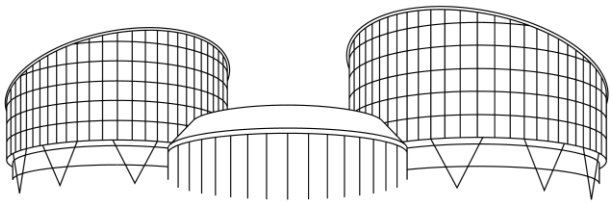

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF OTEGI MONDRAGON v. SPAIN

(Application no. 2034/07)

JUDGMENT

STRASBOURG

15 March 2011

FINAL

15/09/2011

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Otegi Mondragon v. Spain**,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President*,
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Mihai Poalelungi, *judges*,
and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 8 March 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 2034/07) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Mr Arnaldo Otegi Mondragon ("the applicant"), on 5 January 2007.

2. The applicant was represented by Mr D. Rouget and Ms J. Goirizelaia Ordorika, lawyers practising in Saint-Jean-de-Luz and Bilbao respectively. The Spanish Government ("the Government") were represented by their Agent, Mr I. Blasco, Head of the Legal Department for Human Rights, Ministry of Justice.

3. The applicant alleged that the decision of the Supreme Court finding him guilty of serious insult against the King of Spain amounted to an unjustified infringement of his right to freedom of expression under Article 10 of the Convention.

4. On 27 November 2008 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. On 7 June 2009 the applicant requested the Court to hold a public hearing. The Court examined the request. In view of the information available to it, it decided that no hearing was necessary.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1956. At the time the application was lodged he lived in Elgoibar (Gipuzkoa).

7. At the time of the events, the applicant was spokesperson for *Sozialista Abertzaleak*, a left-wing Basque separatist parliamentary group in the Parliament of the Autonomous Community of the Basque Country.

A. Background to the case

8. On 21 February 2003, following an order issued by central investigating judge no. 6 of the *Audiencia Nacional*, the premises of the daily newspaper *Euskaldunon Egunkaria* were searched and then closed, on account of the newspaper's alleged links with the terrorist organisation ETA. Ten persons were arrested, including the newspaper's senior managers (members of the board and the editor-in-chief). After spending five days in secret detention the persons concerned complained that they had been subjected to ill-treatment in police custody.

9. On 26 February 2003 the President of the Autonomous Community of the Basque Country received the King of Spain at the opening of an electricity power station in the province of Biscay.

10. At a press conference held the same day in San Sebastián, the applicant, as spokesperson for the *Sozialista Abertzaleak* parliamentary group, outlined his group's political response to the situation concerning the newspaper *Euskaldunon Egunkaria*. Replying to a journalist he said, with reference to the King's visit to the Basque Country, that "it [was] pathetic", adding that it was "a genuine political disgrace" for the President of the Autonomous Community of the Basque Country to be inaugurating the project with Juan Carlos of Bourbon and that "their picture [was] worth a thousand words". He went on to say that inaugurating a project with the King of the Spaniards, who was the Supreme Head of the Civil Guard (*Guardia Civil*) and the Commander-in-Chief of the Spanish armed forces, was absolutely pitiful. Speaking about the police operation against the newspaper *Euskaldunon Egunkaria*, he added that the King was in charge of those who had tortured the persons detained in connection with the operation. He spoke in the following terms:

> "How is it possible for them to have their picture taken today in Bilbao with the King of Spain, when the King is the Commander-in-Chief of the Spanish army, in other words the person who is in charge of the torturers, who defends torture and imposes his monarchical regime on our people through torture and violence?"

B. The criminal proceedings in the Basque Country High Court of Justice

11. On 7 April 2003 the public prosecutor lodged a criminal complaint against the applicant for "serious insult against the King" within the meaning of Article 490 § 3 of the Criminal Code read in conjunction with Article 208, on account of his remarks made on 26 February 2003.

12. In the proceedings before the Basque Country High Court of Justice, which had jurisdiction to try the applicant because of his status as a member of parliament, the applicant argued that his remarks had constituted political criticism directed against the Head of the government of the Basque Country. He added that to say that the King of Spain was the Supreme Head of the Civil Guard did not imply any intention to undermine dignity or honour; it was merely a statement of the political reality in the Spanish State, where the King exercised supreme command over the armed forces. The applicant further argued that there was no insult or attempt to dishonour in saying that the Civil Guard had tortured the persons detained in connection with the closure of the newspaper *Euskaldunon Egunkaria* because that was the reality, and proceedings had been instituted in that connection before the Madrid investigating judge no. 5. Numerous public figures had also commented on the subject. In sum, the applicant, as a politician, had sought to express political criticism in the context of freedom of expression, one of the foundations of the rule of law and democracy. He pointed out in that regard that politicians had greater freedom of manoeuvre when it came to informing society about matters of public interest.

13. In a judgment of 18 March 2005, the High Court of Justice found the applicant not guilty of the charges against him. After stating that his remarks had been "clearly offensive, improper, unjust, ignominious and divorced from reality", the court found as follows:

> "... This is not an issue concerning the private life of the Head of State but one of rejection of the ties of political power deriving from the hereditary nature of the institution which he personally symbolises. ... [C]riticism of a constitutional institution is not excluded from the scope of the right to freedom of expression; in this case the latter has the status of a constitutional right which takes precedence over the right to honour. The Constitution does not guarantee the right to freedom of expression solely in relation to certain points of view that are considered correct, but in relation to all ideas, subject to the limits which it lays down ..."

14. The High Court of Justice summed up as follows:

> "[T]he [applicant's] remarks were made in a public, political and institutional setting, regard being had not only to the speaker's status as a member of parliament but also to the authority to which they were addressed, namely the State's highest judicial authority, and to the context of political criticism of the [Head of the government of the Basque Country] for his official hospitality in receiving His Majesty King Juan Carlos I in the wake of the closure of the newspaper [*Euskaldunon*] *Egunkaria* and the detention of its senior managers, and the latter's public allegations of ill-treatment. This context is therefore unconnected to the

innermost core of individual dignity protected by law from any interference by third parties."

C. The appeal on points of law to the Supreme Court

15. The public prosecutor lodged an appeal on points of law, arguing firstly that the law protected the honour of the King as a specific individual possessed of personal dignity, who had been the object of the offence of insult, and secondly that the law was aimed at ensuring respect for the symbolic content of the institution of the Crown as established by the Spanish Constitution and "represented by the Head of State, the symbol of its unity and permanence". The seriousness of the offence could be inferred from the fact that the legislature had sought to afford increased protection to the dignity of the King, including *vis-à-vis* other public authorities (Articles 496 and 504 of the Criminal Code). Furthermore, the inviolability of the King, as proclaimed in Article 56 § 3 of the Constitution, demonstrated the unique position occupied by the Crown in the system of the 1978 Spanish Constitution. That constitutional position highlighted the disproportionate nature of the vexatious and insulting remarks made by the applicant. In the view of the public prosecutor, who referred several times to the case-law of the Strasbourg Court, it was clear that the King had been performing official duties and that he was a figure in the public eye; however, that did not deprive him of the right to respect for his honour. In that regard, the public prosecutor pointed out that Article 20 § 1 (a) of the Constitution did not protect a supposed right to proffer insults. Drawing a parallel with the special protection to be afforded under Article 10 § 2 of the Convention to the judiciary, the public prosecutor further argued that the same protection should be afforded to the Head of State, who was the "symbol of the unity and permanence of the State" and was above party politics, from the "destructive and baseless attack" constituted by the applicant's remarks. Lastly, in the public prosecutor's view, the applicant's remarks could be said to amount to "hate speech" within the meaning of the Court's case-law, given the existing situation with regard to terrorist attacks.

16. In two judgments delivered on 31 October 2005, the Supreme Court set aside the judgment of the lower court, making several references to the Court's case-law. It sentenced the applicant to one year's imprisonment, suspended his right to stand for election for the duration of the sentence and ordered him to pay costs and expenses, on the ground of his criminal liability for the offence of serious insult against the King. The Supreme Court considered the impugned remarks to have been value judgments rather than statements of fact. The remarks, described as "ignominious" by the lower court, had expressed contempt for the King and the institution he represented, affecting the innermost core of his dignity by accusing him of one of the most serious manifestations of criminal conduct in a State

governed by the rule of law. The exercise of the right to freedom of expression had therefore been contrary to the principle of proportionality and had been unnecessary, overstepping the limits beyond which criticism could be deemed to be hurtful or upsetting. The Supreme Court further observed that the context in which the remarks had been made did nothing to alter their offensiveness. Firstly, the proceedings relating to the complaints of ill-treatment of the persons detained in connection with the operation against the newspaper *Euskaldunon Egunkaria* had been discontinued for lack of evidence. Secondly, the impugned remarks could not be construed as a reaction or response to a political debate with the King. In view of the seriousness of the insulting comments and the fact that the applicant had deliberately expressed them in public, the Supreme Court sentenced him to one year's imprisonment.

17. Judge P.A.I. issued a dissenting opinion in which he argued that the comments complained of had been of a political nature, in view of the applicant's status as a member of parliament and the context in which they had been made, namely the King's visit to the Basque Country and the attitude of the Head of the government of the Basque Country in that regard. The judge agreed with the Basque Country High Court of Justice that the remarks had not targeted the King's private life or his personal honour but had been directed solely at his institutional role as Commander-in-Chief of the Spanish armed forces. The applicant had not claimed that the King was responsible for actual acts of torture, only that he was strictly liable as Head of the State apparatus. The judge pointed out that the limits of freedom of expression were wider with regard to institutions since the latter did not possess honour, an attribute that was confined to individuals.

D. The *amparo* appeal to the Constitutional Court

18. The applicant lodged an *amparo* appeal with the Constitutional Court alleging, *inter alia*, a breach of his right to freedom of expression (Article 20 § 1 (a) of the Constitution) and of his right to freedom of ideas (Article 16 of the Constitution).

19. In the applicant's view, the Supreme Court's judgment had incorrectly weighed the competing interests at stake, as the comments complained of had not contained any insulting or vexatious expressions, had been directed principally against the President of the Autonomous Community of the Basque Country rather than the King of Spain and, in any event, had reflected the reality of the situation and had not referred to the King's private life or his attitudes. The statements in question had not been disproportionate in the context in which they had been uttered, namely the warm welcome extended to the King of Spain by the government of the Basque Country in the wake of the closure of the daily newspaper *Euskaldunon Egunkaria* and, in connection with that closure, the detention

of several individuals who had stated before the courts and the Basque Parliament that they had been tortured.

20. In a decision (*auto*) of 3 July 2006, served on 11 July 2006, the Constitutional Court declared the applicant's *amparo* appeal inadmissible as manifestly devoid of constitutional content. The Constitutional Court noted at the outset that the right to freedom of expression did not encompass a right to proffer insults. It pointed out in that connection that the Constitution did not prohibit the use of hurtful expressions in all circumstances. However, freedom of expression did not protect vexatious expressions which, regardless of their veracity, were offensive and ignominious and were not pertinent for the purpose of conveying the opinions or information in question.

21. The Constitutional Court considered that the weighing of the competing rights at stake had been carried out in an appropriate manner by the Supreme Court, as the latter had concluded that the impugned remarks had been disproportionate, while taking into account the context in which they had been made, the public nature of the act, the public interest in the subject in question (the use of torture) and the fact that the persons targeted (a politician and the King) were public figures. In the Constitutional Court's view, there was no denying the ignominious, vexatious and derogatory nature of the impugned remarks, even when directed against a public figure. That finding was all the more valid with regard to the King, who, by virtue of Article 56 § 3 of the Constitution, was "not liable" and was a "symbol of the unity and permanence of the State". Regard being had to his role as "arbitrator and moderator of the lawful functioning of institutions", the King occupied a neutral position in political debate. This implied that he was owed institutional respect of a kind that was "substantively" different from that due to other State institutions. The Constitutional Court stated as follows:

> "... [I]n a democratic system which recognises freedom of ideas and freedom of expression, the fact that [the figure of the King] is characterised in this way does not shield him from all criticism 'in the exercise of his duties or on account of or in connection with them' ...; however, such criticism may not extend to attributing acts of public authority to the King – which, as indicated above, is prohibited by the Constitution – as a pretext for gratuitous attacks on his dignity or public esteem."

22. Lastly, the Constitutional Court held that the applicant's remarks, on account of their obviously derogatory nature, had clearly gone beyond what could be considered legitimate. It agreed with the Supreme Court that the remarks had expressed open contempt for the King and the institution he embodied, affecting the essential core of his dignity. Hence, such statements could manifestly not fall within the exercise of the right to freedom of expression.

E. Enforcement of the sentence and subsequent events

23. In a decision (*auto*) of 15 May 2006, the Basque Country High Court of Justice ordered that enforcement of the applicant's sentence be stayed for three years. According to the Government, his sentence was remitted on 16 July 2009.

24. The applicant was imprisoned on 8 June 2007 after the Supreme Court upheld a judgment of the *Audiencia Nacional* of 27 April 2006 sentencing him to fifteen months' imprisonment for publicly defending terrorism.

25. He is currently in pre-trial detention in connection with other criminal proceedings.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. National legislation

26. The relevant provisions of the Spanish Constitution read as follows:

Article 14

"Spaniards shall be equal before the law; they may not be discriminated against in any way on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance."

Article 16

"1. Freedom of ideas, religion and worship shall be guaranteed to individuals and communities without any restrictions on its expression other than those necessary for the maintenance of public order as protected by law.

..."

Article 20

"1. The following rights shall be recognised and protected:

(a) the right freely to express and disseminate thoughts, ideas and opinions orally, in writing or by any other means of reproduction;

...

2. The exercise of these rights may not be restricted by any prior censorship.

...

4. These freedoms shall be limited by respect for the rights secured in this Part, by the provisions of the implementing Acts and in particular by the right to honour and to a private life and the right to control use of one's likeness and to the protection of youth and children.

..."

Article 56

"1. The King shall be the Head of State, the symbol of its unity and permanence. He shall be the arbitrator and moderator of the lawful functioning of institutions. He shall be the supreme representative of the Spanish State in its international relations, in particular with those nations belonging to its historic community, and shall exercise the functions expressly attributed to him by the Constitution and the law.

...

3. The King shall be inviolable and shall not be liable. ..."

Article 62

"It shall be incumbent on the King to:

...

(h) exercise supreme command over the armed forces;

(i) exercise the right of clemency in accordance with the law, but without the power to grant general pardons

..."

27. The relevant provisions of the Criminal Code (as amended by Institutional Act no. 10/1995 of 23 November 1995) read as follows:

Article 208

"Acts or expressions which undermine another's dignity by attacking his or her reputation or self-esteem shall constitute insult.

Only insults which, by virtue of their nature, effects and context, are generally acknowledged to be serious shall constitute an offence ..."

Article 209

"The offence of serious public insult shall be punishable by a day-fine payable for between six and fourteen months. Where the insult is not proffered publicly, the fine shall be payable for between three and seven months."

28. With regard to the offence of insult against the King, Article 490 of the Criminal Code provides for the penalties indicated below:

Article 490

"...

3. Anyone who falsely accuses or insults the King or any of his ascendants or descendants, the Queen consort or the consort of the Queen, the Regent or any member of the Regency, or the Crown Prince, in the exercise of his or her duties or on account of or in connection with them, shall be liable to a term of imprisonment of between six months and two years if the false accusation or insult is of a serious nature, and otherwise to a day-fine payable for between six and twelve months."

This provision is contained in Title XXI of Book II of the Criminal Code ("Offences against the Constitution"), under Chapter II ("Offences against the Crown").

29. Articles 496 and 504 of the Criminal Code deal with the offence of serious insult against Parliament, the government or other State institutions. These provisions feature in Title XXI of Book II of the Criminal Code ("Offences against the Constitution"), under Chapter III ("Offences against State institutions and the separation of powers").

Article 496

"Anyone who seriously insults the *Cortes Generales* [Congress of Deputies and Senate] or the legislative assembly of an Autonomous Community ... shall be liable to a day-fine payable for between twelve and eighteen months ..."

Article 504

"Anyone who seriously threatens, falsely accuses or insults the nation's government, the General Council of the Judiciary, the Constitutional Court, the Supreme Court, or the Governing Council or High Court of Justice of an Autonomous Community shall be liable to a day-fine payable for between twelve and eighteen months ..."

B. Council of Europe texts

30. Reference should first be made to the Declaration on freedom of political debate in the media adopted by the Committee of Ministers of the Council of Europe on 12 February 2004, which provides:

"The Committee of Ministers of the Council of Europe,

...

Conscious that some domestic legal systems still grant legal privileges to political figures or public officials against the dissemination of information and opinions about them in the media, which is not compatible with the right to freedom of expression and information as guaranteed by Article 10 of the Convention;

...

II. Freedom to criticise the State or public institutions

The State, the government or any other institution of the executive, legislative or judicial branch may be subject to criticism in the media. Because of their dominant position, these institutions as such should not be protected by criminal law against defamatory or insulting statements. Where, however, these institutions enjoy such a protection, this protection should be applied in a restrictive manner, avoiding in any circumstances its use to restrict freedom to criticise. Individuals representing these institutions remain furthermore protected as individuals.

...

VI. Reputation of political figures and public officials

Political figures should not enjoy greater protection of their reputation and other rights than other individuals, and thus more severe sanctions should not be pronounced under domestic law against the media where the latter criticise political figures. ...

...

VIII. Remedies against violations by the media

Political figures and public officials should only have access to those legal remedies against the media which private individuals have in case of violations of their rights by the media. ... Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech."

31. Parliamentary Assembly Resolution 1577 (2007), entitled "Towards decriminalisation of defamation", is worded as follows:

"...

11. [The Assembly] notes with great concern that in many member States the law provides for prison sentences for defamation and that some still impose them in practice – for example, Azerbaijan and Turkey.

...

13. The Assembly consequently takes the view that prison sentences for defamation should be abolished without further delay. In particular it exhorts States whose laws still provide for prison sentences – although prison sentences are not actually imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.

...

17. The Assembly accordingly calls on the member States to:

17.1. abolish prison sentences for defamation without delay;

17.2. guarantee that there is no misuse of criminal prosecutions ...;

17.3. define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law and to ensure that civil law provides effective protection of the dignity of persons affected by defamation;

...

17.6. remove from their defamation legislation any increased protection for public figures, in accordance with the Court's case-law ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicant alleged that the Supreme Court decision finding him guilty of serious insult against the King amounted to undue interference with his right to freedom of expression under Article 10 of the Convention, which reads as follows:

"1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

33. The Government contested that argument.

A. Admissibility

34. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

35. The applicant submitted firstly that the provision of the Criminal Code on which his conviction had been based (Article 490 § 3) was not worded with sufficient precision and clarity. The increased protection provided for by Article 490 § 3 of the Criminal Code had in reality been turned into an absolute defence of the constitutional monarchy, going beyond the defence of individuals' honour and dignity. In the applicant's view, such a broad interpretation of the provision concerned could not be said to be "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

36. Furthermore, the interference had not pursued a "legitimate aim" within the meaning of Article 10 § 2, as it had been intended as symbolic punishment of any attempt to question the institution of the monarchy and, accordingly, the Constitution.

37. The applicant contended that his conviction had been neither proportionate to the legitimate aim pursued nor "necessary in a democratic society". He referred to his own status as spokesperson for the Basque separatist parliamentary group *Sozialista Abertzaleak* and to the particular circumstances of the case, namely the closure of the Basque daily newspaper *Euskaldunon Egunkaria* and the outcry caused in the Basque Country by the allegations that the persons detained in connection with that operation had been tortured. His remarks had dealt with a topic of public interest, namely the use of torture by the Spanish security forces in the fight against terrorism, a practice confirmed by numerous international human rights organisations. As to the Supreme Court's argument that his remarks had been without foundation since the proceedings relating to the complaints alleging torture had been discontinued, the applicant submitted firstly that he could not have known when he was making his remarks what the outcome of the criminal investigation would be, since the latter had taken place several months after the events; secondly, no final decision had been issued discontinuing the proceedings. In that connection, the applicant, referring to the judgment in *Martinez Sala and Others v. Spain* (no. 58438/00, § 160, 2 November 2004), stated that, in Spain, numerous complaints alleging torture were filed away without further action being taken although no detailed investigation had been carried out. Furthermore, the monarch had granted pardons under the Spanish Constitution to numerous members of the Spanish security forces convicted of torture. The applicant cited by way of example the decision of the United Nations Committee Against Torture in the case of *Kepa Urra Guridi v. Spain*

(Communication no. 212/2002, UN doc. CAT/C/34/D/212/2002). It was against this background that his remarks had to be seen; the applicant claimed that he had himself been subjected to torture following his arrest in July 1987.

38. Referring to the Court's case-law on the subject of insults against a Head of State (see *Colombani and Others v. France*, no. 51279/99, §§ 66-69, ECHR 2002-V, and *Pakdemirli v. Turkey*, no. 35839/97, §§ 51-52, 22 February 2005), the applicant argued that the excessive protection afforded to the Crown under Spanish criminal law was incompatible with Article 10 of the Convention. Whereas in the case of ordinary individuals and other institutions an insult had to be characterised as serious in order for the person concerned to be prosecuted, in the case of the Crown any kind of insult sufficed and was punishable. The offence of serious insult against the Crown was unique in carrying a prison sentence (of six months to two years); under ordinary law and in the case of other institutions, the penalty for serious insult was a fine. The provisions in question therefore conferred on the Crown "a special privilege that [could not] be reconciled with modern practice and political conceptions" (the applicant referred to *Colombani and Others*, cited above, § 68). The applicant alluded to the legislative trends in Council of Europe member States, most of which dealt with attacks against the sovereign under the ordinary law. Hence, making insults against the King a criminal offence was not necessary in a democratic society, especially as the offences of criminal defamation and proffering insults provided Heads of State or monarchs with sufficient remedy against remarks that damaged their honour.

39. As to the proportionality of the penalty, the applicant stressed that from 8 June 2007 to 30 August 2008 he had served the prison sentence that had become enforceable after the Supreme Court had upheld his 2006 conviction for publicly defending terrorism. Referring to the Court's case-law, according to which a prison sentence imposed for an offence committed in the context of political debate was compatible with freedom of expression only in exceptional circumstances (see *Feridun Yazar v. Turkey*, no. 42713/98, § 27, 23 September 2004), he submitted that there had been no grounds in the present case for imposing such a penalty, which in his view was manifestly disproportionate to the aim pursued. Lastly, he argued that the King had not suffered any harm and that no civil proceedings had been brought.

(b) The Government

40. The Government contended that the applicant's remarks would have constituted a serious slur on the honour of whoever happened to be the target, including of course the King. Describing someone as a torturer amounted to saying that the person concerned had violated the core values of the society of which he or she was a member and conveying a negative

view of his or her dignity and integrity. This was especially so in the instant case, where the target of the remarks had a particular duty to adhere to and ensure adherence to the core values in question.

41. In the Government's view, the Spanish courts had taken due account of the Court's case-law on the subject. In that connection, they pointed out that the case-law of the Constitutional Court recognised the importance of freedom of expression as an essential guarantee of free public opinion, which was inextricably linked to democratic pluralism. However, the right to freedom of expression did not protect a supposed right to proffer insults and hence did not encompass vexatious remarks which were irrelevant and superfluous for the purposes of conveying the opinions or information concerned. Referring to the Court's case-law (see *Lingens v. Austria*, 8 July 1986, Series A no. 103), the Government stressed that although the limits of permissible criticism were wider with regard to public figures, the latter's reputation must also be protected for the purposes of Article 10 § 2 of the Convention even where the persons concerned were not acting in a private capacity.

42. The Government stressed the unique institutional position occupied by the King under the Spanish Constitution, pointing out that the King could not be held liable and that his neutral status in political debate under the Constitution meant that he was owed institutional respect of a kind that was "substantively" different from that due to other State institutions.

43. Even assuming that the limits of criticism of the King of Spain by a member of a regional parliament were wider, neither the Spanish Constitution nor the Convention could be deemed to recognise a right to proffer insults, in disregard of a person's dignity. The Government agreed with the Spanish courts that the interference complained of had not been directed against the applicant's anti-monarchy views but against specific expressions which had overstepped the bounds of legitimate exercise of the right to free expression, in breach of the King's right to honour. Lastly, the Spanish courts had given ample reasons for the applicant's conviction, in the light of the background to the case.

2. The Court's assessment

44. It is not disputed between the parties that the applicant's conviction amounted to "interference by public authority" with his right to freedom of expression. Such interference will infringe the Convention unless it satisfies the requirements of paragraph 2 of Article 10. It must therefore be determined whether it was "prescribed by law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve those aims.

(a) "Prescribed by law"

45. The Court notes that the statutory basis for the applicant's conviction was Article 490 § 3 of the Criminal Code, which makes it a punishable offence to insult the King. As to whether that provision was applied by the courts examining the case on the merits with the aim of defending the monarchy, as suggested by the applicant, to the point of making the legal rule in question less foreseeable, this question is actually linked to the relevance and sufficiency of the reasons given by the domestic courts to justify the interference with the applicant's freedom of expression. The Court will therefore examine this issue in the context of the "necessity" of the interference.

46. The Court concludes that the interference at issue was "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

(b) Legitimate aim

47. In the Court's view, the interference pursued one of the aims enumerated in Article 10 § 2, namely the "protection of the reputation or rights of others", in this case the reputation of the King of Spain.

(c) "Necessary in a democratic society"

(i) General principles

48. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV; and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 96, ECHR 2009). As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

49. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling

on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see, among many other authorities, *Mamère v. France*, no. 12697/03, § 19, ECHR 2006-XIII, and *Lindon, Otchakovsky-Laurens and July*, cited above, § 45).

50. There is little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest. While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interference with the freedom of expression of a member of parliament calls for the closest scrutiny on the part of the Court (see *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236).

Furthermore, the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens*, cited above, § 42; *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, § 40, 27 May 2004; and *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 30, ECHR 2000-X). He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly (see, among other authorities, *Pakdemirli*, cited above, § 45, and *Artun and Güvener v. Turkey*, no. 75510/01, § 26, 26 June 2007). The Court has also acknowledged that public officials are subject to wider limits of criticism than private individuals, although the criteria applied to them cannot be the same as for politicians (see *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I).

(ii) Application of these principles

51. The Court notes at the outset that the applicant was undeniably speaking in his capacity as an elected representative and spokesperson for a parliamentary group, so that his comments were a form of political expression (see *Mamère*, cited above, § 20). Furthermore, the applicant's remarks concerned an issue of public interest in the Basque Country, namely the welcome extended by the Head of the government of the Basque Country to the King of Spain during the latter's official visit to the Basque Country on 26 February 2003, against the background of the closure of the Basque-language newspaper *Euskaldunon Egunkaria* and the detention of its senior management a few days previously, and of the latter's public allegations of ill-treatment. The applicant's statements were therefore made in the context of a debate on matters of public interest. Accordingly, the margin of appreciation available to the authorities in establishing the "necessity" of the penalty imposed on the applicant was particularly narrow (see, *mutatis mutandis*, *Mamère*, cited above, § 20).

52. The Court must now examine the reasons leading to the impugned decisions by the domestic courts, in order to determine whether they were relevant and sufficient to justify the applicant's conviction on the basis of the legitimate aim referred to, namely the protection of the reputation of the King of Spain. The Supreme Court, in overturning the applicant's acquittal by the Basque Country High Court of Justice, sentenced him to one year's imprisonment for serious insult against the King. It considered that the impugned remarks had directly targeted the King in person and the institution he embodied and that they had overstepped the limits of permissible criticism.

53. As regards the terms in which the applicant expressed himself, the domestic courts found them to have been ignominious, vexatious and derogatory in so far as they accused the Head of State of "one of the most serious manifestations of criminal conduct in a State governed by the rule of law", namely torture ("in charge of the torturers", "who defends torture" and "[who] imposes his monarchical regime on our people through torture and violence"). The Court points out in that regard that a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (see, for example, *Lindon, Otchakovsky-Laurens and July*, cited above, § 55). Furthermore, the

requirement to furnish facts in support of a value judgment is less stringent if the information is already known to the general public (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII).

In the present case, the Court observes that the Supreme Court stated in its judgment that the impugned remarks had been value judgments rather than statements of fact. However, it took the view that the context in which they had been made did not justify their seriousness, in view of the fact that the proceedings concerning the allegations of torture made by the management of the newspaper *Euskaldunon Egunkaria* had been discontinued for lack of evidence. The Court observes that there was a sufficiently strong link between the applicant's remarks and the allegations of ill-treatment made public by the editor-in-chief of *Euskaldunon Egunkaria* on his release. It further notes that the terms used by the applicant could be understood as forming part of a wider public debate on the possible implication of the State security forces in cases of ill-treatment.

54. Turning to the expressions themselves, the Court accepts that the language used by the applicant could have been considered provocative. However, while any individual who takes part in a public debate of general concern – like the applicant in the instant case – must not overstep certain limits, particularly with regard to respect for the reputation and rights of others, a degree of exaggeration, or even provocation, is permitted; in other words, a degree of immoderation is allowed (see *Mamère*, cited above, § 25). The Court observes that, while some of the remarks made in the applicant's speech portrayed the institution embodied by the King in a very negative light, with a hostile connotation, they did not advocate the use of violence, nor did they amount to hate speech, which in the Court's view is the essential element to be taken into account (see, conversely, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV). It also notes that neither the domestic courts nor the Government sought to justify the applicant's conviction by reference to incitement to violence or hate speech.

The Court further takes account of the fact that the remarks were made orally during a press conference, so that the applicant had no possibility of reformulating, refining or retracting them before they were made public (see *Fuentes Bobo v. Spain*, no. 39293/98, § 46, 29 February 2000, and *Birol v. Turkey*, no. 44104/98, § 30, 1 March 2005).

55. Next, the Court notes that, in convicting the applicant, the domestic courts relied on Article 490 § 3 of the Criminal Code, which affords the Head of State a greater degree of protection than other persons (protected by the ordinary law on insults) or institutions (such as the government and Parliament) with regard to the disclosure of information or opinions concerning them, and which lays down heavier penalties for insulting statements (see paragraphs 27-29 above). In that connection, the Court has already stated that providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention.

In its judgment in *Colombani and Others*, it examined section 36 of the French Act of 29 July 1881, which has since been repealed, concerning offences against foreign Heads of State and diplomats. It observed that the application of section 36 of the 1881 French Act conferred on foreign Heads of State a special privilege, shielding them from criticism solely on account of their function or status; this, in the Court's view, could not be reconciled with modern practice and political conceptions. The Court therefore held that it was the special protection afforded to foreign Heads of State by section 36 that undermined freedom of expression, not their right to use the standard procedure available to everyone to complain if their honour had been attacked (see *Colombani and Others*, cited above, § 69). In *Artun and Güvener*, the Court took the view that its findings in *Colombani and Others* on the subject of foreign Heads of State applied with even greater force to a State's interest in protecting the reputation of its own Head of State. That interest, in the Court's view, could not serve as justification for affording the Head of State privileged status or special protection *vis-à-vis* the right to convey information and opinions concerning him (see *Artun and Güvener*, cited above, § 31; see also, with regard to excessive protection of the status of the President of the Republic in civil cases, *Pakdemirli*, cited above, § 52).

56. The Court considers that, despite the differences compared with a republican system like that of Turkey, the principles established in its own case-law in that regard are also valid in relation to a monarchy like Spain, where the King occupies a unique institutional position, as pointed out by the Government. In *Pakdemirli*, the excessive protection afforded to the President of the Republic derived also from the fact that the holder of the office ceased to have the status of politician and acquired that of statesman (see *Pakdemirli*, cited above, § 51). In the Court's view, 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 or – as in the instant case – in his capacity as representative of the State which he symbolises, in particular from persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy. In that connection, the Court notes that the Basque Country High Court of Justice, which acquitted the applicant at first instance, observed that criticism of a constitutional institution was not excluded from the scope of the right to freedom of expression (see paragraph 13 above). The Court cannot but emphasise that freedom of expression is all the more important when it comes to conveying ideas which offend, shock or challenge the established order (see *Women On Waves and Others v. Portugal*, no. 31276/05, § 42, 3 February 2009). Furthermore, it considers that the fact that the King is "not liable" under the Spanish Constitution, particularly with regard to criminal law, should not in itself act as a bar to free debate concerning possible institutional or even

symbolic responsibility on his part in his position at the helm of the State, subject to respect for his personal reputation.

57. In that connection, the Court points out that the remarks at issue in the instant case did not concern the King's private life (see, conversely, *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05, 4 June 2009, a case concerning strictly personal aspects of the Austrian President's private life; see also *Von Hannover v. Germany*, no. 59320/00, § 64, ECHR 2004-VI) or his personal honour, nor did they amount to a gratuitous personal attack against him (see, conversely, *Pakdemirli*, cited above, § 46). It also notes that, in the view of the Basque Country High Court of Justice, the applicant's statements had been made in a public and political context unconnected to the "innermost core of individual dignity" (see paragraph 14 above). Nor did the remarks in question criticise the manner in which the King performed his official duties in a particular sphere or attribute any individual responsibility to him in the commission of a specific criminal offence. The applicant's comments related solely to the King's institutional responsibility as the symbol and Head of the State apparatus and of the forces which, according to the applicant, had tortured the editors and directors of the newspaper *Euskaldunon Egunkaria*.

58. Lastly, as regards the penalty imposed, while it is perfectly legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings (see, *mutatis mutandis*, *Castells*, cited above, § 46; see also the Council of Europe materials, paragraphs 30 and 31 above). The Court observes in that regard that the nature and severity of the penalties imposed are also factors to be taken into consideration in assessing the "proportionality" of the interference. It notes the particularly harsh nature of the penalty imposed: the applicant was sentenced to one year's imprisonment. His criminal conviction also resulted in his right to stand for election being suspended for the duration of his sentence, even though he was a politician.

59. The Court has previously held that, although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for an offence in the area of political speech will be compatible with freedom of expression as guaranteed by 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 (see *Bingöl v. Turkey*, no. 36141/04, § 41, 22 June 2010, and, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI). It refers in that regard to the guidance given in the materials of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe concerning prison sentences in the area of political speech (see paragraphs 30 and 31 above).

60. There is nothing in the circumstances of the present case, in which the impugned remarks were made in the context of a debate on an issue of legitimate public interest, to justify the imposition of such a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, notwithstanding the fact that enforcement of the applicant's sentence was stayed. While that fact may have eased the applicant's situation, it did not erase his conviction or the long-term effects of any criminal record (see, *mutatis mutandis*, *Artun and Güvener*, cited above, § 33, and *Marchenko v. Ukraine*, no. 4063/04, § 52, 19 February 2009).

61. In view of the foregoing, even assuming that the reasons given by the domestic courts could be said to be relevant, they are not sufficient to demonstrate that the interference complained of was "necessary in a democratic society". Notwithstanding the margin of appreciation left to the national authorities, the Court considers that the applicant's conviction was disproportionate to the aim pursued.

62. Accordingly, there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 10 OF THE CONVENTION

63. The applicant alleged that he had been the victim of discrimination based on his political opinions and his function as a spokesperson for the Basque separatist movement. He relied on Article 14 of the Convention taken in conjunction with Article 10. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

64. The Court observes that this complaint is linked to the complaint examined above and should therefore likewise be declared admissible.

65. Having regard to its finding in relation to Article 10 of the Convention (see paragraph 62 above), the Court considers that it is not necessary to examine separately the applicant's complaint under Article 14 taken in conjunction with Article 10 (see, among other authorities, *Bingöl*, cited above, § 44).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

67. The applicant claimed 78,586 euros (EUR) in respect of pecuniary damage. He submitted that this amount corresponded to the losses actually sustained as a direct consequence of the alleged violation, and especially the loss of his allowance as a member of parliament on account of his imprisonment from 8 June 2007 to 30 August 2008.

68. The Government contested the claim.

69. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

B. Non-pecuniary damage

70. The applicant claimed EUR 30,000 in respect of non-pecuniary damage.

71. The Government considered the amount claimed to be excessive.

72. The Court considers that the applicant sustained, on account of the violation found, non-pecuniary damage that cannot be compensated by the mere finding of a violation. Ruling on an equitable basis as required by Article 41 of the Convention, it awards the applicant the sum of EUR 20,000 in respect of non-pecuniary damage.

C. Costs and expenses

73. The applicant also claimed EUR 3,000 for the costs and expenses incurred before the Court.

74. The Government contested the claim.

75. In the present case, regard being had to the documents in its possession and its case-law, the Court considers it reasonable to award the applicant the sum of EUR 3,000 for the proceedings before the Court.

D. Default interest

76. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 14 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three thousand euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on these amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 15 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada	Josep Casadevall
Registrar	President