MEPs Report on Basque politically motivated Prisoners' Human Rights

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Abstract

This report is the result of a three day visit to the Basque Country made by seven Members of the European Parliament (hereinafter MEP) and carried out within the framework of a GUE/NGL group initiative. The purpose of the visit was to receive first-hand information on Basque politically motivated prisoners from a human rights perspective. This report will give some conclusions and recommendations on the information gathered in a wide range of meetings with different civil society organisations, political parties, institutions and authorities of the Basque Autonomous Community and the Foral Community of Navarre.

The main objective of this report is to scrutinise and denounce violations of these prisoners' human rights, based on testimonies and documentation received during the visit of the delegation to the Basque Country, and on European and International human rights standards. The delegation was monitoring four aspects of human rights violations, namely: the dispersal policy against Basque politically motivated prisoners, the seriously ill prisoners, the implementation of the Framework Decision 2008/675/JHA of 24 July 2008 in Spain and the granting of conditional release to prisoners in France.

1. Origin of the cross-group delegation

In March 2015, the association of friends and relatives of Basque political prisoners and refugees ETXERAT visited the European Parliament with the aim of informing MEPs about the situation of Basque politically motivated prisoners.

After listening to the testimonies of the representatives of the association and having concerns about the possible breaches of these prisoners' and their relatives' human rights, seven MEPs from three different groups visited the Basque Country from 14-17 February, 2016.

The purpose of the delegation was to verify and evaluate these testified violations of human rights. Hence, to observe whether these rights are being guaranteed in Spain and France.

These are the members of the delegation and the agenda followed during their visit to the Basque Country:

Members of the delegation			
Name	**Group**	**Party**	**Country**
Gabi ZIMMER	GUE/NGL	Die Linke	Germany
Malin BJÖRK	GUE/NGL	Vänsterpartiet	Sweden
Martina ANDERSON	GUE/NGL	Sinn Féin	Ireland
Lidia SENRA	GUE/NGL	Alternativa galega de esquerda en Europa	Galiza
Josep-Maria TERRICABRAS	Greens/EFA	Esquerra Republicana de Catalunya (ERC)	Catalonia
Tatjana ŽDANOKA	Greens/EFA	Latvijas Krievu Savienība / Русский Союз Латвии	Latvia
Mark DEMESMAEKER	ECR	Nieuw-Vlaamse Alliantie (N-VA)	Flanders

General Delegation Schedule								
Time	**Sunday 14th February**	**Monday 15th February**			**Tuesday 16th February**		**Wednesday 17th February**	**Time**
04:00 - 09:00							*Departure of participants*	04:00 - 09:00
09:00 - 10:00				**Ombudsman Office Representative of the Basque Autonomous Community** *Bilbao*				09:00 - 10:00
10:00 - 11:00		**Parliament of the Basque Autonomous Community** *Vitoria-Gasteiz*	**Representatives of the Foral Government of Navarre** *Pamplona-Iruña*		**Political Social actors in Northern Basque Country** *Baiona/ Bayonne*	**Media Editors** *Donostia - San Sebastian*		10:00 - 11:00
					Press statement by **Mark Demesmaeker** *Baiona/ Bayonne*			
11:00 - 12:00				**Chief Prosecutor of the Basque Autonomous Community** *Bilbao*	**Political Social actors in Northern Basque Country** *Baiona/ Bayonne*			11:00 - 12:00
12:00 - 13:00	*Arrival of Participants*	Press Statement by **Gabi Zimmer**	**Foral Parliament of Navarre** *Pamplona-Iruña*			**Rosa Rodero** *Donostia - San Sebastian*		12:00 - 13:00
13:00 - 14:00		**Representatives of the Basque Autonomous Government** *Vitoria-Gasteiz*	Press Statement by **Martina Anderson**	**Bar Association of Bizkaia** *Bilbao*		**Cultural Representatives Laura Mintegi and Fermin Muguruza** *Donostia - San Sebastian*		13:00 - 14:00
			Former President of					

14:00 - 15:00			**the Basque Autonomous Community** *Pamplona-Iruña*					14:00 - 15:00
15:00 - 16:00				**Garbiñe Biurrrun** *Donostia - San Sebastian*		**Trade Unions** *Donostia - San Sebastian*		15:00 - 16:00
16:00 - 17:00			**Ombudsman of the Foral Community of Navarre** *Pamplona-Iruña*					16:00 - 17:00
17:00 - 18:00				**Paul Rios** *Donostia - San Sebastian*	**Trade Unions** *Donostia - San Sebastian*	**Political Parties not represented in the Basque Autonomous Parliament** *Donostia - San Sebastian*		17:00 - 18:00
18:00 - 19:00		**Basque Prisoners´ Lawyers** *Donostia - San Sebastian*		**Sare** *Donostia - San Sebastian*	**Jaiki hadi** *Donostia - San Sebastian*			18:00 - 19:00
19:00 - 20:00	Press statement (at the airport) by **Josep-Maria Terricabras**			**Etxerat** *Donostia - San Sebastian*				19:00 - 20:00
20:00 - 21:00								20:00 - 21:00
21:00 - 24:00		**Dinner**			**Dinner**			21:00 - 24:00

Groups for Monday 15 February			***Groups for Tuesday 16 February***	
Group A	**Group B**	**Group C**	**Group D**	**Group E**
Gabi ZIMMER	Tatjana ŽDANOKA	Malin BJÖRK	Mark DEMESMAEKER	Tatjana ŽDANOKA
Mark DEMESMAEKER	Martina ANDERSON	Josep-Maria TERRICABRAS	Lidia SENRA	Martina ANDERSON
		Lidia SENRA	Josep-Maria TERRICABRAS	Malin BJÖRK
All participants				
Press statements				

2. A brief background on the Organic Law 7/2003 and the Spanish prison system

Article 55.2 of the Spanish Constitution foresees that an organic act may determine the manner and the circumstances in which the rights recognised in Articles 17.2, 18.2 and 18.3 of the Spanish Constitution may be suspended for specific persons in connection with investigations of the activities of armed bands or terrorist groups.

This provision allows for a suspension of individual rights related to the duration of preventive arrest, the inviolability of the home and the secrecy of communications in exceptional cases, on an individual basis and with the necessary participation of the courts and parliamentary control. The Spanish Constitution is the only Constitution in Europe that contains this exception.

Moreover, not only procedural rights can be modified by this special legislation. Exceptional measures are also extended to the Spanish Criminal Code (more severe penalties, there is no application of the principle of proportionality in some cases…) and to prison rules. It is the widest, harshest and most severe anti-terrorist legislation ever in Spain.

The need to find a response to the terrorist phenomenon and related conducts has been the source of many amendments to the Spanish prison system. The Organic Law 7/2003 of 30 June *on reforming the measures aimed at the full and effective serving of courts sentences* was created with terrorism in mind and it resulted in a significant increase in severity regarding the service of sentences of imprisonment.

This law is inspired by the principle of making the offenders pay rather than by the principle of reintegration; and therefore justice is often mixed with revenge. It is a paradigm of the Criminal Law of the Enemy. It blocks access to conditional release and third grade for prisoners (half of the sentence is requested to be served in order to access to the third grade, 40 year-limit is the maximum that applies in prison sentences, etc.). Moreover, it strengthens administrative authorities' power when deciding on prisoners.

3. The monitored issues during the visit to the Basque Country

In this section, the human rights of Basque politically motivated prisoners will be assessed according to European standards, i.e. the European Convention on Human Rights (hereinafter ECHR) and the Charter of Fundamental Rights of the European Union, regardless of any other possible violation of domestic law. International tools such as recommendations, rules or resolutions will also be taken into account when evaluating these prisoners' human rights.

It should be noted that many other matters and concerns about Basque politically motivated prisoners were testified to in the meetings held in the Basque Country.

Nevertheless, the delegation monitored four specific issues: the dispersal policy against Basque politically motivated prisoners, the situation of the seriously ill prisoners, the implementation of the Framework Decision 2008/675/JHA in Spain and the granting of conditional release to prisoners in France. Each of them will be separately scrutinised below. This section seeks to evaluate whether these matters are in conformity with European and International standards of human rights.

According to the lists provided by the association ETXERAT in April 2016, there are 392 Basque politically motivated prisoners imprisoned in 75 prisons, allocated in different modules.

- 4 prisoners in 3 prisons in the Basque Country.
- 299 prisoners in 44 Spanish prisons.
- 84 prisoners in 26 French prisons.
- 1 prisoner in Portugal.
- 1 prisoner in Switzerland.
- 3 prisoners are under home arrest or light prison for the illnesses they suffer.

3.1. The dispersal policy against Basque politically motivated prisoners

The dispersal policy is a special discriminatory policy applied by different Spanish and French governments for nearly three decades (it was introduced in 1989) to Basque politically motivated prisoners.

Based on data provided by the association ETXERAT in April 2016:

- 56 prisoners are being held 1,100-1,000 km from the Basque Country.
- 106 prisoners are being held 990-800 km from the Basque Country.
- 148 prisoners are being held 790-500 km from the Basque Country.
- 15 prisoners are being held 490-400 km from the Basque Country.
- 51 are being held less than 400 km from the Basque Country.

Owing to this policy, prisoners' relatives suffered 9 accidents in 2014 and since 1988, 16 relatives have died going to or coming from a visit.

Moreover, each family has to travel an average of 63.599,47 km a year (overall 47.572.408 km) and each of them spends an average of 1.000-1.200€ per month (overall 10.357.131€ a year).

As noted above, only 4 prisoners are being held in prisons located in the Basque Country. The rest of the prisoners have filed numerous applications requesting a transfer to a prison located closer to their place of residence or origin. Their requests are based on different arguments: prisoner's advanced age, prisoner's serious illness, prisoner's relatives' illnesses or difficulties prisoners face in order to see their children, among others.

With regards to prisoners held in Spanish prisons, around 30 applications[1] have been dismissed by the *Audiencia Nacional* of Spain and the Spanish Supreme Court. These decisions were subject to an appeal before the Spanish Constitutional Court. The Court will first decide on the admissibility of the appeal. If successful, it will rule on the merits. Consequently, up to now none of the requests made by Basque politically motivated prisoners have been admitted.

For instance, on 29 October 2015 Section One of the Criminal Chamber of the *Audiencia Nacional* issued the Judicial Order[2] no. 841/2015 refusing to move the applicant to a closer prison to his place of origin. However, the dissent opinion of one of the magistrates belonging to the Chamber (Judge Sáez Valcárcel) clearly states that the transfer of prisoners is an administrative intervention with no legal basis in the Spanish law.

According to Judge Sáez Valcárcel, it should be noted that prisoners are subjects of rights and the only limit to these rights is the deprivation of liberty and any other faculty that could be affected by the content of the sentence. This means that all civil, political, cultural and economic rights of the inmate should be guaranteed while imprisoned. As a result, the prison administration could not interfere systematically and universally transferring a category of prisoners (based on the nature of the committed offence) to prisons located far from their places of origin.

Moreover, he states that the principle of reintegration is the inspiring principle when serving prison sentences. Therefore, every action concerning the prisoner's life in prison should be undertaken with this principle in mind. This should be the constitutional framework protecting the prisoner.

With regards to human rights standards, the following European and International instruments are essential when assessing prisoners' allocation:

- Within the framework of the Council of Europe, the Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules. Its principle 17.1 states the following regarding allocation and accommodation: *"Prisoners shall be allocated, as far as possible, to prisons close to their homes or places of social rehabilitation."*

- United Nations General Assembly's Resolution 43/173 of 9 December 1988. *Body of principles for the protection of all persons under any form of detention or imprisonment*. According to its principle 20, *"if a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence."*

[1] This is only a representative piece or a data sample of all the applications filed. There are more applications lodged in different judicial instances (both in the *Audiencia Nacional* and in the Spanish Supreme Court).
[2] *Auto nº 841/2015 de 29 de octubre de 2015, de la Audiencia Nacional, Sala de lo Penal, Sección Primera*.

- United Nations Standard Minimum Rules for the Treatment of Prisoners[3] (the Mandela Rules). According to Rule 59, *"prisoners shall be allocated, to the extent possible, to prisons close to their homes or their places of social rehabilitation."*

- United Nations Economic and Social Council Resolutions 663 (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

Likewise, the following rules could also be taken into account when considering transfers of prisoners to prisons located far from their places of origin:

- Principle 19 of the United Nations General Assembly's Resolution 43/173 of 9 December 1988. *Body of principles for the protection of all persons under any form of detention or imprisonment*: *"A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of this family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable condition and restrictions as specified by law or lawful regulations."*

- Mandela Rule 106: *"Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interest of both."*

- Mandela Rule 107: *"From the beginning of a prisoner´s sentence, consideration shall be given to his or her future after release and he or she shall be encouraged and provided assistance to maintain or establish such relations with persons or agencies outside the prison as may promote the prisoner´s rehabilitation and the best interests of his or her family."*

- The Oslo Recommendations regarding the Linguistic Rights of National Minorities of 1998. This provision should be read with the reasonableness of application, i.e. the category of Basque politically motivated prisoners could reasonable be considered as a collective belonging to a national minority. The location of the prison is linked to prisoner's community and culture. Nonetheless, above this, what is essential here is the application of the principle of reintegration.

  Recommendation 21: *Detained persons belonging to national minorities shall have the right to use the language of their choice in communications with inmates as well as with others. Authorities shall, wherever possible, adopt measures to enable prisoners to communicate in their own language both orally and in personal correspondence, within the limitations prescribed by law. In this relation, a detained or imprisoned person should, in general, be kept in a place of detention or imprisonment near his or her place of residence.*

[3] On 17 December 2015 a revised version of the Standard Minimum Rules was adopted unanimously by the 70th session of the UN General Assembly in Resolution.

- Amnesty International in its June 2012 report, *An Agenda for Human Rights in the Basque Country*, asked for the repatriation of prisoners and noted the right of every prisoner to be imprisoned, when possible, at a reasonable distance from his/her place of residence, as recognised on Principle 20 of UN's *Body of principles for the protection of all persons under any form of detention or imprisonment*.

Since the place of the prison may have an impact on the prisoner's private and family life, the allocation of prisoners is covered by Article 8 of the ECHR:

"1. Everyone has the right to respect for this private and family life (…)"
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

As established by the European Court of Human Rights in *Khodorkovskiy and Lebedev v. Russia* judgment: *"placing a convict in a particular prison may potentially raise an issue under Article 8 if its effects for the applicant's private and family life go beyond 'normal' hardships and restrictions inherent to the very concept of imprisonment."*

The European Court of Human Rights has recently delivered its judgment of 14 January 2016 analysing prisoner's right to respect for his or her family life. This is the *Rodzevillo v. Ukraine* case (application no. 38771/05), and is the third[4] judgment delivered by Strasbourg assessing this issue. One of the violations alleged by the prisoner is the denial of his requests for a transfer to a prison located closer to his parents' home.

Facts of the case

The applicant's prison in Gubnyk, in the Vinnytsia Region, was located some 1,000 kilometres from Simferopol, where his parents lived. Travelling by public transport from Simferopol to Gubnyk involved rides in two trains, followed by either an unreliable bus or a costly taxi.

The overall journey took some twenty-four hours, one way – which was impossible for the applicant's stepfather (who was born in 1925 and suffered from advanced disability). His mother, born in 1940, also suffered from various health problems. Taking a two-day multi-leg journey to attend a meeting with her son lasting several hours was an exhausting endeavour for her. It also involved a serious financial outlay and the need to make special care arrangements for her disabled husband during her absence.

[4] Judgment of 25 July 2013 *Khodorkovskiy and Lebedev v. Russia* (application no. 11082/06 and 13772/05) and Judgment of 23 October 2014 *Vintman v. Ukraine* (application no. 28403/05) are also rulings on this issue.

Accordingly, in spite of the applicant's mother's strong desire to maintain close contact with him, she could not afford to visit him four times a year, as permitted by law (two times a year before 2010). Between 2007 and 2015 the applicant received only seven visits from his mother and no visit whatsoever from other family members.

Ruling

Despite reiterating that the Convention does not grant prisoners the right to choose their place of detention, and the fact that prisoners may be separated from their families at some distance is an inevitable consequence of their imprisonment, the Court states as follows:

"(…) it is inconceivable that prisoners should forfeit all of their Article 8 rights merely because of their status as persons detained following conviction.

An essential element of a prisoner´s right to respect for his or her family life is that the prison authorities should assist him or her in maintaining contact with close family members. Detaining an individual in a prison which is so far from his or her family as to render family visits very difficult or even impossible may in certain circumstances constitute disproportionate interference with family life."

Moreover, the Court rules on the actions taken by the prison administration. In line with the principle of reintegration, the Court says that *"the distribution of the prison population should not remain entirely at the discretion of the administrative bodies. The interests of prisoners in maintaining at least some family and social ties must somehow be taken into account."*

In the *Rodzevillo* case, the Court somehow rephrases the idea mentioned above that the prison administration could not interfere with a systematic approach when transferring prisoners. Reasons submitted by the prisoners should be considered in a meaningful way:

"It appears that the competent authorities took a formalistic and restrictive approach in interpreting and applying the relevant legislation. There is no appearance that they attempted, in a meaningful way, to consider the applicant's and his mother's arguments concerning their personal situation, including serious health-related and budgetary constraints on the applicant's parents' ability to travel in order to visit him in the Ladyzhynska Colony."

The Court observes that the aforementioned circumstances giving rise to the applicant's complaint under Article 8 of the Convention in the present case are very similar to those that served as a basis for finding a violation of that provision in the *Vintman* case. The Court finds that legal assessment of the relevant facts in the *Vintman* case is equally pertinent to the case at issue.

Finally, the Court concludes with the following sentence: *"This measure was not necessary in a democratic society within the meaning of Article 8, second paragraph of the Convention."*

As stated above, 56 prisoners are being held 1,000-1,100 km from the Basque Country, which is the distance analysed in this case. Long journeys, prisoner's parent's health problems, difficulties to travel, a serious financial outlay… All of these issues were mentioned during the meetings with prisoners' relatives. Therefore, it could be concluded that many Basque politically motivated prisoners' situation is equivalent to the *Rodzevillo v. Ukraine* case and thus they could be covered by Article 8 of the ECHR.

Reading the International tools, it is clear that prisoners should be allocated in a prison close to their places of origin or residence.

Consequently, the dispersal policy against Basque politically motivated prisoners breaches the constitutional principle of reintegration and the right to private and family life provided by Article 8 of the European Convention on Human Rights.

3.2. Seriously ill prisoners

Based on data provided by ETXERAT and Jaiki Hadi (the association of health professionals which provides medical support and assistance to prisoners and relatives), ten Basque politically motivated prisoners are currently diagnosed with serious illnesses, namely: Schizophrenia, obsessive-compulsive disorder, symptomatic bradycardia, or acute ischemic heart disease among others. These are the official data:

	Year and place of birth	Prison	Diagnosed disease
Josetxo Arizkuren Ruiz	1958, Pamplona-Iruñea (Navarre)	A Lama (Pontevedra)	Acute ischemic heart disease
Garikoitz Arruarte Santa Cruz	1980, Hernani (Gipuzkoa)	Almeria	Ankylosing spondylitis Arthralgia Kneecap condropathy Sacroilitis
Jagoba Codó Callejo	1964, Donostia (Gipuzkoa)	Castelló II	Ankylosing spondylitis Multipathology
Iñaki Etxeberria Martin	1964, Pamplona-Iruñea Navarre)	Topas (Salamanca)	Myopia magna
Ibon Fernandez Iradi	1971, Lasarte-Oria (Gipuzkoa)	Lannemezan	Multiple sclerosis
Gorka Fraile Iturralde	1970, Durango (Bizkaia)	Badajoz	Epidermoid carcinoma of the tongue

Aitzol Gogorza Otaegi	1975, Orereta (Gipuzkoa)	Basauri	Obsessive-compulsive disorder Depressive disorder
Ibon Iparragirre Burgoa	1973, Ondarroa (Bizkaia)	Alcalá Meco (Madrid)	AIDS C-3 infection Neurological lesion
Jose Ramón Lopez de Abetxuko Likiniano	1949, Gasteiz (Araba)	Villabona (Asturias)	Symptomatic bradycardia Cardiac catheterization Cardiac pacemaker Prostate gland adenoma Cervical arthrosis
Jesús María Martín Hernando	1962, Basauri (Bizkaia)	Zaballa	Paranoid schizophrenia and generalized anxiety disorder Cognitive disorder

It should be noted that the above-mentioned ten prisoners gave consent to make their illnesses public. Nevertheless, eight more prisoners' illnesses could be classified as serious according to Jaiki Hadi's last report[5].

All of them are serious and incurable illnesses for which their release would help in order for them to be treated in an adequate manner and to avoid the situation getting worse.

Long years spent in difficult incarceration conditions and under constant pressure generate multiple physical and/or psychological problems for the imprisoned individuals. Furthermore, medical control in prison is usually reduced to the minimum and is even more difficult due to the various security conditions imposed on Basque politically motivated prisoners.

A simple diagnosis becomes a true obstacle course: months waiting for an appointment, being moved to hospital under spectacular escorts, repeating incidents, longer medical examination or hospitalisations under prison or police officers' permanent surveillance, denials of visits from doctors of the prisoners' choice, etc. Hence, there is a great limitation on the right to health.

According to the professional judgement of Jaiki Hadi these prisoners should be released in order to receive proper medical assistance and adequate treatment.

It is essential to highlight that requests for transfers to closer prisons are also done based on the illnesses of the prisoners.

The Basque Parliament made a clear call for the non-restrictive application of Article 104.4 of the Prison Regulation for Basque prisoners with serious and incurable illnesses.

[5] *Espetxea eta osasuna*, Jaiki Hadi, 6 March 2016.

There are some International rules and principles that could be taken into account when assessing the right to health care in prison:

- United Nations General Assembly's Resolution 43/173 of 9 December 1988. *Body of principles for the protection of all persons under any form of detention or imprisonment*. Principle 24: *"A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."*

- Mandela Rule 24: *"The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status."*

After listening to the testimonies of prisoners' relatives and based on the professional opinions of the doctors of the association Jaiki Hadi, it could be concluded that the right to health of at least ten Basque politically motivated prisoners is at high risk.

3.3. The implementation of the Framework Decision 2008/675/JHA in Spain

Within the context of the third pillar of the European Union, Council Framework Decision 2008/675/JHA of 24 July 2008 *on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings* (hereinafter Framework Decision) aims to ensure that similar legal effects are given to domestic convictions and convictions from other Member States.

Article 3 is a vital provision of the Framework Decision. This Article is based on the principle of simple assimilation of convictions and imposes as a matter of principle, that legal effects of foreign convictions must be equivalent to the legal effect of domestic convictions, according to national law.

There is an obligation to take foreign convictions into account, to be exercised in accordance with national law, i.e. to the extent that a national conviction would be taken into account.

"Each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national

convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law."

According to Article 5.1 of the Framework Decision, *"Member States shall take the necessary measures to comply with the provisions of this Framework Decision by August 2010."*

More than three years after the implementation date, Spain did not notify the measures transposing the obligations of the Framework Decision[6]. The Member State informed the Commission of the process of preparing relevant transposition measures at national level but it did not adopt the measures or notify the Commission before April 2014.

Since there was no incorporation of this European instrument into domestic law, the Spanish Supreme Court ruled in conformity with the Framework Decision in its judgments of 13 March 2014 (N. 186/2014). The Court took into account previous sentences served by a Basque politically motivated prisoner in France when calculating the maximum limit for prison terms when serving sentences.

Four years after the required implementation deadline, Spain adopted the Organic Law 7/2014 of 12 November 2014 *on the exchange of information on previous convictions and the taking account of criminal judgments in the European Union*. This law entered into force on 3 December 2014.

The exceptions provided in Article 14.2 and the Sole Additional Provision of the Organic Law 7/2014 allows for previous served sentences handed down in other Member States not to be taken into account when calculating sentences.

Therefore, the Organic Law 7/2014 limits the scope and the objective of the Framework Decision insofar it establishes a time limit for its application. In other words, convictions handed down in other Member States before 15 August 2010 will not be taken into account. This implies longer periods in prison for prisoners and thus the breach of the right to freedom.

As a consequence, this leads to the situation that whereas France is taking into account Spanish convictions, Spain limits this obligation imposed in Article 3 of the Framework Decision and does not take into account French convictions.

With regards to Basque politically motivated prisoners, this limitation could have an impact on a lot of inmates, as without it some of them could be automatically released and some others have a big reduction in their prison term.

According to data provided during the meeting with the lawyers in the Basque Country, 48 accumulation[7] requests were filed before the Organic Law 7/2014

[6] Report of 2 June 2014 from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decision 2008/675/JHA of 24 July 2008 *on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.*
[7] *Accumulation of sentences* is the concept used in the Spanish Criminal Code when calculating the maximum limit for prison terms when serving more than one sentence.

entered into force. Since the adoption of the transposition law of the Framework Decision in November 2014, no requests have been accepted and thus some of them are in the Supreme Court and in the Constitutional Court. If French convictions were accumulated 7 prisoners should be immediately released.

Both the Supreme Court and the *Audiencia Nacional* discussed the possibility of addressing a preliminary ruling to the Court of Justice of the European Union on the interpretation of the above-mentioned two articles of the Organic Law due to the inconsistencies between national law and Union law. Many judges were of the opinion that this law contravened the letter and spirit of the Framework Decision and the case-law that arose to implement it. According to them, Spain might have infringed rights recognised in the Charter of Fundamental Rights of the European Union (Article 49) and the ECHR (Articles 5, 7 and 14).

However, none of them asked the Court of Justice of the European Union. The Plenary of the Second Chamber of the Spanish Supreme Court in its judgment of 27 January 2015 (N. 874/2014) refused both to accumulate convictions and to request a preliminary ruling on the compatibility of the Organic Law 7/2014 with the EU law, stating that there is no need for such a question based on the *acte clair* doctrine. The judgment has 6 dissent opinions out of 14 magistrates.

Since the judgment of 27 January 2015 of the Spanish Supreme Court, case law is being consolidated (almost 30 judgments to date) and the number of prisoners affected by this situation is growing.

Up to now, three parliamentary questions have been addressed to the European Commission regarding this Framework Decision and its compatibility with the national law transposing it. The European Commission answered that Spain has not yet communicated to the Commission the transposition measures related to the Framework Decision.

However, according to the Annex (page 14) of the Report of 19 January 2016 from the Commission to the European Parliament and the Council *on the implementation of Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States,* Spain notified the Organic Law 7/2014 of 12 November 2014 two days after its adoption. The purpose of this notification is to transmit to the Commission the text of the provisions transposing into their national law the obligations imposed by the Framework Decision 2009/315/JHA as foreseen in its article 13.2.

It is a common practice that Member States adopt the transposing national laws for several EU instruments in a single law. The Organic Law 7/2014 incorporates two Framework Decisions into the Spanish legislation: Framework Decision 2009/315/JHA and Framework Decision 2008/675/JHA.

Consequently, not notifying the Organic Law 7/2014 as the transposition law of the Framework Decision 2008/675/JHA while having notified it for the same purposes

regarding the Framework Decision 2009/315/JHA could lead to the conclusion that there is an intentional delay in the notification.

From the information gathered on this issue, it could be concluded that the compatibility of the Spanish Organic Law 7/2014 with the Framework Decision should be reviewed.

The Organic Law must comply with the objective and scope of the Framework Decision, i.e. the principle of equivalence (legal effects of foreign convictions must be equivalent to the legal effect of domestic convictions, according to national law).

Having two Member States applying the same Framework Decision in a totally opposite way means that there are different minimum standards among the Member States of the European Union and this is against the principle of mutual trust and legal certainty.

Having first ruled in conformity with the Framework Decision (Supreme Court judgement N. 186/2014), Spanish courts now refuse to take into account previous served sentences in France, based on the Organic Law 7/2014. This implies longer periods in prison for prisoners and thus the breach of the right to freedom.

3.4. The granting of conditional release to prisoners in France

According to the French law, convicts who have shown evidence of social reintegration while in prison may be conditionally released prior to their official release date. Early release is subordinated to certain control conditions and measures of assistance.

Conditional release serves a threefold purpose: it is an incentive to rehabilitation for the convict while he or she is in prison; it is a further development of that rehabilitation in a state of controlled freedom; and it is a test of the rehabilitation program's success.

The conditional release would presumably be conducted pursuant to Article 729 of the French Code of Criminal Procedure. The convicted person only becomes eligible for parole or conditional release under Articles 729 and 729-2 once he has served at least half of his or her sentence.

Article 729 provides that *"convicted persons who have to serve one or more custodial sentences may be granted parole if they show serious efforts towards social reintegration, especially if they can prove that they work, or prove their regular attendance at teaching or training courses, or work experience or a temporary job with a view to their social reintegration, or their essential participation in family life, or of their need to undergo treatment or their efforts with regard to compensating their victims (…)"*

Seriously ill Basque politically motivated prisoners held in French prisons have also asked for conditional release in order to receive proper medical assistance and adequate treatment.

Despite fulfilling all legal requirements and submitting proper files to the tribunals, judges are not basing their rulings on legal arguments.

From the information gathered during our meetings with the lawyers in Baiona, during 2015 eight release requests were made and all of them were dismissed. The reasons given to dismiss them are the following:

- The prisoner did not show repentance for what he or she did.
- The prisoner has the same ideas and political commitments.
- Even though ETA is not active anymore, decommissioning of weapons has not yet occurred, meaning that there is no certainty on what could happen in the future.

One of these eight requests in 2015 was made by Lorentxa Gimon. She was one of the seriously ill prisoners held in a French prison and she asked for conditional release. Her request was first accepted, then subject to appeal by the Prosecutor and subsequently refused, and finally in 2016, her release was accepted. She was released on 1 March 2016.

It could be concluded that, more than four years since ETA declared a definitive end to its fifty years of armed activity, the penitentiary regime has significantly increased in severity regarding the service of sentences of imprisonment. Access to release regimes is blocked due to the fact that the law is inspired by the principle of making the offenders pay rather than by the principle of reintegration.

4. Conclusions

After a wide range of interesting and fruitful meetings with different civil society organisations, political parties, institutions and authorities in the Basque Autonomous Community and the Foral Community of Navarre, we the undersigned conclude:

- On 20 October 2011 ETA declared a definitive end to its fifty years of armed activity. Nevertheless, more than four years, the penitentiary regime has significantly increased in severity regarding the service of sentences of imprisonment. Access to release regimes is blocked due to the fact that the law is inspired by the principle of making the offenders pay rather than by the principle of reintegration.

- According to recent case-law of the European Court of Human Rights, denying prisoners transfers to prisons located closer to their places of origin not only affects prisoners but also their relatives. An essential element of a prisoner´s right to respect for his or her family life is that the prison authorities should assist him or her in maintaining contact with close family members. The dispersal policy against Basque politically motivated prisoners breaches the constitutional right of reintegration and the right to private and family life provided by Article 8 of the European Convention on Human Rights.

- The right to health of at least ten seriously ill Basque politically motivated prisoners is at risk. They are diagnosed with serious and incurable illnesses. We express our deep concern about their access to an adequate treatment and medical control in prison.

- The Spanish Organic Law 7/2014 limits the scope and the objective of the Framework Decision 2008/675/JHA of 24 July 2008 *on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings*. The exceptions provided in Article 14.2 and the Sole Additional Provision of the Organic Law 7/2014 allows for previous served sentences handed down in other Member States not to be taken into account when calculating sentences. This implies longer periods in prison for prisoners and thus the breach of the right to freedom.

- During 2015, eight release requests were made in the French tribunals and all of them have been dismissed for the following reasons: the prisoner did not show repentance; the prisoner has the same ideas and political commitments; there is no certainty on what could happen in the future since ETA´s decommission of weapons has not happened yet. Surprisingly, release requests made before the end of ETA´s armed activity were more easily accepted.

5. Recommendations

In a very sincere attempt to support the Basque peace process and as Members of the European Parliament, we the undersigned hereby declare as follows:

- There is no hierarchy in human rights. Respecting Basque politically motivated prisoners' human rights is not opposite to respecting ETA's victims' human rights. Human rights are universal and they should be guaranteed in every single case.

- We urge the governments of Spain and France to take the necessary steps in respecting prisoners' human rights. Therefore, no more exceptional discriminatory policies should be applied to Basque politically motivated prisoners.

- The only way for a successful peace process is to leave collective punishment aside. Basque politically motivated prisoners should be seen as an important element of the Basque peace process. Prisoners should also be involved in making peace and their human rights should always be guaranteed.

- We demand the end of the dispersal policy against Basque politically motivated prisoners.

- We call upon the authorities to scrutinise each of the files of the seriously ill prisoners and consider whether their release would help to guarantee their right to health.

- We urge the Spanish government to adjust the Organic Law 7/2014 to the Framework Decision 2008/675/JHA of 24 July 2008 *on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings* and thus ensure that equivalent legal effects are attached to foreign convictions, in accordance with national law.

- We demand an end to the practice of using political arguments when deciding about a prisoners´ release since this is an obstacle to the Basque peace process.

- We express our solidarity with the relatives of the Basque politically motivated prisoners.

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