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# LET THEM EAT (THEIR OWN) CAKE

## INSULTING THE CROWN AND FREEDOM OF EXPRESSION

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# ABSTRACT

This thesis examines whether the crime of insulting the crown is a proportional limitation to freedom of expression. The thesis is divided into two main chapters: a legal or normative approach to the problem, and a more pragmatic or political one. To contextualise the use of this crime, the red lining through the thesis are the convictions of two Catalan rappers, Valtònyc and Pablo Hasél. After explaining the constitutive elements of the crimes in the two relevant legal regimes (i.e., Spain and Belgium), the principle of freedom of expression gets briefly explained. According to the criteria set out by the ECtHR, is this protection of the monarch(y) a proportionate limitation to Article 10 ECHR? No: special crimes giving the king *more* protection than ordinary citizens are not in spirit of the Convention. In the second part, five different political reasons why the monarchy maybe deserves *less* protection than ordinary citizens are explained: the chilling effect, the monarch compared to politicians, the vagueness of context, the unwanted effects of convicting and – very specific to the Spanish case – the appearance of discrimination. Taking both the legal and pragmatic objections into account I conclude that the prosecution of this crime causes more harm than good. It is, literally, *no vale la pena*.

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# 1. Introduction

On 15 February 2018 the Spanish Supreme Court[1] confirmed the *Audiencia Nacional*'s decision[2] to convict a rapper under the pseudonym Valtònyc to a three and a half year of imprisonment for glorifying terrorism and humiliating its victims, threats, slander, and serious insults against the crown. Valtònyc was expected to surrender himself to the authorities. Instead, he fled to Belgium.[3] Just a few days later, 2 March 2018, another rapper, Pablo Hasél, was convicted[4] for insulting the Crown, insulting the police, and glorifying of terrorism.[5] On 7 May 2020, the Spanish Supreme Court[6] confirmed the AN's decision. Since this was not Hasél's first contact with the public authorities, his suspended sentence was revoked. Therefore, the court ordered he should voluntarily enter prison on 28 January 2021.[7] This caused a flood wave of protests in Spain, especially in big cities like Barcelona, Valencia, and Madrid. Unlike Valtònyc, Pablo Hasél did not flee the country, but barricaded himself in the University of Lleida along with some fellow protesters, where he was arrested by the Spanish authorities on 16 February 2021.[8]

This thesis will shed a more in-depth light on these two cases, limited to their convictions of insults against the monarchy. The main goal will be to find out whether this crime is an illegitimate limitation on freedom of speech or not. The first section will attempt to answer whether the lèse-majesté is a disproportionate limitation to freedom of speech from a normative or legal approach. First, the crime as it exists in Spain and Belgium will be explained, followed by a brief overview on what freedom of speech is. After, the ECtHR jurisprudence regarding the relationship of this crime and Article 10 ECHR gets explained. Because of the controversies these convictions cause, I think the debate expands the normative scope and should also be researched from a political point of view. Therefore, a second section was added, which explores if there are pragmatic or political reasons in favour of a more tolerate approach to freedom of expression regarding the monarchy.

[1] STS 79/2018, 15 February 2018.
[2] SAN 494/2017, 21 February 2017.
[3] X, "Free speech under siege in Spain", *OpenDemocracy,* 30 March 2018, https://www.proquest.com/magazines/free-speech-under-siege-spain/docview/2019867278/se-2?accountid=14708.
[4] SAN 27/2018, 2 March 2018.
[5] J. DOPICO GÓMEZ-ALLER, "The „Pablo Hasél Case": Slander and Defamation of the Spanish Crown in the 21st Century", *VerfBlog,* 18 March 2021, link: https://verfassungsblog.de/hasel-case/ (hereafter: "The Pablo Hasél Case); A. TAYLOR, "A Spanish rapper was arrested for tweets praising terrorists and mocking royals. Then the protests began", *The Washington Post*, 23 February 2021, link: https://www.washingtonpost.com/world/2021/02/23/pablo-hasel-tweets-spain-arrest/.
[6] STS 1298/2020, 7 May 2020.
[7] F. VILAR, "El rapero Pablo Hasel tiene 10 días para entrar en prisión por enaltecimiento del terrorismo", *The Objective,* 28 January 2021, link: https://theobjective.com/sociedad/2021-01-28/el-rapero-pablo-hasel-tiene-10-dias-para-entrar-en-prision-por-enaltecimiento-del-terrorismo/.
[8] X, "Spain: Rapper Pablo Hasel who fled to university sent to jail", BBC, 16 February 2021, link: https://www.bbc.com/news/world-europe-56082117.

# 2. Normative or legal level

## 2.1. Lèse-majesté

### 2.1.1. Description of the crimes in Spain and Belgium

In this section I will explain the *actus reus* and *mens rea* of the crime, as it exists in the Belgian and Spanish legal order. Explaining both is relevant if we want to make compare the different judicial approaches to this crime of both legal regimes.

#### *a. Spanish version: defamation of the Spanish crown*

There are two types of crimes in the Spanish criminal code that prohibit defamation of the Spanish monarch and his/her family:[9]

- Article 490.3 CP: Defamatory comments related to the exercise of the office, i.e., directed to the monarch (or his close relatives) in his function as Head of State. This can be punished with just a fine if they are not very serious (*pena de multa de 6 a 12 meses*)[10] and a prison sentence of 6 months to 2 years when serious.[11]
- Article 491 CP: Defamatory comments not related to the exercise of the office, i.e. directed to the monarch (or his close relatives) personally. This is only punished by a fine (*pena de multa de 4 a 20 meses*).[12]

Defamation of the Spanish crown can be seen as a special form of slander. In Spain, the latter is only criminal if the insults are grave, which is not required when insulting the King. Even then, no prison sentence is foreseen: *pena de multa de de 3 a 7 meses (6 a 14 meses si son con publicidad)*. [13] The Audience Nacional has justified this because the protected good of this special crime is different than that of regular slander: [14] not just the personal honour of the Royals is protected but '*además, la dignidad de la Institución'*.[15] The behaviour must also be considered objectively insulting: subjective injury by the aggrieved party does not suffice.[16] Further, the *exceptio veritas* – i.e., the behaviour is not punishable if your claim is truthful[17] – is applicable.[18]

[9] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021.
[10] Article 490.3 CP
[11] GEPC, "Calumnias o injurias al rey, la reina y a ciertos miembros de su familia", *LibEx,* link: https://libex.es/calumnias-o-injurias-al-rey-la-reina-y-a-ciertos-miembros-de-su-familia/.
[12] Article 491 CP
[13] J., Dopico Gómez-Aller, "El segundo "caso Pablo Hasél"", *Eunomía. Revista en Cultura de la Legalidad*, 2020, 395.
[14] GEPC, "Calumnias o injurias al rey, la reina y a ciertos miembros de su familia", *LibEx,* link: https://libex.es/calumnias-o-injurias-al-rey-la-reina-y-a-ciertos-miembros-de-su-familia/.
[15] SAN 2526/2013, 21 May 2013.
[16]GEPC, "Calumnias o injurias al rey, la reina y a ciertos miembros de su familia", *LibEx,* link: https://libex.es/calumnias-o-injurias-al-rey-la-reina-y-a-ciertos-miembros-de-su-familia/.
[17] Article 210 CP
[18] GEPC, "Calumnias o injurias al rey, la reina y a ciertos miembros de su familia", *LibEx,* link: https://libex.es/calumnias-o-injurias-al-rey-la-reina-y-a-ciertos-miembros-de-su-familia/.

### b. Belgian version

Article 1 of the *Loi du 6 avril 1847 portant répression des offenses envers le Roi* states that anyone who is guilty of insulting the person of the King (and his family) can be punished with imprisonment from six months to three years and with a fine from 300 to 3,000 euros.

First, it appears from the parliamentary preparations that the word "insult" and not "slander" or "libel" was deliberately chosen because they wanted to give the crime the widest possible scope.[19] Further, we can highlight that it is the *person* and *not* the *institution* of the King that is protected.[20] The crime of insulting the King diverges significantly from the general crime of "assault on the honour or good name of persons" in two aspects: first, no specific *mens rea* (i.e., malice) is required; general intent (i.e., the awareness that one is offending) suffices.[21]Second, following Article 8 of the *Loi*, the aggrieved person (i.e., the King) does not have to file a complaint;[22] it can be prosecuted *ex officio*.[23]

The last time someone got convicted for insulting the King, was back in 2007 for insulting His Majesty of being complicit to paedophilia and corruption in several letters to his office and e-mails to politicians.[24] So, although it formally exists, this crime is rarely prosecuted. This has to do with the nature of the crime. In Belgium, political and press offences are prosecuted for the *Cour d'Assises* instead of the regular *Tribunal Correctionel*.[25] This court's procedure is very cumbersome: the trial must be held completely orally (this means reading out all witness statements) in front of a public jury of twelve people. Juries often do not find a political of press offence worthy of punishment. Therefore, the Public Prosecutor stopped commencing these cumbersome, expensive procedures, because they just ended up in acquittals or symbolic punishments anyway. [26] Besides this procedural objection, there were also two material objections: first, a public trial would give more publicity to these insults. Secondly, the notion that also the "person of the King" – and not solely the royal institution – should be the object of criticism in a democratic society became dominant.[27] Could this different *ratio*

[19] *Parl. St.,* Senate meeting of 30 March 1847, nr. 197, 3.
[20] F. PERIN, *Cours de droit constitutionnel, I :Les libertés publiques*, Luik, Presses Universitaires de Liège, 1985, 79-80; P. POIRIER, *Code de la presse et de l'imprimerie*, Brussel, Larcier, 1945, 320.
[21] C. LAURENT, *Études sur les délits de presse*, Brussel, Larcier, 1871, 185.
[22] Art. 8 Loi 6 april 1847.
[23] Cass. 26 november 1877, *Pas.* 1878, I, 18, concl. MERLOT.
[24]F. FEYTEN, "Vebord op majesteitschennis is in strijd met Grondwet", VRT, 28 October 2021, link: https://www.vrt.be/vrtnws/nl/2021/10/28/verbod-op-majesteitsschennis-is-in-strijd-met-vrije-meningsuitin/#:~:text=geen%20VRT%2Dprofiel%3F-,Verbod%20op%20majesteitsschennis%20is%20in%20strijd%20met%20vrije%20meningsuiting%2C%20oordeelt,heeft%20het%20Grondwettelijk%20Hof%20geoordeeld.
[25] Art. 4 Wet 6 april 1847; R. VANDEPUTTE, "Het begrip van het politiek misdrijf in het Belgisch recht", *RW* 1932, 425-430. 99-102. (thesis oorspronkelijk: https://cms.ice.be/files/239/b.-loncke-belediging-van-staatshoofden-en-de-vrijheid-van-meningsuiting.pdf)
[26] M. VAN DAMME, *Overzicht van het Grondwettelijk recht*, Brugge, Die Keure, 2015, 391.
[27] J. VELAERS, *De beperkingen van de vrijheid van meningsuiting*, II, Antwerpen, Maklu, 1991, 453.

*legis* explain the different execution of these crimes in the two discussed jurisdictions? Allow me to elaborate.

### 2.1.2. Different *ratio legis*?

When the Belgian legislator adopted the law back in 1847, the justification of criminalising this conduct with a higher penalty than normal slander, were the constitutional principles of inviolability and irresponsibility of the head of state. According to these, the King cannot defend himself against "attacks" on his policy, but that his ministers are responsible for his actions.[28]

The Spanish legislation is different is this regard, since it does not only foresee in a personal protection of the monarch himself, but also of the institution in se. The aim of Article 490.3 CP is to defend the constitutional state, of which the King is "*símbolo de su unidad y permanencia y asume su más alta representació*n".[29] The Constitutional Court has noted that this special protection must be seen as a protection of constitutional state, and not merely of the monarch himself. In *Lius Manuel v. Spain* they noted that this could be clear from the fact that the crime is part of '*Título XXI: Delitos contra la constitución'* and not '*Titulo XI: Delitos contra el honor'*. [30]

I find it interesting how two crimes that are similar in wording and spirit can have such a different *ratio legis*. Where in Belgium the monarch deserves protection for his "helplessness" to defend himself and insulting the royal institution is not considered criminal conduct, the Spanish see it the opposite way around. Insulting the King related to his office duties, i.e., the regal institution, is an even higher protected good that deserves the hardest punishment (*infra*). Because of his vital position as head of state, he deserves extra protection, also when acting *outside* of the scope of his regal duties. Maybe this different approach in reasoning can explain why the Belgian law is comatose while the Spanish version is still alive and kicking. This brings us to two Spanish cases mentioned in the *Introduction*. In what follows I will shortly explain the facts of the case that led to the conviction of these two rappers.

[28] Parl.St. Kamer, 1846-47, nr. 857.
[29] SAN 64/2008, 04 November 2008.
[30] SAN 27/2018, 2 March 2018, 13.

### 2.1.3. The cases of Valtònyc and Pablo Hasél

#### *a. Pablo Hasél*

The judgement mentions nineteen tweets and lyrics of a song. Seven tweets contain offensive comments about the monarchy in general, comparing it to, among others, '*banda criminal'*, '*parásitos*' and '*mafiosa y medieval*'.[31] He also mentions the monarchy was installed by Franco. In three tweets he harshly criticises left-winged politicians for supporting the monarch and in one he mentions that[32] '*Miles de ancianos pasando frio y sin un techo seguro mientras monarcas dan lecciones desde palacios'*.[33] However, most of his attention goes to King Emeritus Juan Carlos I: in seven tweets he highlights the friendly relationship between Juan Carlos I and the Saudi monarchy. Regarding his past business, he refers to the King Emeritus as a 'ladrón' and 'mafiosa de mierda'. He also posted a rap song on YouTube about the King Emeritus, in which he refers to him as 'basura' and accuses him of squandering public money, of being a 'cacique' and a 'borracho', of consuming drugs and visiting prostitutes, and of having benefited from the attempted coup d'état in 1981. Lastly, he casts doubts on the unfortunate shooting accent in which the King Emeritus accidently killed his younger brother, [34] claiming '*quién se cree que fue un accidente'*.[35]

Pablo Hasél was also found guilty of committing two other crimes, but for '*injurias y calumnias contra la Corona y utilización de la imagen del Rey*' he was ordered to pay a fine *('pena de multa de doce meses con una cuota diaria de 30 euros'*).[36] Since most of the insults were directed at Juan Carlos I, the court convicted Pablo Hasél on the grounds of Article 491 CP.[37] Within Spain, the public and academic disapproval towards this judgement by the Tribunal Supremo was enormous. Some objections could indeed be made against the Court's decision to apply Article 491 CP instead of 490.3 CP.

First, it is peculiar that some tweets that are not directed against the King personally but at other people are still included in the verdict, e.g., the left-wing politicians' support of the monarchy.[38] Other tweets, should not have constituted the criminal offence at all. Can one reasonable argue that claiming '*miles de ancianos pasando frio y sin un techo seguro mientras monarcas dan lecciones desde palacios'* is a punishable offence? This, and the fact Franco installed the

[31] STS 1298/2020, 7 May 2020.
[32] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021; J. DOPICO GÓMEZ-ALLER, "El segundo "caso Pablo Hasél"", *Eunomía. Revista en Cultura de la Legalidad*, 2020, 397.
[33] STS 1298/2020, 7 May 2020.
[34] J. DOPICO GÓMEZ-ALLER, "El segundo "caso Pablo Hasél"", *Eunomía. Revista en Cultura de la Legalidad*, 2020, 397-398.
[35] STS 1298/2020, 7 May 2020.6.
[36] SAN 27/2018, 2 March 2018.25- 26.
[37] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021.
[38] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021.

monarchy after his death, might have even fallen under the *exceptio veritas*. Also, many tweets do not criticise the King personally, but are an attack against the institution. Dopico claims the SC tried to circumvent the wider protection given to political speech by the ECtHR by invoking Article 491 CP (i.e., personal insults) instead of Article 490.3 CP (i.e., institutional insults).
In general, their reasoning is quite uncomplete: *'no se trata de expresar una reivindicación política de otra forma de Estado, como pudiera ser la republicana, […] ya que únicamente se dedican los tuits y canción a insultar y menospreciar a la monarquía y a sus integrantes'*.[39] However, as Dopico articulates it: 'freedom of expression protects not only political criticism that proposes alternatives, but also that which simply opposes an institution […] or public persons'. This point of view seems more in line with ECtHR jurisprudence. For example, when they said pouring paint over the Ataturk statute in Turkey[40] or burning pictures of the Spanish king[41] was as specific form of political protest worthy of protection.[42] Finally, they concluded that Hasél's expressions reveal *'el ánimo evidente de que por quien accede a sus tuits adopte una posición contraria [a la monarquía y a sus integrantes], incluso de forma violenta.'*[43] By stating this the SC invoked the hate speech doctrine. However, invoking an unsupported claim of hate speech is not enough: the Court should have justified this statement by for example using the proportionality test (see *infra*).[44]

### b. Valtònyc

The Pablo Hasél case reminded a lot of people of a similar, earlier case. Here, Valtònyc got convicted for glorifying terrorism, non-conditional threats at an individual and insulting the crown. Two main differences between the Pablo Hasél and Valtònyc case can be mentioned: first, the latter got convicted on the legal basis of Article 490.3 CP instead of Article 491 CP. Second, instead of just a fine, Valtònyc got a more severe punishment: one year of imprisonment for insulting the crown – in total he was sentenced to three and a half year years imprisonment.[45] What exactly did Valtònyc say that justifies this (harsh) sentencing?

His insults towards the monarch relating to the exercise of his office were made in the form of rap songs that he posted on social media. In his lyrics he accuses the King Emeritus of '*para hacer de diana utilizaba a su hermano', 'ahora sus hermanastros son los árabes y les pide*

[39] STS 1298/2020, 7 May 2020, 10.
[40] *Murat Vural v. Turkey*, no. 9540/07, ECHR 21 October 2014.
[41] *Stern Taulats and Roura Capellera v. Spain,* nos. 51168/15 and 51186/15, ECHR 13 March 2018, p. 38.
[42] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021.
[43] STS 1298/2020, 7 May 2020, 10.
[44] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021.
[45] SAN 494/2017, 21 February 2017.

*dineritos para comprar armas', 'ir de putas', 'los derechos humanos se los pasa por "los cojones"'* and *'no es democrático, que es un dictador enmascarado'*. Other insults were directed at the King ('*hijo de puta'*) and the Princess *('Sofía en una moneda, pero fusilada'*). He also makes threats like '*un día ocuparemos Marivent [a royal palace] con un kalasnikof', 'encontrándonos en el palacio del Jacobo, kalashnikov', 'el Rey tiene una cita en la plaza del pueblo, una soga al cuello y que le caiga el peso de la ley', 'por qué no se fractura la cabeza y no la cadera',* and '*puta policía, puta monarquía, a ver si ETA pone una bomba y explota'*. He also mentions the civil war, e.g., '*Mi puta lengua envenena la fuente de la que bebéis, si contagia la rabia resurgida del treinta y seis'*. The AN concludes that these numerous expressions go beyond political criticism and enter the realm of attacks on personal dignity, death threats, incitement to violence or hate speech and cannot be protected by freedom of expression, nor artistic creation. Therefore, these songs constitute the offence of Article 490.3 CP.[46]

Valtònyc appealed his sentence before the Supreme Court. He claimed that 'using his brother as target' and 'buying arms from the Saudis' were historical facts. In general, he stated that the judgement confuses political criticism with a personal one. The Supreme Court rejected these arguments and confirmed the AN's decision: '*No son letras irrelevantes; no realizan una crítica política al jefe del Estado, o a la forma monárquica, exponiendo las ventajas del sistema republicano, lo que sería admisible con arreglo a la doctrina que aplica y trascribe la sentencia recurrida, sino que injurian, calumnian y amenazan de muerte al Rey o a miembros de la Familia Real*.'[47] Instead of undergoing his sentence, Valtònyc fled to Belgium were the authorities refused to extradite him. What happened after, will be explained *infra*.

### c. Comparison

After discussing these two judgements, one preliminary conclusion can already be made. Even though the cases have very similar facts, a different legal base is chosen to convict the rappers. Since Article 490.3 CP gives rise to significantly higher penalty (i.e., imprisonment instead of just a fine) than Article 491 CP, one could expect the Court to at least give an extensive explanation as to why one offence was chosen over the other. Instead, both judgements seem to unquestionably support the applicability of the specific crime. In the Pablo Hasél case, the AN mentions both articles, but does not explain why only article 491 CP applied.[48] In the

[46] SAN 494/2017, 21 February 2017, 15.
[47] STS 79/2018, 15 February 2018, 19.
[48] SAN 27/2018, 2 March 2018, 18-19.

Valtònyc case, Article 491 was not even mentioned. This is peculiar, especially since some of the insults are almost the same, e.g., Juan Carlos I's friendship with the Saudi monarchy, the suspicious death of Juan Carlos I's brother and use similar R-rated slurs to describe the monarchs. Is it maybe not clear for the courts themselves what is a personal criticism to the King and what can be regarded as criticism related to his royal duties? Or are they doing this on purpose, trying to avoid well-established ECtHR-case law regarding political speech (see *infra*)? Whatever the reason may be, certain question marks about how does impact the *lex certa*-principle seem in place.

Before diving deeper in to whether these convictions were an illegitimate limitation of freedom of speech or not, let's briefly expand on what freedom of expression is.

## 2.2. Freedom of expression

### 2.2.1. American v. European doctrine

There are two main doctrines regarding freedom of expression: the American and the European one. Ever since *Brandenburg v. Ohio*[49] the US Supreme Court has affirmed that free speech deserves a sweeping protection: except in emergency cases where the speech could cause *imminent* harm, the speech is permitted.[50] Although many critics have voiced their opinions against such a liberal approach,[51] voices in favour have equally been raised and up until today the quasi-absolute form of free speech prevails. The European doctrine is less tolerant towards free speech and has implemented more restriction. Since this thesis focusses on crimes and events that took place on the European territory, in what follows I will only focus on the settled case law of the ECtHR to establish what freedom of expression entails.

### 2.2.2. Article 10 ECHR and its limitations

Article 10 of the ECHR states: *'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'* However, a second paragraph quickly indicates that this right is not absolute. This states that interferences are justified if they

[49] US Supreme Court 1969 *Brandenburg v. Ohio*, 395.
[50] J. HOWARD, "Dangerous Speech", Philosophy & Public Affairs 47, 2019, 209.
[51] See for example: J. WALDRON, *The harm in hate speech*, Harvard University Press, 2014, 304 p., J. HOWARD, "Dangerous Speech", Philosophy & Public Affairs 47, 2019, 208-254.

are “necessary in a democratic society” for the protection of one of the extensively listed policy interests.[52]

Freedom of expression is one of the fundamental pillars of a democratic society. The Court has stated that: “Article 10 […] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”[53] The Court had affirmed in later jurisprudence that without pluralism, tolerance and broadmindedness, there is no democratic society.[54] However, the Court also emphasises that the exercise of your Article 10 right “carries with it duties and responsibilities”. The Court has ruled that this applies “in particular in respect of the reputation and rights of other.”[55] The right to freedom of expressions can be subject to formalities, conditions, restrictions or sanctions. However, these exceptions must be “construed strictly, and the need for any restrictions must be established convincing.”[56]

The interferences to fundamental rights are under scrutiny of the ECtHR. They have developed a three-step test to check whether limitations under Article 10, second paragraph are allowed:[57] besides it **(a)** being “prescribed by law” (i.e., **principle of legality**), it needs to **(b)** pursue one or more of the legitimate aims set out in paragraph two (i.e., **principle of legitimacy**) and be **(c)** “necessary in a democratic society” (i.e., **principle of proportionality**).[58] Case law in which this test is applied, is very extensive. In what follows I will limit myself to cases regarding insulting the head of state. How does the ECtHR apply this three-step test in cases regarding insulting the head of state?

[52] J. Gerards, “How to improve the necessity test of the European Court of Human Rights”, International Journal of Constitutional Law, Volume 11, Issue 2, April 2013, 466.
[53] *Handyside v. UK*, ECHR 7 December 1976, §49.
[54] *Öztürk v. Turkey,* ECHR 28 September 1999§ 64; *Mouvement raëlien suisse v. Switzerland,* ECHR 13 July 2012, § 48.
[55] *De Haes and Gijsels v. Belgium,* ECHR 24 February 1997, § 37.
[56] *Pentikäinen v.* Finland ECHR 20 October 2015, § 87; *Stoll v. Switzerland,* no. 69698/01, ECHR 10 December 2007, §101.
[57] CoE, *Guide on Article 10 of the European Convention on Human Rights: Freedom of expression*, 2021, 19. (Hereafter*: Guide on Article 10*).
[58] *Ibid.,* 467; *Otegi Mondragon v. Spain,* ECHR, 15 March 2011, §44.

## 2.3. Lèse-majesté and freedom of expression

### 2.3.1. ECtHR case law regarding insulting the Head of State

The first two requirements are easily fulfilled. The main focus of their jurisprudence is the proportionality test.

#### *a. "Prescribed by law"*

Since "*nulla crimen, nulla poena sine lege*"[59] is a well-integrated principle in our European society, of course people only get convicted based on a crime that is prescribed by law.[60]

#### *b. Legitimate aim*

Regarding insulting the king, two different legitimate aims[61] can be found in ECtHR jurisprudence. First, the legitimate aim test is quickly satisfied when courts claim limitation is permitted to "[protect] the reputation or rights of others" – *in casu* the royals in question – since Article 10, paragraph two explicitly provides in this exception.[62] A second legitimate interest that allows for limitation, is invoking the hate speech doctrine.[63] Although this exception is not explicitly mentioned in the non-exhaustive list of Article 10, §2 ECHR, the ECtHR has confirmed that hate speech is an acceptable limitation.[64] When expressions may lead to violence towards other individuals/groups (and thus their right to life), the speech cannot be accepted. [65]

#### *c. Necessary in a democratic society*

To determine the proportionality, first the element of "public interest" will be discussed, which is a relevant criterion irrespective of the invoked legitimate aim. After this, the elements to determine the proportionality of both legitimations will be discussed separately.

##### 1. Public interest reduces the margin of appreciation

The Court has admitted that the word 'necessary' in se requires a certain margin of appreciation for the legislators and judiciary to decide what exactly is 'a pressing social need'. However, the exercise of this margin of appreciation is still under European supervision: the Court is empowered to decide whether a constriction is reconcilable with the soul of Article 10 ECHR.[66]

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[59] Latin adagio that means "No crime, no punishment without law", hereby referring to the legality principle in criminal law.
[60] For example, *Otegi Mondragon v. Spain,* ECHR 15 March 2011, §46.
[61] Of course, there are more legitimate aims. I only mentioned the two that are relevant in regard of insulting the crown.
[62] For example, *Otegi Mondragon v. Spain,* ECHR 15 March 2011, §47.
[63] For example: *Stern Taulats and Roura Capellera v. Spain*, ECHR 13 March 2018. For more information see: A. BUYSE, "dangerous expressions: the echr, violence and free speech*", The International and Comparative Law Quarterly 63*, 2014, 492.
[64] *Stern Taulats and Roura Capellera v. Spain*, ECHR 13 March 2018, §40
[65] A. BUYSE, "dangerous expressions: the echr, violence and free speech*", The International and Comparative Law Quarterly 63*, 2014, 492.
[66] *Otegi Mondragon v. Spain,* ECHR 15 March 2011, §49.

When the expression regards statements that are of public interest, the Court has stated that Member States' margin of appreciation is more restricted.[67] Especially for restrictions on political speech (which is inherent to the monarch's function as head of state), the Court has consistently established that there is little scope for limitations under Article 10, §2 ECHR.[68] Therefore they give political expression a wider protection than others.[69]

## 2. Assessing the necessity of "protection of reputation"

### *i. Content-related elements*

- Forms/means of expression

Besides political expression, Article 10 also includes artistic freedom. This gives artists the opportunity to take part in the public debate by exchanging, among others, political ideas.[70] The ECtHR has confirmed that satire is a form of artistic expression, and due its inherent "nature of exaggeration and distortion of reality, naturally aims to provoke and agitate." Therefore, any interreference of this right of artists should be examined with particular care. [71] A relevant case in this regard is *Eon v. France*, in which a French activist got convicted by the national courts for insulting the president of holding up a sign saying "Casse toi pov'con" ("get lost, you sad prick").[72] President's Sarkozy himself had uttered the same words to a dissatisfied farmer at the 2008 agricultural show, as a response to the farmer's refusal to shake the President's hand.[73] The ECtHR concluded France had overstepped the legitimate limitations on freedom of expression by convicting the protester for holding up this satirical sign.[74]

- Distinction between statements of facts and value judgements

The ECtHR also distinguishes between statement of facts – which can be verified – and value judgement – which are not susceptible to proof.[75] The ECtHR has admitted that establishing the difference between these two will in many cases by difficult.[76] The tone of the remarks, the context in which they were made and if the assertions are a matter of public interest are relevant to determine the distinction.[77] This distinction is also made in satire cases.[78] In this regard the

[67] CoE, *Guide on Article 10*, 2021, 185*; Kobenter And Standard Verlags Gmbh v. Austria*, ECHR no. 60899/00, 2 November 2006, §32.
[68] CoE, *Guide on Article 10*, 2021,135 *juncto* 186; *Castells v. Spain*, ECHR 23 April 1992, §43.
[69] S. DJAJIĆ1 and D. LAZIĆ, "Artistic Expression: Freedom Or Curse?", *The Age of Human Rights Journal,* December 2021, 98.
[70] CoE, *Guide on Article 10*, 2021,187.
[71] *Ibid.,* 188
[72] *Eon v. France*, ECHR no. 26118/10, 14 March 2013.
[73] M. FOSTER, "European court rejects double standard for freedom of expression in France", Human Rights Center, 13 March 2013, link: https://www.hrlc.org.au/human-rights-case-summaries/european-court-rejects-double-standard-for-freedom-of-expression-in-france.
[74] *Eon v. France*, ECHR no. 26118/10, 14 March 2013, §60.
[75] CoE, *Guide on Article 10*, 2021, 189.
[76] *Scharsach and News Verlagsgesellschaft v. Austria,* ECHR no. 39394/98, 2003-XI, §40.
[77] CoE, *Guide on Article 10*, 2021, 196.
[78] Ibid., 205.

ECtHR has concluded that calling someone a "closet nazi" should be considered a value judgement and not a statement of fact. Although, looking at the context of the case, it was a fact that the politician *in casu* was *not* a neo-Nazi, she was associated with extreme right politics. Therefore, making this statement is a permissible value judgement and an important matter of public interest.[79] However, a value judgement must still have a sufficient factual basis to support it, although this necessity to link the two may vary depending on the case.[80]

### *ii. Context-related elements*

- Oral vs. written statements

When comments are made in person, they can be more "lively and spontaneous".[81] This gives the speaker "no possibility of reformulating, refining or retracting them before they were made public".[82] This is in sharp contract with written statements, which give the writer the opportunity to mull them over and reformulate before publishing them. Therefore, more tolerance is giving to the first compared to the latter.

- Person making the disputed statement

Certain people get an increased Article 10 protection when making exercising their right to freedom of expression due to their role and status in a democratic society, for example, the press (because of their role as "public watchdogs"), judges and politicians.[83]

- Target of the disputed statement

The Court states that the "limits of acceptable criticism are much wider as regards individuals with a public status than as regards private individuals."[84] Different categories fall under this jurisprudence, including heads of state. In this regard, the Court has stated that "the fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties."[85]

The monarch, as symbol of the State, must therefore accept a wider form of criticism. However, the Court distinguishes between comments that relate to the monarch's private life and those to the exercise of his function, "unconnected to the innermost core of individual dignity".

[79] *Scharsach and News Verlagsgesellschaft v. Austria,* ECHR no. 39394/98, 13 November 2003, §41; CoE, *Guide on Article 10*, 2021, 195.
[80] CoE, *Guide on Article 10*, 2021, 197 *juncto* 199.
[81] Fuentes Bobo v. Spain, ECtHR no. 39293/98 29 February 2000, § 46,
[82] CoE, *Guide on Article 10*, 2021, 171; *Otegi Mondragon v. Spain*, §54; *Fuentes Bobo v. Spain*, §46.
[83] CoE, *Guide on Article 10*, 2021, 225-226.
[84] *Palomo Sánchez and Others v. Spain,* ECHR 12 September 2011*,* § 71
[85] CoE, *Guide on Article 10*, 2021, 232; *Otegi Mondragon v. Spain*, § 56; *Stern Taulats and Roura Capellera v. Spain*, § 35

However, statements cannot be considered a personal attack against the King when they relate "solely to the King's institutional responsibility as the symbol and Head of the State".[86] Since this is considered political speech, limitations are under strict scrutiny. The Court has also noted that "the right of the public to be informed can in certain special circumstances even extend to aspects of the private life of public figures, particularly where politicians are concerned."[87] Still, lines must be drawn and anyone, even public figures, have a right to privacy. In *Standard Verlags GmbH v. Austria* the Court did accept the defamation punishment against a newspaper for publishing a story solely related to the private life of the President, *in casu* an article claiming an alleged affair between the First Lady and another top-notch politician had taken place.[88] In *Von Hannover v. Germany* the Court also concluded freedom of speech was abused, because of publicised photos of a member of the Prince of Monaco's family, taking while they were just enjoying their daily life activities. Since the applicant did not even exercise any official function and these pictures did not in any way contribute to the public debate, the private life of the royal trumped the right of freedom of expression of the applicant.[89]

### *iii. Nature of penalties*

- The special nature of the crime

The Court has decided that a special crime giving greater protection to the head of state than to other persons (protected by ordinary crime of insults) or institutions (such as the government and parliament) by foreseeing in heavier penalties, "will not, as a rule, be in keeping with the spirit of the Convention."[90] The ECtHR has ruled this about legislation protecting foreign head of states,[91] their own head of states[92] as well as Presidents.[93]

- Severeness of the penalty

First, the ECtHR has stated that because of the dominant position of royal institutions in society, Member States should – even though it is legitimate – better refrain from starting criminal proceedings against this form of speech.[94] Second, the use of prison sentence as punishment to excessive political speech "will be compatible with freedom of expression as guaranteed by

[86] *Otegi Mondragon v. Spain*, ECHR 15 March 2011, §57.
[87] *Standard Verlags GmbH v. Austria*, ECHR 4 June 2009, §48.
[88] Ibid, §52.
[89] *Von Hannover v. Germany*, ECHR no. 59320/00, 24 June 2004, §64.
[90] *Otegi Mondragon v. Spain*, ECHR 15 March 2011, §55.
[91] *Colombani and Others v. France*, ECHR no. 51279/99, 25 June 2002, §69.
[92] *Artun and Güvener v. Turkey*, ECHR no. 75510/01, June 2007, §31.
[93] *Pakdemirli v. Turkey,* ECHR no. 35839/97, 22 February 2005, §52 and *Eon v. France*, ECHR no. 26118/10, 14 March 2013.
[94] CoE, *Guide on Article 10*, 2021, 233; ECHR, 15 March 2011; *Otegi Mondragon v. Spain*, ECHR 15 March 2011, §58.

Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence."[95] Since a *pena de multa* can be executed as a prison sentence if the fine is not paid, this has also been considered as overly severe by the ECtHR.[96]

### 3. Assessing the necessity of "hate speech"

#### *iv. What constitutes hate speech?*

In 1997 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (97) 20 in which it defined the term 'hate speech' as: "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance."[97] The ECtHR refers to this definition in various case law. In *Stern Taulats v. Spain* they give a list a few situations in which freedom of expression was not tolerated because it amounted to hate speech: "*incriminadas declaraciones que negaban el holocausto, que justificaban una política pro nazi o que asociaban a todos los musulmanes con un acto grave de terrorismo."*[98] *In casu* pro-independency protesters were condemned under Article 490.3 CP for burning a picture of the King on a public square. According to the ECtHR, these acts could not be considered hate speech.

#### *v. Consequences of the statements*

Besides looking at what the statements is, the ECtHR takes the consequences of the statements in regard: were they accompanied by violent conduct or disturbances of the public order? In *Stern Taulats v. Spain* the ECtHR stated that the Spanish courts had falsely attributed the protests following the indictment of the two applicants as a consequence of their "hateful" acts. It was not: on the contrary, it was a reaction towards the State's use of criminal prosecution of these acts.[99]

## 2.3.2. Application of these principles by Member States: the Spanish-Belgian case

What is interesting is that this ECtHR case law was used both by the Spanish Supreme Court and the Belgian Constitutional Court when making their judgements regarding the legitimacy

[95] *Otegi Mondragon v. Spain*, ECHR 15 March 2011§59.
[96] *Stern Taulats and Roura Capellera v. Spain*, ECHR 13 March 2018, §42.
[97] *Gündüz v. Turkey,* ECHR no. 35071/97, 4 December 2003, §22.
[98] *Stern Taulats and Roura Capellera v. Spain*, ECHR 13 March 2018§41.
[99] *Stern Taulats and Roura Capellera v. Spain*, ECHR 13 March 2018§40.

of insults against the crown. However, both reached completely opposite conclusions. How did they get there?

### a. How did the Spanish Courts apply these principles?

#### 1. Valtònyc

At the SC Valtònyc claimed his constitutional right to freedom of expression (Article 20 Spanish Constitution) was violated by the AN's decision. In its response, the Court referred to the Spanish Constitutional Court's doctrine regarding the matter. They often reference case CC 177/2015, in which the Court tested the constitutionality of Article 490.3 CP.[100] *In casu*, two protesters were convicted for burning a big picture of the King in a town square. The Constitutional Court concluded that this was not a "*expresión de una opción política legítima, que pudieran estimular el debate tendente a transformar el sistema politico."*[101] But on the contrary a *"un reflejo emocional de hostilidad, incitando y promoviendo el odio y la intolerancia incompatibles con el sistema de valores de la democracia*.".[102]

Valtònyc argues that this argument is not relevant here because his songs were not a form of hate speech, since they were directed at the Monarch, who is not any "*minoría social, religiosa, nacional, étnica, ni sexual*".[103] The SC responded by admitting that there must also be room in society for opinions that "*hieren, ofenden y se oponen al orden establecido*" and mentioned the *Otegi* case in which the King's penal irresponsibility does not in itself "*impide […] el libre debate sobre su eventual responsabilidad institucional, incluso simbólica, en la jefatura del Estad*".[104] The SC seem to tip-toe in choosing the relevant justification for limiting freedom of speech *in casu*. They justified the limitation on the basis of the doctrine of the king's personal honour but justified the prison sentence by stating that in the extraordinary circumstance of *incitement to violence or hate speech* a prison sentence is allowed.[105]. Of course, the Court was aware that in defamation cases, the ECtHR has explicitly requested to show restraint in criminal proceedings and recommends, if necessary, civil or disciplinary measures.[106] So to justify the prison sentence, they switch track and opted for the hate speech doctrine. Of course, more than one justification can be invoked. Nonetheless, this also means both justifications must survive their own proportionality test; merely invoking does not suffice.

[100] STC 177/2015, 22 July 2015.
[101] STC 177/2015, 22 July 2015, 76013.
[102] Ibid.
[103] STS 79/2018, 15 February 2018, 12.
[104] Ibid.
[105] Ibid., 12-13.
[106] CoE, *Guide on Article 10*, 2021, 254.

Yet, the Constitutional Court merely concludes that it has been constant jurisprudence since STC 107/1988 that it must be determined whether the comments are "*innecesarias para la expresión pública del pensamiento que se trata de manifestar o expresiones o acciones que son formalmente injuriosas*".[107] Based on the CC jurisprudence, the SC does not accept the unconstitutionality of the crime as a ground for annulling the AN's judgement.

After following the CC jurisprudence, the SC makes an interesting comparison. The Court compares this situation with Article 15 of the Constitution. According to this Article the death penalty is still permitted through military law in war times. Even though the Constitution formally stipulates this, they have abandoned the death penalty completely in all circumstances with Spain's ratification of Protocol B and LO 11/1995.[108] Is the SC trying to hint at something? Are they trying to subtly indicate they do not want to enforce out of date constitutional doctrine that is contradictory to international obligations? If not, why are they mentioning an argument in favour of unconstitutionality, shortly before rejecting this plea?

It is also worth noting that there have been some dissenting opinions to CC 177/2015. Judge Xiol Ríos claimed the CC was banalizing the hate speech exception by[109] "*excluyendo esa dimensión antidiscriminatoria e identificando 'discurso de odio' con la mera manifestación general de hostilidad*".[110] The dissenting judges turned out to be right: a few years later, just one month after the SC Valtònyc judgement, the ECtHR called the sentencing in *Stern Taulats* (i.e., this is the same case that gave rise to CC 177/2015) a violation of the applicants Article 10 rights.[111] Would the judging have been different if the SC had known the ECtHR's sword of Damocles was hanging over their heads?

### 2. Pablo Hasél

They did not: "*la opinión es libre, pero lo que no es libre es el insulto, la calumnia, el ataque a las instituciones del Estado, el menosprecio grav*e."[112] In 2020, years after the ECtHR *Stern Taulus* judgement, the SC is clearly aware it exists and references it throughout their judgement.[113] However Pablo Hasél's conviction still stands, since his insults go beyond "mera

[107] STS 79/2018, 15 February 2018, 14.
[108] Ibid.
[109] G.M. TERUEL LOZANO, "La Jurisprudencia Del Tribunal Constitucional Ante Los Delitos De Opinión Que Castigan Discursos Extremos: Comentario A La Stc 35/2020 Y Más Allá", Teoría y Realidad Constitucional, núm. 47, 2021, 419.
[110] R.A. GUIRAO, "Oiniones constitucionales", *Indret*, Barcelona 2018, 8.
[111] *Stern Taulats and Roura Capellera v. Spain,* ECHR 13 March 2018.
[112] STS 1298/2020, 7 May 2020, 24.
[113] Ibid., 22.

crítica pública".[114] The ECtHR clearly stated that the monarch does not deserve a higher protection than what is giving to regular citizens. However, the SC twists this "plano de igualdad" as in accepting that the king, also worthy of protection as a victim of slander or libel, can be protected by Article 490.3 CP.[115] In a *voto particular* two dissenting judges voice their disagreement with the outcome of the case: regarding insults the crown, these statements did not incite violence. They conclude that Pablo Hasél did not abuse his right to freedom of expression and the appeal should therefore have been accepted.[116]

### b. How did the Belgian Courts apply these principles?

As explained above, Valtònyc fled to Belgium to escape his imprisonment.[117] Upon his arrival, Spain asked the Belgian authorities to extradite him. However, one of the requirements for extradition is "double incrimination", which means that the crime does not only exist in the requesting country, but also in the country of origin.[118] Since "glorifying terrorism" is not a crime in Belgium, Valtònyc's extradition sinks or swims depending on his crime of insulting the crown.[119] Because the Belgian version of the lèse-majesté had not been used in almost 15 years, this caused an abrupt awaking in its national legal order. Thus, it triggered the Court of Appeal to ask the Constitutional Court whether the crime was still in accordance with Article 19 of the Constitution (the Belgian version of Article 10 ECHR).[120]

First, the Court stated that Article 19 of the Constitution and Article 10 of the ECHR basically have the same scope and therefore form an 'inseparable entity'.[121] Therefore, they use the same three-step structure the ECtHR uses when assessing limitations to freedom of speech. The crime is, obviously, prescribed by law. According to the Court, two legitimate aims can be found. The crime of insulting the king does not only protect the reputation of others, but the parliamentary discussions of the *Loi of 6 April 1847* reveal another one. The crime intended to guarantee the inviolability of the King and the stability of the constitutional system.[122] The Court aligns this with a second legitimate aim mentioned in Article 10, §2 ECHR, namely "the interests of national security, territorial integrity or public safety" and "the prevention of disorder or crime". Then, the CC does the proportionality test. The Court starts by summarising

[114] Ibid.
[115] STS 1298/2020, 7 May 2020, 22.
[116] *Ibid.,* 33.
[117] X, "Case of Jose Miguel Arenas (Valtonyc)", *Global freedom of expression*, Colombia University, consulted on: 22 May 2022, link: https://globalfreedomofexpression.columbia.edu/cases/case-jose-miguel-arenas-valtonyc/.
[118] Cass., Nr. P.21.1692.N, 22 January 2022, §5-6.
[119] Ibid.
[120] GwH 28 October 2021, nr. 157/2021.
[121] GwH 28 October 2021, nr. 157/2021, B.11.2.
[122] Parl. St., Senaat, zitting van 30 maart 1847, nr. 197, p. 1. (only available in French).

the relevant case law regarding insulting the crime, which has already been discussed in depth *supra*. From this case law, the Court concludes that a special law giving the monarch a broader protection than regular citizens would be contradictory to the spirit of the Convention – and thus the Belgian constitution. "The fact that the King is not able to lodge a complaint without the agreement of a minister when that complaint may have […] political repercussions could […] justify the adoption of special procedural rules but could not justify the interference with freedom of expression", argues the Constitutional Court.[123] Moreover, the possible punishments to the crime are considered unreasonably high when compared to that of regular slander. Thus the crime of insulting the crown unjustifiable differs from regular slander in two regards: one, it is easier to fulfil the constitutive elements (e.g., no specific intent necessary) and two, the possible penalties are significantly higher.[124] Thus, the Court concludes that "the provision does not meet a compelling social need and is disproportionate to the goal of protecting the reputation of the King's person." Therefore, it is not compatible with article 19 of the Constitution, read in conjunction with article 10 ECHR.[125]

### c. *Preliminary conclusion: how would the ECtHR respond to these cases?*

Even though Pablo Hasél was convicted under Article 491 CP, I still believe his statements are political speech, because of the similarities to the Valtònyc case in which Article 490.3 CP applied. I think the Court tried to escape the *Stern Taulus* jurisprudence by invoking a different penal article. However, simply *changer son fusil d'épaule*[126] is not enough to exclude this jurisprudence when the facts are very similar. To claim otherwise, would be contrary to fundamental principles of *lex certa* in criminal law. If we accept both are a form of political speech, the lesser margin of appreciation-rule applies. Regarding the lyrical insults, we can also apply the ECtHR's jurisprudence regarding artistic and satiric speech, in which case a greater tolerance of provocation must be accepted. Weirdly enough, the Spanish nor the Belgian courts seem to take this factor into account.

The Spanish courts' explanation of necessity of both legitimations (*in casu* the monarch's reputation rights and hate speech) is unconvincing.

[123] GwH 28 October 2021, nr. 157/2021, B.18.3; own translation, only available in Dutch.
[124] Ibid., B.19.
[125] Ibid., B.20-21. After this, the Belgian Supreme Court annulled the Court of Appeal's decision to not extradite Valtònyc based on the Constitutional's Court decision. The appellate judges had made a fundamental error: after accepting the crime of insulting the crown did no longer exist, they forgot to check if the facts *in casu* constitute a form of regular slander, under which the monarch is still protected. This judgement does not change the Constitutional Court's reasoning regarding unconstitutionality. (Source: Cass.18 January 2022, Nr. P.21.1692.N, §26; only available in Dutch).
[126] Literal translation: to switch one's rifle to a different shoulder; meaning to change strategy/track/course.

Regarding the right to reputation, they invoke the Austrian judgements (see *supra*), stating the Court has accepted head of states still have a right to privacy. However, the facts of Valtònyc are inherently different from these Austrian cases. Can we reasonably argue a tabloid gossiping about the romantic life of the President's wife is comparable to being critical of your monarch's friendship with the Saudi monarch, not exactly a role model when it comes to democratic governance?[127] The comments made about the monarchy are more than idle gossip in a magazine: the political allegations and dubious past of a head of state is significant to the public debate. And even if one can argue otherwise, another significant difference is worth mentioning. In the Austrian case, a journalist lost a civil defamation case for spreading idle gossip.[128] This is not comparable to a private individual serving jail time for sharing his, albeit impolite, opinion. These value judgements do not have to be proven to be true, as was stated in the *neo-Nazi* case, in which this criticism was permitted even if the politician involved was in fact not a neo-Nazi, because the speaker was just making his political views clear.[129] The same can be said about outspoken pro-independency, anti-monarchist Valtònyc and Pablo Hasél.

Regarding hate speech as a legitimate limitation, dissenting Judge Xiol Ríos is right when he claims this means trivialization of the doctrine.[130] Even when the insults are graphic and brute, monarchs still enjoy a privileged position in society: they cannot reasonably be considered deserving this quasi-untouchable level of protection foreseen for minorities.

The ECtHR has not (yet) claimed that there is a European consensus regarding the illegitimacy of this crime. However, the Court's jurisprudence has had a significant influence on the legal landscape of different countries. The ECtHR's judgements have led to the abolishment of the prohibition to insult Napoleon III in France and foreign head of states in Germany.[131] Belgium's CC's declaration of unconstitutionality was grounded on ECtHR jurisprudence. Although there may not yet be a European consensus, it is certainly moving in one direction rather than the other. The Council of Europe's Human Rights Commissioner has also condemned Spain for violating freedom of expression:

[127] X, "Saudi Arabia: Government", GlobalEdge, last consulted on 6 June 2022, link: https://globaledge.msu.edu/countries/saudi-arabia/government.
[128] *Standard Verlags GmbH v. Austria*, ECHR 4 June 2009.
[129] *Scharsach and News Verlagsgesellschaft v. Austria,* ECHR no. 39394/98, 13 November 2003.
[130] G.M. TERUEL LOZANO, "La Jurisprudencia Del Tribunal Constitucional Ante Los Delitos De Opinión Que Castigan Discursos Extremos: Comentario A La Stc 35/2020 Y Más Allá", Teoría y Realidad Constitucional, núm. 47, 2021, 419.
[131] X, "Verbod op 'majesteitsschennis' is in strijd met vrije meningsuiting, oordeelt Grondwettelijk Hof", De Standaard, 28 October 2021, link: https://www.standaard.be/cnt/dmf20211028_94770963.

*"In the last few years, a growing number of criminal convictions, including custodial sentences, have been handed over on artists for controversial lyrics […], and on social media activists for statements considered offensive, including for remarks conceived as humour, on grounds of […] criminalising libels and insults to the Crown (Articles 490 and 491)."*[132]

I therefore conclude that the Spanish SC and CC's jurisprudence is in misalliance with the ECtHR's and the special crime of insulting the crown is unconstitutional. If the SC and CC do not change their jurisprudence, it is not a matter of *if* Spain will endure further condemnation for this prosecution policy, but *when*.

It seems that the Spanish legislator is realising this as well and is ready to intervene. On 25 May 2022, the Senate approved the proposal to amend the Penal Code to decriminalise insults against the crown.[133] The ball is now in the Congress' camp. Since the topic already caused some controversy in the Senate (145 ayes, 111 nays and two abstentions), the definite depenalisation is far from certain. Therefore, a second section of this thesis will explore that besides these legal calls for depenalisation, some practical and political reasons can be found as to why abolishing insults against the crown, or in general ceasing to prosecute this form of political speech, is a favourable outcome for society as a whole.

[132] D. MIJATOVIĆ, "CommHR/DM/sf 015-2021", link: https://rm.coe.int/letter-to-mr-mr-juan-carlos-campo-minister-of-justice-of-spain-by-dunj/1680a1c05e.
[133] V. MARTINEZ, "El Senado aprueba despenalizar las injurias a la Corona con el voto a favor del PSOE", El Pais, 25 May 2022, link: https://elpais.com/espana/2022-05-25/el-senado-aprueba-despenalizar-las-injurias-a-la-corona-con-el-voto-a-favor-del-psoe.html.

# 3. Political or pragmatic approach

The conclusion of section two is the following: if freedom of speech would not be allowed to insult and ordinary citizen, nor could you use the same speech to insult a king. In this section we swing the pendulum completely: could it be argued that the King should actually tolerate *more* than an ordinary citizen? Society has so fundamentally changed that we have gone from the current (overly) protective system to one where he could make *less* claims than an ordinary citizen. Since this is not the European legal system that is currently in place, these arguments have a more pragmatic/political favour. Especially in the Anglo-Saxon literature[134], there are some familiar arguments in favour of a liberal free speech approach: the so-called *chilling effect*, the counterproductive effects of driving dangerous speakers "underground" and the risk of future government abuse by these exceptions to freedom of speech. These are considered the "costs" we must pay for the "benefit" of enforcing a limited right to freedom of expression.[135] In the case of insulting the king, do the benefits still outweigh the costs? To answer this question, the Valtònyc and Pablo Hasél cases are used as frequent references.

## 3.1. The *chilling effect*

The *chilling effect* is the term used to describe the unwanted consequence of government laws or actions to limited certain types of expression.[136] Due to the fear of negative legal consequences, the speaker is scared to express his opinion: even though the expression might be permitted, they speaker thinks it better to be safe than sorry.[137] Although the ECtHR has not specifically referred to the risks of chilling effect in its Head of state-caselaw, it has done so in other judgements.[138] The Court also inexplicitly referred to this principle in *Otegi Mondragón* when it claimed that "exceptions to freedom of expression require a restrictive interpretation"[139] and that "the authorities [should] show restraint in the use of criminal proceedings".[140]

Another mayor influence on whether the speech is permitted or not, is its target. As explained *supra*, in Eon v. France the Court even allowed *insulting* the Head of State: "the phrase should be examined in the light of the case as a whole, particularly with regard to the

[134] However, to some of these arguments the ECtHR has also explicitly referenced in its case law.
[135] J. HOWARDS, "Dangerous Speech", *Philosophy & Public Affairs* 47, 2019, 211.
[136] F. ASKIN, "Chilling Effect", *The First Amendment Encyclopedia*, consulted on: 3 June 2022, link: https://www.mtsu.edu/first-amendment/article/897/chilling-effect.
[137] V. FERRERES COMMELLA, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights" *in Political Rights Under Stress in 21st Century Europe*, Oxford press, 2006, 86.
[138] Some examples: *Margulev v. Russia*, ECHR no. 15449/09, 8 October 2019, §42; *Schweizerische Radio- und Fernsehgesellschaft and Others v. Switzerland*, ECHR no. 34124/06, 21 June 2012n § 72; *Heinisch v. Germany*, no. 28274/08, ECHR 2011, § 91.
[139] *Otegi Mondragon v. Spain,* ECHR, 15 March 2011, §54.
[140] *Ibid.,* §58.

status of the person at whom it was directed". As Dopico suggests, this seems to be in favour to conclude that the King does indeed have to tolerate *more* insensitive comments than a regular person does.[141]

Of course, a counterargument is the ECtHR's distinction between the Head of State's private and functional life: this higher tolerance only applies in the latter (*supra*). As a rebuttal, one can say this distinction is not always easily made and highly depends on concrete context, resulting in confusing caselaw. Second – and this is a very personal argument – does it really matter? The monarch does not exactly have a *9 to 5* job. Even if one could take the crown of to catch a breath, it is always still there. While the public might not care when Joe-Shmoe is friends with absolute despots, fathers children with mistresses or shoots his younger brother, when their head of state is the actor of this behaviour – they *do* care. It gives the people a sense of: is this the person representing my country? Is this how our country is being viewed by others? Because the shenanigans of royals get reported on with the necessary amount of satire, citizens might feel that their Head of State is acting like a buffoon and that they do not want to be represented by this. Unlike in other forms of democratic governance, the people cannot simply take their vengeance in the form of voting for another candidate: the monarch is not elected. A thicker skin for criticism is a price the King must pay for having quasi absolute job security. It isn't all bad: they have some benefits that come with the title as well (e.g., royal immunity and irresponsibility). These constitutional principles foresee that the monarch is supposed to be neutral in return of protection from the acts committed by his ministers.[142] The ECtHR has already accepted that this is no longer a justification to giving the monarch more protection than an ordinary citizen. Could we instead argue the contrary: that he, as price to pay for these special privileges, be given less? We are not discovering hot water here: a similar argument has been made regarding politicians.

## 3.2. The monarch compared to politicians

Ever since the *Lingens* case, the court has relaxed the allowed criticism regarding politicians as compared to private individuals.[143] "They must consequently display a greater degree of tolerance [because they] inevitably and knowingly lay themselves open to close scrutiny of their every word".[144] The American Supreme Court has made a similar argumentation regarding

[141] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021
[142] M. VAN DAMME, *Overzicht van het Grondwettelijk recht*, Brugge, Die Keure, 2015, 391.
[143] V. FERRERES COMMELLA, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights" in W. SADURSKI, *Political Rights Under Stress in 21st Century Europe*, Oxford press, 2006, 694.
[144] *Lingens v. Austria*, ECHR 8 July 1986, Series A no. 103, 42; CoE, *Guide on Article 10*, 2021, 43.

public figures in general. Ferreres makes an interesting counter argument against this claim: if we accept political candidates to tolerate harsh criticism and even insults, will this not attract the wrong kind of people for office?[145] Another argument in favour of a more tolerant approach regarding politicians, is that it is easier for them to get access to public media to debunk these false claims about them. However, as Ferreres rightly states, this does not count for all politicians (especially lesser-known ones) nor does it guarantee that the response will get as widespread as the initial slander.[146] The main reason we have this relaxed regime is that politicians' right to respect of reputation must be "weighed against the interest of open discussion of political issues".[147]

Thus, could we apply the same reasoning to justify a more relaxed regime towards monarchs? Some of these arguments are not at all applicable towards monarchs.

For starters, monarchs do not exactly choose to open themselves up to close scrutiny: they are not elected but born into their position. However, if the pressure is too high, they can always abdicate. Ferreres' fear of attracting the wrong kind of people for the job is unnecessary when it comes to royals. Abdications are the exception, and even so, the next one in line would just take their place.

Secondly, monarchs have easy press access to respond to claims as well, even more so than small fish politicians. However, the principle of royal neutrality might throw some spanner in the rocks. The monarch – a symbol of unity – is supposed to stand above politics: monarchs cannot vote or stand election.[148] They are supposed to not show their political colours, and when they do, they often get highly criticised for it.[149] A recent survey in Spain, found that most citizens found royal political neutrality very important.[150] So, for royals responding to debunk statements might be more complicated than for politicians. When they do, they have to be aware they are walking on thin ice.

Yet, the main argument as to why politicians get higher protection is also applicable towards monarchs: it's a political issue. In *Otegi* the Court stated that "public officials are subject to wider limits of criticism than private individuals, although the criteria applied to them

[145] V. FERRERES COMMELLA, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights" in W. SADURSKI, *Political Rights Under Stress in 21st Century Europe*, Oxford press, 2006, 95.
[146] *Ibid.,* 95.
[147] CoE, *Guide on Article 10*, 2021, 43; *Otegi Mondragon v. Spain,* ECHR 15 March 2011, 50; Artun and Güvener v. Turkey, ECHR 26 June 2007, no. 75510/01, § 26,
[148] For example, in the UK this is decided by Convention (X, "Queen and Government", Royal UK, consulted on: 11 June 2022, link: https://www.royal.uk/queen-and-government.)
[149] For example, when the Queen made her anti-Brexit sentiments clear (M. FOSTER, "Why British monarch stays above politics", CNN, 9 March 2016, link: https://edition.cnn.com/2016/03/09/europe/royal-brexit-neutrality/index.html).
[150] E. HERNÁNDEZ, M. TORRE AND A.I. DE MORAGAS, "The crown: a survey about the Spanish monarchy", *Political Research Exchange* 2021,1938149, 11.

cannot be the same as for politicians".[151] However, is the King just another public official? Is his task description not closer to that of an important politician than to that of, e.g., a judge? If the special laws giving extra protection towards the kings get abolished, these cases in front of the ECtHR will die out as well. It would be interesting to see if a country would try to prosecute royal insults under slander or libel provisions. If this were to happen, the court would have to determine whether this "regular" limitation is permitted. Here context, especially political one, will be extremely relevant. And this is exactly "where the shoe pinches":[152] this not always be as clear as one might think…

## 3.3. The vagueness of context

As explained above, the context in which speech is made is highly important to investigate whether the speech is permitted. Although this *prima facie* makes sense, it can also lead to some complications. To show how context is a vague concept, I will explain some legal issues regarding context in the Valtònyc and Pablo Hasél cases.

The ECtHR's distinction between the monarch's private versus functional life is not always clear: monarchs never really take of their crown. Differentiating between these two regimes can lead to abuse, as explained *supra* regarding why Article 491 instead of 490.3 CP was invoked.[153] If this practice becomes regular, citizens can fear *qualification shopping* by prosecutors and judges. Changing the qualification to achieve a favourable outcome does not change the fact that the cases were very similar. This is completely contradictory to the *lex certa* in criminal law and against the spirit of the ECtHR judgements.

Second, the spontaneity in which statements are made are also a crucial factor to the ECtHR: oral statements deserve higher tolerance than written ones (*supra*). Songs and newspaper articles are both the products of a long thought process, although a differential treatment might be justified by a distinct purpose (*infra*). How would the Pablo Hasél's tweets fit into this? The Court's case law on freedom of expression in relation to the internet in still in high development. In my opinion, tweets should rather be treated as spontaneous expression that cannot be revoked. Even though one could technically delete or edit a tweet, print screens of the original copy will exist, or haunt, the writer forever. Of course, the same could be said about a written

[151] *Otegi Mondragon v. Spain,* ECHR no. 2034/07, 15 March 2011, §50; *Janowski v. Poland*, ECHR no. 25716/94, 21 January 1999, § 33.
[152] Dutch expression, 'where the problem lies' in colloquial English.
[153] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021.

article. However, the fast-paced use of the internet is very different than traditional media sources. Social media platforms are an online extinction of your real-life personality. This is my opinion, but the contrary can also be argued, emphasising the similarities between newspapers and social media and how a differential treatment is no longer justified. The result of the case will highly depend on which elements are considered decisive.

Another interesting side note regarding context – and the Spanish nor the Belgian courts mention this – is that most of the statements (besides the tweets made by Pablo Hasél) were lyrics from a song. This makes them, besides political speech, a form of artistic freedom of expression. The only case in front of the ECtHR where political speech and artistic speech were both present and examined, was *Eon v. France* (*supra*). Here the Court stated that satirical expression should be examined with special care – due to its nature of provocation, agitation and distortion of reality. How would the ECtHR treat the Pablo Hasél and Valtònyc cases in this regard? Why did the Spanish and Belgian courts did not put any emphasis on the fact these statements were made in a song? Is it maybe not relevant?

Political speech has always been given better protection than other types of expression (artistic, commercial, academic even) by the ECtHR, due to its value to a democratic society.[154] Exceptions to artistic freedom of expression were accepted on the basis of public morals – which it considered a local, national value on which there was no European consensus[155] – or the protection of religious sensibilities of the believers.[156] The comparison between the *Pussy Riot Case*[157] and *Sinkova v. Ukraine*[158] shows that when the artistic speech can be connected to a clear political intention, the political speech "trumps" the artistic one and the higher protection regime is activated.[159] The same logic would probably apply to Pablo Hasél and Valtònyc

While songs and news articles might both be the product of a thought process, they do have a very different meaning or purpose. The reader has different acceptations when consuming an informative article – they want to be informed – than when listening to a song – they want to be entertained. Could this justify giving songs a greater degree of tolerance than informative texts? However, the contrary might be concluded when we look at the consequence of speech: a song might be more dangerous than an article. First, the reached audience of songs is typically bigger than of articles. Second, someone will read a political article, reflect on it,

[154] S. DJAJIĆ1 and D. LAZIĆ, "Artistic Expression: Freedom Or Curse?", *The Age of Human Rights Journal,* December 2021, 98.
[155] Ibid., 107: *Müller and Others v Switzerland*, ECHR no. 10737/84, 24 May 1988.
[156] Ibid., 108; *Otto-Preminger-Institut v. Austria*, ECHR no. 13470/87, 24 September 1994.
[157] *Mariya Alekhina and Others v. Russia,* ECHR no. 38004/12, 17 July 2018.
[158] *Sinkova v. Ukraine,* ECHR no. 39496/11, 27 February 2018.
[159] S. DJAJIĆ1 and D. LAZIĆ, "Artistic Expression: Freedom Or Curse?", *The Age of Human Rights Journal,* December 2021, 114-115.

and decide whether they agree or disagree with it. A song might not trigger the same critical response: insulting political lyrics might be thoughtlessly chanted while singing the song. In sum: the rational brain *versus* the passionate heart, can they be treated the same? Or does on deserve more protection that the other? If so, which one?

I wanted to make my reflections on these two cases to prove that while context clearly matters, how exactly it influences decisions can be looked at from very different angles. I think the Americans saw these dangers and have therefore adopted such a liberal approach to freedom of expression: better to not let the outcome depend on a biased judge interpreting the context of the case. The European have a more paternalistic attitude: we want to protect individuals' reputation and our society from hate speech. Although it is a laudable approach, the price we must pay for this is that case law can cause confusing and misinterpreted at times, as was shown in the concrete cases discussed in this paper. Besides this, another argument can be found why the American approach of not prosecuting might be a more fruitful approach.

## 3.4. The unwanted effects of convicting

### 3.4.1. Notoriety of the controversial statements

One of the reasons why Belgium stopped prosecuting political and press crimes, was that they needed to be judged by the *Hof van Assisen/Cour d'Assises* (i.e., criminal court with a jury). These court room proceedings were given high media attention, given the contested statements an even bigger platform and reaching ears they never reached before.[160] The same can be said about Pablo Hasél and Valtònyc. Were it not for Valtònyc's conviction, the Belgian obsolete version of insulting the crown would have just continued living its half-life. Instead, newspapers in foreign tongues were writing critical articles about both convictions, questioning its legitimacy. In the Pablo Hasél conviction, the Court mentioned that the song '*Pablo Hasel…Juan Carlos el Bonbón'* "a fecha de 30 de agosto de 2016 había tenido 5.417 visualizaciones".[161] As of 16 June 2022, the song has reached a total of 879.600 views.[162] Curious readers went on googling the controversial songs, giving the song a popularity, it would have never reached otherwise.

[160] M. VAN DAMME, *Overzicht van het Grondwettelijk recht*, Brugge, Die Keure, 2015, 391.
[161] Mentioned in the judgement of the SAN 3337/2018, 14 September 2018.
[162] See: https://www.youtube.com/watch?v=S6VcZidg66Q&t=12s.

### 3.4.2. Glorification of perpetrators

Pablo Hasél and Valtònyc were small, underground music artists before this all went down: their Wikipedia page, for example, has a handful lines dedicated to their non-renowned music and a whole chapter about their legal case. The public debate was not about whether they had violated their right to freedom of expression or not, but if they were heroes or villains. The contra-camp focussed on e.g., Hasél's history of making brute statements: he suggested sticking an ice pick in the head of a certain politician and bombing the care of another one (in reference to the car-bombing by ETA).[163] The pro-camp, on the other hand, portray these artists as symbols of Catalan repression and heroes of the independency cause. While the contra-camp cannot use his past (for which, apropos, Hasél had already been tried and convicted)[164] to justify his new conviction, the glorification of someone who freely insults (or threatens) anyone who he politically disagrees with is not exactly the right societal response either.[165] People, from Madrid to Barcelona, turned violent towards the police to express their support for the rapper's conviction.[166] The same goes for Valtònyc, who, during his exile, has visited Puigdemont in his estate in Waterloo. Photos of the two together were proudly posted on social media. [167] In this thesis I have argued that legally there is no justification for both convictions. Arguing this is a far cry from thinking we, as a political society, must vouch our unquivering support in favour of dubious figures by declaring them national heroes. Not convicting them would not just never have given them the platform they seek; it would also never have caused the outrage that has now happened.

A well-known argument in favour of absolute free speech in the American doctrine is that if you prohibit certain types of speech, the voices get driven underground: the speech still happens, secretly contaminating the minds of people without any form of contradicting what they are saying.[168] However, these cases have proven the opposite can also happen: by convicting speakers, their controversial message gets a bigger platform than ignoring it could ever do. Parents are often given the advice that giving a cold shoulder to their children is the

[163] [163] J. DOPICO GÓMEZ-ALLER, "The Pablo Hasél Case", *VerfBlog,* 18 March 2021.
[164] Ibid.
[165] I. ESCOLAR, "Pablo Hasél, el rapero que no debería estar en prisión", *The Washington Post,* 23 Februart 2021, https://www.proquest.com/blogs-podcasts-websites/pablo-hasél-el-rapero-que-no-debería-estar-en/docview/2492483032/se-2?accountid=1478.
[166] A.L. CONGOSTRINA, F., BONO R. CARRANCO, "Catalonia rocked by third night of protests over jailing of rapper Pablo Hasél", *El Pais*, 19 February 2021, link: https://english.elpais.com/society/2021-02-19/catalonia-rocked-by-third-night-of-protests-over-jailing-of-rapper-pablo-hasel.html.
[167] X, "El encuentro de Valtonyc con Puigdemont", *Ultima Hora,* 12 Augustus 2019, link: https://www.ultimahora.es/noticias/local/2019/08/12/1100201/encuentro-valtonyc-puigdemont.html.
[168] J. HOWARD, "Dangerous Speech", *Philosophy & Public Affairs* 47, 2019, 244.

best way to make their tantrum stop. Maybe governmental institutions can be given the same advice.

Of course, the argument in favour of convicting is that you as a society send the message that this kind of behaviour is not tolerated. Yet, what harm have these songs really caused society? One could refer to the violent protests the songs have caused. However, the protests were a result of Pablo Hasél's conviction, not a consequence of the song itself.[169] Can one really claim there are still justified reasons to penalize this behaviour, if convicting has more negative consequences than positive ones? This bring us the final argument, one that is very specific to the Spanish case.

## 3.5. The appearance of discrimination

Although freedom of expression is not only about what is being said, who is saying it might also be a relevant element. However, this "who"-influence must be based on objective, neutral criteria. As stated above, politicians were given a wider discretion to make certain statements due to the nature of their job. Article 21 of the Charter of Fundamental Rights clearly forbids Member States to discriminate based on "any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation" (own underlining). Are there indications that this crime is de facto being used to mostly target the linguistic and/or political minorities in Spain who are challenging the status quo?

### 3.5.1. Overview ECtHR judgements

There have been two times the Spanish crime of insulting the crown has been challenged in front of the ECtHR. In *Otegi Mondragon v. Spain* the applicant was a Basque spoke-person for a left-wing Basque political party[170]. He was condemned for insulting the King after critically reacting to the King's visit to the Basque country.[171] The ECtHR concluded that this was a violation of his right to freedom of expression.[172] In *Stern Taulats and Roura Capellera v. Spain* the two applicants were from respectively Girona and Banyoles, Catalunya.[173] They were

[169] *Mutatis mutandis*: *Stern Taulats and Roura Capellera v. Spain,* nos. 51168/15 and 51186/15, ECHR 13 March 2018.
[170] *Otegi Mondragon v. Spain,* ECHR no. 2034/07, 15 March 2011, §6.
[171] Ibid., §10.
[172] Ibid, §62.
[173] *Stern Taulats and Roura Capellera v. Spain*, ECHR 13 March 2018, §5.

convicted for publicly burning a picture of the King in Girona, as form of protest to the King's upcoming visit. Here, the ECtHR also concluded that this was a violation of Article 10.[174]

### 3.5.2. Overview national Spanish cases

For privacy reasons, the Spanish cases do not state the name of the defendants (instead of applicants), and mostly neither where they are from. However, in nearly all the cases except for one, it was clear where the defendant was from; either from context, or because the actual infractions are mentioned in the judgement. By simply googling what the accused had said about the monarchy, the original source is easily accessed on the internet. In what follows is a brief overview from all the cases I found in the CENDOJ database under the tag "*injurias contra la corona*". [175]

#### *a. Tribunal Supremo*

There are two cases of insulting the crown that made it all the way to the Supreme Court: the Pablo Hasél and the Valtònyc case. Both are Catalan natives: Hasél from Lérida[176] and Valtònyc from the Balearic Islands.[177] These two cases have of course been explained in depth in this thesis. However, their names often get associated with another rapper: César Strawberry.[178] This Madrileño got acquitted by the AN,[179] then convicted by the SC[180] and then acquitted again by the CC[181] for glorifying terrorism. He has not been mentioned before because he was not accused of insulting the crown. However, looking at the judgement of the AN one of the tweets that were in dispute was: "*Ya casi es el cumpleaños del Rey ¡Qué emoción! (le voy a regalar) un roscón-bomba*". In their acquittal the AN reasoned that this tweet was a spontaneous form of expression, that should be considered a form of irony and is therefore permitted speech.[182] Why didn't the same logic apply to the other two cases? One justification could be that *in casu* César Strawberry had only made one tweet regarding the monarchy; the "attack" was not as

[174] *Stern Taulats and Roura Capellera v. Spain*, ECHR 13 March 2018, §42.
[175] Since this was the only source available to me, I cannot assure this list is exhaustive. Even if it is not, it is still a statistical sample.
[176] A.B DEMUR, "¿Quién es Pablo Hasél y por qué está en la cárcel?", *Euronews* 19 February 2021, link: https://es.euronews.com/2021/02/19/quien-es-pablo-hasel-y-por-que-esta-en-la-carcel.
[177] G. ABRIL, "La vida del fugado Valtònyc en Bélgica", *El Pais* 21 February 2021, link: https://elpais.com/cultura/2021-02-20/la-vida-del-fugado-valtonyc-en-belgica.html.
[178] X, "Justicia trabaja en una revisión del Código Penal para que los raperos radicales no vayan a la cárcel", *Confilegal* 8 February 2021, link: https://confilegal.com/20210208-justicia-trabaja-en-una-revision-del-codigo-penal-para-que-los-raperos-radicales-no-vayan-a-la-carcel/.
[179] AAN 224/2015, 18 July 2016.
[180] M. PINHEIRO, "El Supremo condena a César Strawberry a un año de cárcel por sus tuits", *El Diario,* 19 January 2017, link: https://www.eldiario.es/politica/supremo-condena-cesar-strawberry-carcel_1_1157770.html.
[181] E. HERRERA, "El Constitucional anula la condena a César Strawberry por sus tuits y los ampara en la libertad de expression*", El Diario* 25 February 2020, link: https://www.eldiario.es/politica/constitucional-condena-carcel-supremo-strawberry_1_1114936.html.
[182] M. PINHEIRO, "El Supremo condena a César Strawberry a un año de cárcel por sus tuits", *El Diario,* 19 January 2017, link: https://www.eldiario.es/politica/supremo-condena-cesar-strawberry-carcel_1_1157770.html.

systematic as it had been in the other two rappers. Although it is not a constitutional element of this crime, this might have played a role. Or did the lack of independency minded politics might have had some influence? Are judges seeing what a person says through the lens of knowing who he is, an independentist? Knowing a person is anarchistic and "anti-Spain", does not justify changing similar statements' label from "ironic" to "dangerous". One case does not set the rule. What else has the AN ruled regarding insulting the crown?

### b. Audiencia Nacional

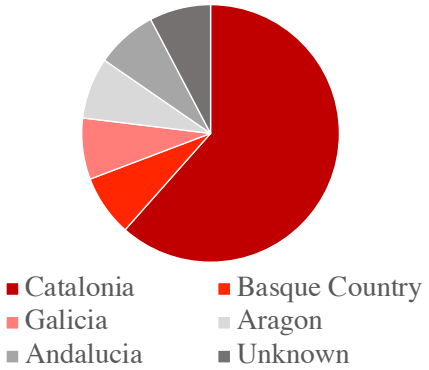
In SAN516/2008 Doble V (a rap group from Zaragoza) got convicted to pay a *pena de multa* of 360 euros for saying "*OK me cago en el Rey"* in one of their rap songs.[183] Two people got convicted in 2009: the mayor of Puerta Real, Cadiz had to pay 6,480 euros for insulting the crown in one of his speeches[184] and $X_1$ for statements he made during a protest in Vigo, Galicia.[185] In 2013 the AN decided a Catalan man's blog post in which he used harsh language against the king was protected by freedom of expression.[186] In 2018[187] $X_2$ got convicted for posting a picture of the beheaded king on Facebook and writing an insulting paragraph underneath.[188] Although there are some articles on the internet heavily criticising this judgement, [189] it is unknown where he is from. Two weeks later someone else's ($X_3$) appeal got accepted: although his manifesto '*Por la pitada al Himno Español y al Rey Barbón*' on his Facebook page '*Catalunya acció*' was impolite, it did not constitute the crime of insulting the crown but was legitimate speech.[190] In 2021 the AN dismissed the complaint against Pilar Ayre, Barcelonian author of the book '*Yo, el Rey*'.[191] She had gone on television making statements like: "*Sofía detesta a los españoles, es clasista y altanera*".[192] On the 4 March 2022, the claim that two Catalan hosts of *BircoHéroes* on *tv3 Catalunya* had insulted the crown was also not accepted – in first instance, nor in appeal.[193] Three days later $X_4$, born in Tarragona, got

[183] SAN 5616/2008, 23 January 2008.
[184] SAN 6190/2009, 18 September 2009
[185]SAN 6408/2009, 18 May 2009.
[186] SAN 2526/2013, 21 May 2013; The judgement does not mention he is Catalan, nor is it clear from context. However, googling the alleged statements gives direct access to the blogpost. I have assumed he is Catalan from his name and the fact he has written in Catalan, see: J. ARASA FERRER, "Carta Al Rei D'espanya", *El Barrinaire,* 9 December 2011, https://blocs.mesvilaweb.cat/elbarrinaire/carta-al-rei-despanya/.
[187] Between 2013 and 2018, the very controversial Pablo Hasél, Valtònyc and César Strawberry cases took place, which, since they were significant enough to go all the way to the SC, are not mentioned here.
[188] SAN 1516/2018, 24 April 2018.
[189] The judgement was highly criticised though. See: A. TORRUS, "La Audiencia Nacional condena a un hombre por llamar "corrupto malparido" al rey Juan Carlos en Facebook", *Público* 29 January 2018, link: https://www.publico.es/sociedad/facebook-audiencia-nacional-condena-hombre-llamar-corrupto-malparido-rey-juan-carlos-facebook.html and A. POZAS, "Multa de 900 euros por amenazar con decapitar al Rey Juan Carlos en Facebook", *Ser* 12 May 2018, link: https://cadenaser.com/ser/2018/05/10/tribunales/1525946439_506602.html.
[190] SAN 1511/2018, 4 May 2018. I assume he is Catalan from the name of his facebook page and his use of the Catalan language.
[191] AAN 372/2021, 24 May 2021, (https://www.poderjudicial.es/search/AN/openDocument/59c34e9da776fb61/20210701)
[192] https://www.telecinco.es/salvamedeluxe/pilar-eyre-reina-sofia-desenmascara_18_3068895043.html.
[193] AAN 1805/2022, 4 March 2022.

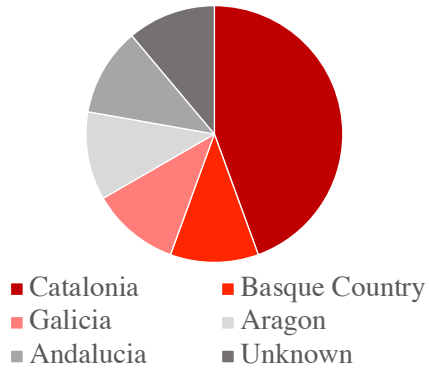
sentenced to pay a fine for insulting the crown: during Felipe VI's speech, he had shared insults about the king with his twitter followers.[194]

### 3.5.3. Is this crime targeting political/linguistic minorities in Spain?

First, it is worth mentioning the crime is not exactly highly prosecuted.[195] In the online database of the Spanish jurisprudence, thirteen cases for insulting the crown were found, resulting in nine convictions by the Spanish courts and four acquittals. Graphically, the total case that were discussed in front of the court can be depicted by Autonomous Region:




If we would not take the acquittals into of account, the graphic looks like this:




In either ten respectively six[196] out of the thirteen convictions were the alleged perpetrators from a linguistically different region: the majority of which from Catalunya. Some thoughts on this:

First, although an acquittal is of course an important indicator, it does not say everything: being prosecuted for a crime is, even after acquittal, still a note-worthy event that can deflect a society's perception of what is considered criminal behaviour worthy of punishment.

[194] SAN 903/2022, 7 March 2022. The verdict mentions he is born in Tarragona and some of his tweets were in Catalan.
[195] I do not know how accurate this database is; I cannot guarantee that this is an exhaustive list. I think it is likely that there have been more cases. Maybe the database is incomplete, or some convictions did not get the tag "*injurias a la corona*". However, the diagrams can still be read as an indication of a statistical sample.
[196] Depending on whether we use "prosecuted" or "convicted" as a criterion.

Second, these cases are merely indicative. They are in no way substantive enough to claim there is some sort of substantive discrimination against linguistic/political minorities in Spain's prosecution policy. However, these numbers do shed a negative light on how this crime seems to target certain types of individuals. Historically, these regions have been discriminated against. Especially in Catalunya the independency movement is still alive and kicking. Do judgements like this not just add unnecessary fire to an already raging flame? Solanos was right when he sais that "the *Otegi* case dropped like a bomb in the midst of the Catalan secession crisis".[197] Although Pablo Hasél still got convicted after the ECtHR judgement, it may have left some impact; three out of the four acquittals have taken place after *Otegi.* The AN was so diligently acquitting, that I almost wanted to give this chapter a Shakespearian ending: all's well that ends well. However, apparently there was the need to convict Joe Shmoe with a symbolic fine[198] for sharing offending tweets with his followers. If the crime is internationally being abolished and declared unconstitutional, one can wonder: what are they even fighting for?

[197] J. SOLANES MULLOR, "The Implications of the Otengi case for the legitimacy of the Spanish judiciary, Case Nos. 4184/15 and 4 other applications, Otegi Mondragon and others v Spain", *European Constitutional Law Review*, 15 September 2019, 574.
[198] "*Pena de cuatro meses multa con cuota diaria de 6 euros"* (SAN 903/2022, 7 March 2022, 1).

# 4. Conclusion

Ever since the 16th century, a radical idea changed the way we viewed our political social contract: the people were no longer ruled by godly creatures but represented by accountable leaders. The monarchy went from the most wide-spread form of institutions, to just 43 worldwide. Absolute monarchs are the rare exception; the grand majority only has ceremonial functions. However, their symbolic function as Head of State goes hand in hand with certain privileges and immunities. In this thesis, I investigated one of their highly contested ones: the special crime of insulting the crown.

This thesis started with explaining what insults against the crown and freedom of expression were. After I researched how the two were related. According to the ECtHR judgements, a higher protection of the monarch is a violation of the fundamental right freedom of expression, (Article 10 ECHR). In accordance with this jurisprudence, the Belgian courts have decided to switch course and declare this crime unconstitutional. However, the highest Spanish Courts seem to persist in its constitutionally. Although the crime is not frequently used in Spain, its heart is still beating. "What do underground music artist, political protesters and internet trolls have in common? – criminal convictions for insulting the crown," should be a bad joke on the back of a block calendar, not the conclusion of a master's thesis. However, there is hope on the horizon. Not only has the conviction rate of the AN seriously dropped, but the Senate has also proposed to amend articles 490.3 and 491 CP. Fingers crossed that soon, this thesis will become irrelevant.

Once we conclude higher protection is unconstitutional, a second, more political question obtrudes: can we not find pragmatic reasons why the monarch should tolerate more than an ordinary citizen? The general fear of the chilling effect is still present when the speech is protected by regular criminal law. We therefore compared the monarch to politicians, a category that deserves less protection than ordinary citizens. Another argument was the vagueness of context. Political context as a criterion to determine if higher protection of freedom of expression is allowed, seemed to have caused some confusion in the Spanish judiciary: where does the scope of Article 490.3 CP end and 491 CP begins? Even if we do find the right ground to convict perpetrators, is this really the best solution to the problem? Does sentencing give the insults not just more notoriety? If it makes people glorify dubious characters, is ignoring not the better response to this issue? Especially in Spain this is a sensitive issue: who is getting

convicted, turns out to be mostly Catalans. Of course, one could counterargue that it makes sense that the wish of many Catalans to become an independent nation might be correlated to the crime numbers: since they are the ones outspokenly protesting and harbouring hatred against the Spanish Monarchy, they are the ones being targeted in the prosecution of this crime. However, a 2020 survey has proven that 52% of the Spanish people would prefer a republic form of government over a monarchy.[199] *Anno* 2020, Catalunya made up 16,3% of the Spanish population. A recent survey showed 44% of Catalans support independency.[200] Not supporting the monarchy and supporting independency might go hand in hand, but the former can clearly exist without the latter.

So even if we do focus on the part of the ECtHR's judgements stating that prosecuting these crimes is not de facto excluded: should we? Are those relatively small punishments we are conflicting upon the perpetrators worth of the public backlash and political implications these convictions might cause?

"Then let them eat cake" is the traditional translation of what Marie Antoinette supposedly[201] answered when told the starving peasants had no bread.[202] The quote has become a symbol of the poor understanding royals used to have of the commoners' suffering. In the rise of democracy, the royals that are still in power nowadays have been the ones that knew how to play their cards right: accept the loss of actual power or lose the throne – if not your head. Nowadays, there is plenty of bread in western societies. Flourishing wealth and technology have given citizens means to participate in public debate that used to be unthought of. The times of royals dishing out without taking it are long in the past. So, maybe it is time to give them a taste of their own medicine. Or to say it like 'a great princess':[203] let them eat their own cake.

[199] C. ENRIQUE BAYO, "Sondeo: Los españoles prefieren república a monarquía por una mayoría absoluta", 6 May 2020, link: https://www.publico.es/politica/sondeo-espanoles-prefieren-republica-monarquia-mayoria-absoluta.html.
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[201] This is actually a false attribution; sources have been found indicating the phrase had been used before she was even born. (see: S. LANSER, "Eating Cake: The (Ab)uses of Marie-Antoinette". In D. Goodman, E. Kaiser and E. Thomas E. (eds.), *Marie Antoinette: Writings on the Body of a Queen. Routledge*, 2003, pp. 273–290).
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[203] *Ibid.*

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