materialized,' that is, that it has culminated in the articulation of a candidacy instrumented in the service of the electoral interests of the outlawed political party" (FJ 8).

9. Even hypothetically admitting that ETA and Batasuna's fraudulent evasion scheme had led them to aim to orchestrate electoral candidate lists for their own benefit, the objective elements used by the Chamber, considered as a whole, do not establish in the constitutionally-required terms the idea that this attempt was actually materialized, precisely, through the candidate lists presented by the appellant coalition nor, in short, that the appellant coalition allowed itself to be used to that end.

In contrast to earlier similar cases (STC 85/2003, May 8th; STC 99/2004, May 27th; STC 68/2005, March 31st; STC 110/2007, May 10th; STC 112/2007, May 10th; STC 43/2009, February 12th; and STC 44/2009, February 12th) in this case there is no evidence of the existence of personal or financial ties, or material support among ETA, the banned political party Batasuna and the appealing coalition, which was relevant in those earlier cases.

Among the documentary circumstantial evidences, when considering evidence that the subject fraudulent evasion intent was materialized through the candidate lists of the appellant coalition, the Chamber placed special relevance on the agreement titled "Euskal Herria Ezkerretik/Euskal Herria from the left," affirming in the decision that it was "signed by Batasuna, Eusko Alkartasuna and Alternatiba." A reading of the agreement, which bears the secondary title "Agreement for political and social change between the independence movement and those seeking regional sovereignty" clearly reveals that this is an agreement signed between the Basque nationalist left, Eusko Alkartasuna and Alternatiba, and not, as indicated in the challenged decision, between these two political parties and Batasuna.

The Chamber considered this document on equal footing and in relation to the document entitled "Electoral Agreement: Herri Akordioa Document. Basic Methodology," and stated that it is "an electoral agreement whose precise approval date is unknown but that clearly refers to the specific elections in question herein, set out in a document entitled 'Herri Akordioa. Basic Methodology', which comprises agreements reached between three groups in order to form a coalition and participate in local and regional elections." This document, which most relevant features were published in two newspapers, makes reference to the framework program or basic program, contains criteria for preparing lists of candidates, and concludes with criteria for future action. The two political parties forming the appellant electoral coalition have denied having ever had knowledge of this document, which, in and of itself, creates a serious obstacle for considering it to be evidence as the Chamber has done, in that the document is not signed by representatives of the two political forces (STC 68/2005, March 31st, FJ 13; and STC 110/2007, May 10th, FJ 16). However, beyond the foregoing consideration and others that could be made in respect of this document, it is important to note that it is not signed by any political group, nor is any mention made at any point of the two political parties forming part of the coalition or of the banned political party Batasuna. The press information relating to this document refers to a pact for local elections between the Basque nationalist left, Eusko Alkartasuna and Alternatiba.

In respect of the valuation of these two circumstantial evidences, this Court must reiterate that the Basque nationalist left, as an ideological expression "has not been proscribed in our system nor could it be so without disrupting the principle of pluralism and associated fundamental rights" and that there is freedom of ideology in the Spanish constitutional system, and the public authority should provide the "primary guarantee of this freedom, to which, however, those who serve to promote and defend illegal or violent means and use terrorist intimidation in order to achieve their ends cannot aspire." In short, "it is these means and not the ideas or political objectives peaceably pursued to which the reaction of public power is addressed in defense of the framework of peaceful coexistence designed by the constitution so that all ideas are covered thereby" (STC 99/2004, May 27th, FJ 18; STC 126/2009, May 21st, FJ 10, for all references). Consequently, these circumstantial evidences must not be given the evidential value awarded to them by the Chamber.

The identification between Batasuna and the Basque nationalist left is set out in the valuation of the document entitled “Lortu-Arte,” given that, as also indicated in the press information incorporated in the proceedings, this is an agreement publically signed between the Basque nationalist left and Eusko Alkartasuna in order to, as stated in the preamble to the agreement, lay the bases for joint action towards creating a Basque nation. Consequently, this piece of proof cannot be given the evidential value awarded to it by the Chamber.

It is also clear that the documents do not evidence the intention to defraud by ETA and Batasuna that the appealed decision considered proven through the candidate lists of the appellant coalition for the upcoming elections in the document titled “BTGNari Komunikazio orokorra 0906/0609 General Communication to the BTGN,” referring to an alleged collaboration attempt with Eusko Alkartasuna for the 2009 European Parliament elections, which was ultimately not carried out. Neither the letters addressed “to the leadership of the Basque nationalist left, Rafael Díaz Usabiaga,” which the Chamber affirmed contained references to contacts between the “Batasuna/ETA complex and Eusko Alkartasuna” in respect of the 2009 elections. However, the paragraphs transcribed do not make anyreference to the ETA/Batasuna complex and, in any case, allude precisely to the termination of these alleged contacts by Eusko Alkartasuna following the terrorist attacks and to the possibility that Eusko Alkartasuna could be a partner, without specifying the other subjects, in those European elections. The December 13, 2010 letter from the Batasuna activist Uriarte Bilbao to the ETA prisoner Ugalde Zubiri was also excessively weak, if not irrelevant, for the purposes of proving the materialization of the intent to defraud (this letter makes a vague and generic reference to Eusko Alkartasuna in respect of the preparation of the “herri” program) , as was the statement of Ekin Egoitz Garmendia Vera, a member of the terrorist organization, to the Central Court Number 3, acknowledging having prepared a brief alluding to an assembly that took place in Vitoria and that, according to the author, gave rise to the social base for the agreement between Eusko Alkartasuna and Batasuna, with no more specifics provided.

Among the documentary circumstantial evidences, the challenged decision also cites, according to the title of the section, “Public statements by leadership of Batasuna, Eusko Alkartasuna and Alternatiba regarding the agreement between these groups.” The decision specifies that these are declarations or public statements made by the spokesperson for Alternatiba, the leaders of the Basque nationalist left, the General Secretary of Eusko Alkartasuna and public representatives. The content refers to the possibility, viability, and ties of the agreement with the two political parties forming part of the appellant electoral coalition with the Basque nationalist left, to the presence of the Basque nationalist left in the 2011 local elections and, in particular, to the aforementioned document signed between those political parties and the Basque nationalist left entitled “Euskal Herria Ezkerretik/ Euskal Herria from the left” and subtitled “Agreement for political and social change between the independence movement and those seeking regional sovereignty.” It is clear that these statements do not evidence the materialization of the intent to defraud.

10. In addition to the documentary circumstantial evidences, the Chamber also based its decision —which in turn led to the quashing of the candidate lists presented by the appellant coalition— on wiretapped conversations which content is reproduced in the grounds of the decision. In the Chamber’s opinion, this information the role played by members of the Batasuna complex in the formation of the candidate lists of the appellant coalition. By way of example, we cite the content of part of the intercepted conversation held on April 2, 2011 between Mr. Otegui, former Batasuna spokesperson, and his spouse in respect of the composition of the candidate list of Bildu in his birthplace, in which she indicates: “I didn't tell you, but do you know who [incomprehensible] the first of ours” .... “The one who works in the Basque Government.” She concluded as follows: “We could take the mayorship.”

As shown in the part of the decision citing the reproduction, this is the case of communications and conversations held by representative public officials, candidates, or public officials in past electoral processes, unidentified people or people identified by their names but with no other information provided, or in certain cases people who in the decision are identified as members of Batasuna's committee, without specifying whether or not this condition was current or previous, and the aforementioned conversation between Mr. Otegui and his wife. The reproduction of some of these communications can be easily discarded, due to their irrelevant content. Most communications reveal only the difficulties experienced in getting certain individuals to accept their inclusion in the candidate lists, in their attempts at and insistence in securing that acceptance, in the not-infrequent problem when preparing the candidate lists of distributing the posts to be covered and the ranking of candidates on the list, etc. In short, both when considered individually and overall, the conversations transcribed in the decision lack sufficient magnitude as required under the constitution to be considered evidence, as the Chamber considered them, of materialization of the intent to defraud. In respect of the valuation of the communications and telephone conversations, we must not forget that, as this Court has declared on numerous occasions, the "dissolution of a political party does not entail the deprivation of the right to vote or to stand for election of those who were its promoters, leaders or members" (for all references, STC 85/2003, May 8th, FJ 23) and, more specifically, that "judicial outlawing of the political parties Herri Batasuna, Euskal Herritarrok and Batasuna in no way led to the loss of the right to vote of any citizen whatsoever" (STC 44/2009, February 21st, FJ 13). Consequently, not even the promoters, leaders or members of the banned political parties have, as a result of this banning, lost the right to political participation or political action in the framework of the democratic system.

In addition, it is not possible to grant evidential value for the purposes of interest herein to the meetings referred to in the decision between Batasuna's electoral team ("hauteskunde taldea") and the local committee of Eusko Alkartasuna in Sestao (Vizcaya). Seemingly, these are three meetings held at the headquarters of Eusko Alkartasuna's local committee. Although the date and those in attendance are known, no information is known regarding the content of the meetings. The report by the General Information Bureau of the Home Ministry does not fully assert that Batasuna participants were responsible for the electoral team in Sestao ("they appear to be the responsible people in the town's electoral team").

And, finally, the fact that the candidates considered "independent" exceeds the number of candidates belonging to the political parties forming part of the coalition, with the Chamber having ruled out any ties between those individuals and the terrorist organization ETA and the banned political parties, this cannot be translated, for the reasons stated above when examining the subjective circumstantial evidences, into an objective item of proof that the banned Batasuna has taken over these lists or to conclude that those "independent" candidates without any subjective ties to the terrorist organization and to the banned political parties could become "dependent" on that organization and on that political party. Lastly, the reference to the election results in determining the distribution of posts in the candidate lists appears only as a measure for identifying the support, in each electoral district, of the Basque nationalist left, a political or ideological school of thought that, as such, is not and cannot be prohibited under our legal system.

11. In respect of the evidence aimed at accrediting materialization of the fraudulent intent in respect of candidate lists presented by the appellant coalition by ETA and the banned political party Batasuna, the State Solicitor and the Public Prosecution Service submit, along with their briefs, report 31/2011 prepared by the Civil Guard (Guardia Civil) on new investigations in respect of Bildu on May 5, 2011, incorporating a document prepared by members of ETA about a meeting held between Eusko Alkartasuna and ETA in February 2009.

Without it being necessary to delve into procedural considerations regarding the moment this report was submitted, it is sufficient for our present purposes to note that, as a reading of the report and the document in question reveal, this alleged reunion related to the possibility of an intent for collaboration between the Basque nationalist left and Eusko Alkartasuna in respect of the autonomous community elections and the 2009 European elections, a collaboration which ultimately did not take place. The report and document are on a par with the document titled "BTGNari Komunikazio orokorra 0909/0609 General Communication to the BTGN," taken into account by the Supreme Court and the evidentiary value of which we have already referred to in Ground 9, above. This evidentiary value is undoubtedly expressed by the argument set out on several occasions in the State Solicitor's brief, namely that what is clear in this amparo appeal is whether in this specific electoral process the candidate lists presented by the appellant coalition were used as vehicles to the benefit of the banned political parties, not what might have happened in previous electoral processes or what never actually occurred.

With respect to the document titled "Lortu-Arte," we refer to Ground 9 above.

12. From the constitutional perspective of this Court, the above considerations emphasize that the circumstantial evidences assessed by the Supreme Court have insufficient evidential value to duly justify, in this case, the loss of the fundamental right of political participation in terms of equality and free defense and promotion of one's particular ideology. In accordance with our case law, for this reason it is not necessary to oppose them with any counterevidence, that is, to discredit them with an unequivocal condemnation of terrorism by the political formation suspected of colluding with a terrorist organization (STC 126/2009 May 21st, FJ 14). In accordance with that case law, "the refusal to expressly condemn terrorism is not therefore, sufficient indication to accredit per se an intention to defraud, such as that foreseen in Article 44.4 of the Elections Law. It is rather the contrary, that is, unequivocal condemnation constitutes counterevidence able to discredit the reality of a willingness of that aspect deduced on the basis of sufficient evidence" (STC 68/2005 of March 31, FJ 15).

Given their insufficiency as proof, it is not necessary in this case to oppose the circumstantial evidences addressed and considered overall with counterevidence of condemnation of terrorism. However, with respect to the position in the decision on the condemnation of terrorism by the appellant coalition, we wish to point out that said condemnation cannot be discarded or relativized as simply a "simulation" using the sole argument that the terrorist organization had recommended this criticism or condemnation (Ground 13). Unless an objective collusion is evidenced, no party is responsible for the actions of others, regardless of how similar or coincidental their own actions are. The efficacy of the counterevidence is not subject to the dilemma —irresolvable for Law— of whether an actor was more or less sincere, although it can be made conditional on the objective identification of the true intentions behind statements that might constitute such counterevidence. However, this intention can only be revealed as contrary (and therefore concealed) based on observable facts and referring to or assignable to the subject itself that attempts to exercise its fundamental right.

In any event, and without prejudice to the foregoing, the suspicion that the creation of the appellant coalition and its rejection of violence form part of a strategy for political cooperation with the terrorist organization must be, at this point, counteracted by something that is more than a mere conjecture or circumstance, but rather information that cannot possibly be discredited or overlooked: the coalition is formed by two parties that, as is publically known, as is recognized in the challenged decision (Ground 13) and as is accredited with the document submitted by the appellant, have repeatedly condemned and continue to condemn the violence committed by ETA. Consequently, there is no reason to assume that these publically-stated positions were forgotten or overruled when adding new "independent members" to the candidate lists. If two political organizations, both of which oppose terrorism, open their candidate lists to "independent members," it is illogical to assume that they have done so abandoning that

position or having been duped by another party. This latter supposition is highly unlikely, and it has been demonstrated that the first supposition did not occur in this case. What can be assumed, in contrast, is that the aligned political parties have stated and, at the moment, confirm that the "independent members" forming part of their candidate lists do not support organized crime, and hold a position against violence. In this regard, it cannot be overlooked that all the candidates of the appellant coalition, as an essential condition for being candidates, have signed a document, point 9 of which states as follows: "There is a firm commitment to act using only political, pacific and democratic means and methods, which carries with it opposition by all legitimate means to any act or activity that entails aggression or infringement of any human right and to the use of violence to achieve political objectives." This Court considered a similar declaration to sufficiently accredit a condemnation of terrorism (STC 126/2009 of May 21, FJ 14).

13. We wish to conclude by emphasizing that a simple suspicion is not a legally-acceptable argument for excluding any party from fully exercising its fundamental right to political participation. Such a suspicion may be indeed confirmed in the future; however, with respect to the legal matter at hand, the suspicion may not lead to a limiting result, jeopardizing the scope of free exercise of the rights to political participation guaranteed in Article 23 CE and, with it, the political pluralism on which the constitutional system of our democratic state is grounded. An extreme effort to ensure security of the constitutional state, through preventative control measures, places the very constitutional state at risk. Moreover, this attempt is disproportionate in light of the wide range of a posteriori control measures available in our legal system, through the latest legal reforms.

RULING

In respect of the foregoing, the Constitutional Court BY THE AUTHORITY VESTED IN THAT BODY BY THE CONSTITUTION OF THE SPANISH NATION,

has decided

to uphold the amparo appeal lodged by the electoral coalition Bildu-Eusko Alkartasuna/Alternatiba Eraikitzenand, and as a result:

1. To declare infringed the appellant's right to access public office in equal conditions, with the requisites set out by law (Article 23.2 CE).

2. To redress the right of the appellant, and to this effect to declare null and void the decision issued on May 1, 2011 by the Special Chamber of the Supreme Court as established in Article 61 of the Organic Law on the Judiciary, handed down in accumulated contentious-electoral proceedings numbers 2-2011 and 4-2011, which declared unlawful and null and void the resolutions of the local electoral boards of the provinces of Álava, Guipúzcoa, Vizcaya and Miranda de Ebro (Burgos), and of the Navarra Electoral Boards announcing the candidate lists presented by the appellant coalition for the local elections, the General Historical Region Board elections, and the elections to the Navarra Parliament to be held on May 22, 2011.

This judgment shall be published in the Official State Gazette ("Boletín Oficial del Estado.")

In Madrid, on May 5, 2011