



## An elected representative's conviction for causing serious insult to the King of Spain was contrary to his freedom of expression

In today's Chamber judgment in the case [Otegi Mondragon v. Spain](#) (application no. 2034/07), which is not final<sup>1</sup>, the European Court of Human Rights held, unanimously, that there had been:

**A violation of Article 10 (freedom of expression) of the European Convention on Human Rights.**

The case concerned the criminal conviction of the spokesperson for a left-wing Basque separatist parliamentary group for causing serious insult to the King of Spain, following comments made to the press during an official visit by the King to the province of Biscay.

### Principal facts

The applicant, Arnaldo Otegi Mondragon, is a Spanish national who was born in 1956 and lived in Elgoibar (Gipuzkoa) at the time that his application was lodged. He was the spokesperson for *Sozialista Abertzaleak*, a left-wing Basque separatist parliamentary group in the Parliament of the Autonomous Community of the Basque Country.

In February 2003, on an order by the *Audiencia Nacional*, the premises of the daily newspaper *Euskaldunon Egunkaria* were searched and then closed on account of its presumed links with the terrorist organisation ETA. Ten people were arrested, including the newspaper's main editors. Following five days in secret detention, they complained that they had been subjected to ill-treatment in police custody.

During a press conference in San Sebastián on 26 February 2003, when the King of Spain was attending the inauguration of an electricity power station in the province of Biscay, the applicant, as spokesperson for his parliamentary group, stated in reply to a journalist's question that the inauguration, with Juan Carlos of Bourbon, was a "genuine political disgrace". He said that the King, as "supreme head of the Guardia Civil (police) and of the Spanish armed forces" was the person in command of those who had tortured those detained in the police operation against the *Egunkaria* newspaper. He called the King "he who protects torture and imposes his monarchical regime on our people through torture and violence".

In April 2003 the public prosecutor lodged a criminal complaint against the applicant for "serious insult against the King". Mr Otegi Mondragon argued that proceedings had been brought in connection with the allegations of torture during the operation in the newspaper's offices, and that numerous statements by public figures had been made in

<sup>1</sup> Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

that respect. Thus, he argued, his comments had been political criticism by a political figure, in the context of his freedom of expression, a basic element of the rule of law and democracy.

Mr Otegi Mondragon was found not guilty on 18 March 2005. The Basque Country Higher Court of Justice, while finding that his comments had been "clearly offensive... and ignominious", held that they had been made in a public, political and institutional context and were "outside the essential core of individual dignity that is protected by the law against any interference by third parties". The public prosecutor appealed on points of law, arguing in favour of the strengthened protection of the King's dignity that had been sought by the legislature and the sovereign's inviolability as proclaimed by the Constitution. The public prosecutor argued that the comments in question could be described as "hate speech" within the meaning of the case-law of the European Court of Human Rights, given the existing situation with regard to terrorist attacks.

On 31 October 2005 the Higher Court of Justice convicted the applicant and sentenced him to one year's imprisonment, suspension of the right to vote during that period and the payment of costs and expenses, having found him criminally liable for the offence of causing serious insult to the King. It considered that the impugned comments were value judgments and not statements of fact, affecting the inner core of the King's dignity, independently of the context in which they had been made. The court noted that the complaints of ill-treatment referred to by Mr Otegi Mondragon had been dropped on the ground of insufficient evidence and that the impugned comments had not been a response to a political discussion with the King. One of the judges expressed a dissenting opinion, considering that the comments targeted the King only in his institutional role as head of the armed forces.

On 3 July 2006 the Constitutional Court declared inadmissible the *amparo* appeal lodged by the applicant for a manifest absence of constitutional content. It held that it was difficult to deny the ignominious, vexatious and dishonouring nature of the impugned comments, even when made with regard to a public figure. That finding was even more valid with regard to the King, who, according to the Constitution, was "not liable" and was "the symbol of unity and permanence". Having regard to his role as "arbitrator and moderator of the lawful functioning of institutions", the King occupied a neutral position in political debate. The court concluded that the applicant's remarks expressed a manifest contempt for the King and for the institution he represented, affecting the inner core of his dignity, and that, consequently, they could clearly not be protected by the exercise of the right to freedom of expression.

At the request of the Basque Country Higher Court of Justice, the sentence imposed on the applicant was suspended for three years. According to the Government, the sentence was remitted on 16 July 2009. The applicant is currently in pre-trial detention in the context of other criminal proceedings.

## Complaints, procedure and composition of the Court

Relying on Article 10, the applicant complained that he had been convicted in criminal proceedings for causing serious insult to the King.

The application was lodged with the European Court of Human Rights on 5 January 2007.

Judgment was given by a Chamber of seven, composed as follows:

Josep **Casadevall** (Andorra), *President*,  
Corneliu **Bîrsan** (Romania),

Alvina **Gyulumyan** (Armenia),  
Ján **Šikuta** (Slovakia),  
Luis **López Guerra** (Spain),  
Nona **Tsotsoria** (Georgia),  
Mihai **Poalelungi** (Moldova), *Judges*,

and also Santiago **Quesada**, *Section Registrar*.

## Decision of the Court

### Article 10

The interference by the public authorities in the applicant's right to freedom of expression, namely his conviction, had had a legal basis in the Criminal Code, which made it a punishable offence to insult the King. It pursued the legitimate aim of protecting the reputation of the King of Spain.

The applicant's remarks, made in his capacity as elected member of and spokesperson for a parliamentary group, concerned a matter of public interest in the Basque Country, namely the welcome to be given by the head of the Basque Government to the King of Spain, who was on an official visit, in the context of the recent closure of the *Egunkaria* newspaper and the complaint alleging ill-treatment which had been lodged by its editors and made public by them. The latitude enjoyed by the authorities in restricting the applicant's freedom of expression was limited in the area of political discussion or debate, as that freedom was especially important for an elected representative of the people who defended the interests of his or her electors. In addition, the limits of acceptable criticism were wider with regard to politicians than to private individuals, as the former inevitably and knowingly laid themselves open to close scrutiny by both journalists and the public at large.

The Higher Court of Justice had considered that the comments in question were value judgments and not statements of fact. The Court had already held that even where a statement amounted to a value judgment, there had to exist a sufficient factual basis to support it, failing which it would be excessive. In Mr Otegi Mondragon's case, his comments had a sufficient link with the allegations of ill-treatment made by the editor-in-chief of the *Egunkaria* newspaper on his release. In addition, Mr Otegi Mondragon's comments could be understood as contributing to a wider public debate on the possible responsibility of the State security forces in cases of ill-treatment.

While the Court acknowledged that the applicant's language could have been considered provocative, it reiterated that it was permitted, in the context of a public debate of general interest, to have recourse to a degree of exaggeration, or even provocation, so long as it did not overstep certain bounds, particularly in respect of the reputation and rights of others. While certain of the terms used by the applicant painted a negative and hostile picture of the king as an institution, that was not an incitement to violence or hate speech, which, in the Court's opinion, was the essential element. Moreover, neither the courts nor the Government had justified the applicant's conviction on such grounds. In addition, these oral statements, made in the course of a press conference, could not be either rephrased or withdrawn.

The Court considered that the principles laid down in its case-law<sup>2</sup> on the issue of over-protection of Heads of State were valid for a monarchical system such as Spain's, where the sovereign held a unique institutional position. While the King of Spain remained

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<sup>2</sup> See the judgment in [Colombani and Others v. France](#) (25.06.2002) on the derogations protecting foreign Heads of State from criticism. On over-protection of the President of the Republic in civil cases: [Pakdemirli v. Turkey](#) judgment (22.02.2005).

neutral in political debate, he was the symbol of the State, and his position as arbitrator could not shield him from legitimate criticism of that State's constitutional structures. The Basque Country Higher Court of Justice had noted in that respect that freedom of expression did not exclude criticism of such structures. The Court emphasised that that freedom was all the more important when it came to ideas that shocked or challenged the established order. The fact that the King was "not liable" under the Spanish Constitution, particularly in terms of criminal law, could not prevent open debate on his possible institutional responsibility, albeit symbolic, within the bounds of respect for his reputation as an individual.

The Court considered that the applicant's impugned remarks had not been a gratuitous personal attack against the King, nor did they concern his private life<sup>3</sup> or his personal honour. In that regard, the Basque Country Higher Court of Justice had found that the comments in issue had been made in a public and political context that was outside the "essential core of individual dignity". The phrases used by Mr Otegi Mondragon concerned solely the King's institutional responsibility as Head and symbol of the State apparatus and of the forces which, according to the applicant, had tortured the editors of the *Egunkaria* newspaper. They did not challenge the manner in which the King had carried out his official functions or accuse him in a tangible way of a criminal offence.

The Court further noted the particular severity of the sentence – one year's imprisonment and suspension of the right to vote during that period. While the determination of sentences was in principle a matter for the national courts, a prison sentence imposed for an offence committed in the area of political discussion was compatible with freedom of expression only in extreme cases, such as hate speech or incitement to violence<sup>4</sup>. Nothing in Mr Otegi Mondragon's case justified such a sentence, which inevitably had a dissuasive effect. The suspension of the applicant's sentence, while it might have eased his situation, had nonetheless not expunged his conviction or the long-term consequences of a criminal record.

Thus, even supposing that the reasons relied upon by the Spanish courts could be accepted as relevant, they were not sufficient to demonstrate that the interference complained of had been "necessary in a democratic society". The applicant's conviction and sentence were thus disproportionate to the aim pursued, in violation of Article 10.

#### Article 14

Having regard to its conclusion under Article 10, the Court held that it was not necessary to examine separately the applicant's complaint under Article 14 taken together with Article 10.

#### Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Spain was to pay the applicant 20,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,000 for costs and expenses.

*The judgment is available only in French.*

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<sup>3</sup> A contrario: the judgment in [Standard Verlags GmbH v. Austria \(no 2\)](#) (04.06.2009), concerning intimate aspects of the Austrian President's private life; [Von Hannover v. Germany](#), concerning the press publication of photographs showing scenes from the private life of Princess Caroline von Hannover and her husband, Prince Ernst August von Hannover.

<sup>4</sup> See the texts of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe on prison sentences resulting from political discussion (Declaration on freedom of political debate in the media, adopted by the Committee of Ministers on 12 February 2004 / Resolution no. 1577 (2007) of the Parliamentary Assembly: "Towards decriminalisation of defamation").

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.