Lèse-majesté

A comparative study of **defamation crimes** against the Head of State in Spain and contemporary Europe.

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Working Paper 01/2026
February 2026

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Executive Summary

Lèse-majesté crimes are rooted in Roman law tradition, in offences designed to safeguard the honour of those who hold the highest office in the State. The aggravated punishment of defamatory conduct against such figures is justified by the need to protect the dignity of the institution they represent and what it symbolises.

These types of provisions have evolved over time and across different political systems. Today, they are present in both monarchies and republics in Europe. Several countries have recently reformed them, particularly those whose criminal laws date back to the 19th and early 20th centuries. In others, including Spain, where the current legislation dates from 1995, the potential reform or abolition of these laws is the subject of public debate, driven by recent domestic and international court rulings, as well as successive legislative proposals.

There are arguments for and against their permanence. Those in favour emphasise the protective function they are entrusted with. Namely, the safeguarding of not a specific individual's honour, but that of the institution they represent, and its value in contemporary democracies. The latter focus on the clash between this type of criminal provision and the fundamental rights to freedom of expression, thought and information, which are also foundations of the democratic order.

In Spain, the courts' interpretation of these offences has prioritised

freedom of expression, considered fundamental to a democratic society as it contributes to the exchange of ideas and opinions. It has been argued that this right should also extend to ideas that shock, disturb or offend. However, it has been established that rights are not unlimited, but come with duties and responsibilities. One such limitation is the rights of others, and in this case the right to honour. Therefore, the criminalisation of offensive expressions that are unnecessary to the essence of the thought being expressed and insults has been deemed lawful. This interpretation applies to criminal defamation against any citizen, as well as to the specific offences of defaming the monarch and other members of the royal family who are specially protected.

The European Court of Human Rights' position on the punishment of defamatory conduct against the head of state can be summarised as follows:

- The right to freedom of expression may be restricted for legitimate purposes —the protection of the reputation or rights of others, the protection of health or morals, national security, territorial integrity or public safety, defence of order and prevention of crime, to prevent the disclosure of confidential information or to ensure the authority and impartiality of the judiciary— provided that such interference is prescribed by law and is 'necessary in a democratic society'. The latter requires that it be 'proportionate to the legitimate aim pursued' and that the reasons given by the courts be 'relevant and sufficient'.
- Regarding political figures, the Court has noted that, while they are also entitled to protection of their reputation, the limits on permissible criticism are broader than for private individuals. Thus, it has

established that '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'. This applies to the head of state in both republican and monarchical systems.

- When assessing the proportionality of restrictions on fundamental rights, it emphasises the importance of the nature and severity of the penalties imposed. It has determined that prison sentences for offences committed in the context of political discourse are only compatible with the right to freedom of expression in exceptional circumstances, such as cases involving the dissemination of hate speech or incitement to violence.

The ECHR has examined two cases involving convictions for defamation against the Crown in Spain: Otegi Mondragón v. Spain, and Stern Taulats and Roura Capellera v. Spain. In both cases, it found that the punishment for such offences was provided for by national law and served legitimate purposes. However, on both occasions, it deemed the prison sentences imposed —one year in the first case, and fifteen months, replaced by a €2,700 fine in the second— to be disproportionate. The ECHR therefore concluded that the Spanish courts had violated the defendants' right to freedom of expression.

This comparative study lays the groundwork for addressing the debate surrounding the amendment of defamation offences against the head of state in Spain. The following points summarise it:

ON THE POTENTIAL ELIMINATION OF THESE CRIMES

The assertion that many European countries have eliminated this

type of legal protection is misleading. It is true that, in recent years, some countries have repealed special laws designed to protect the head of state from attacks on their honour. This is the case in Belgium, the Netherlands, and France. However, these countries have retained specific offences for this purpose in their criminal codes. Norway and the United Kingdom, on the other hand, have abolished all defamation offences, both special and ordinary, making the sanctioning of such behaviour the remit of the civil courts (without distinction applicable to the head of state). Nevertheless, in recent years, in the United Kingdom, citizens protesting against the monarchy have been arrested under public order laws. Therefore, in this case, the change has led to a model with fewer guarantees.

ON THE POSSIBLE MODIFICATION OF APPLICABLE PENALTIES

According to ECHR doctrine, prison sentences for such offences conflict with the right to freedom of expression, thought and information. Except in serious cases such as hate speech or incitement to violence, the Court deems them to be incompatible with fundamental rights. This issue must be addressed in any debate on amending the legislation in question. The proportionality of penalties has been a central consideration in analysing the proportionality of sanctions for this type of behaviour. It is foreseeable that, in future cases brought before the Strasbourg Court, the right to freedom of expression will be deemed violated if prison sentences are imposed.

In Spain, the maximum penalty for defaming the head of state is two years in prison. Ordinary libel/slander —against any citizen— made publicly is also punishable by up to two years in prison. Conversely, serious

libel/slander or insults against other authorities, such as the government, the General Council of the Judiciary, the Constitutional Court, the Supreme Court, the Council of Government, the high court of justice of an autonomous community, the armed forces, the police and security forces, are punishable by a fine, but not imprisonment. No one convicted of insulting the Crown in Spain has been imprisoned for this offence. Nevertheless, the ECHR has highlighted the potential deterrent effect that such penalties can have on public debate.

Spanish regulations are also not an exception in this area. For example, in the Netherlands, violations of the Crown's honour are equivalent to defamation of any public official or institution in terms of penalties, and are punishable by up to 24 months in prison. In Denmark, prison sentences can reach four years, and in Sweden, six. In republican systems such as Italy, defaming the head of state can lead to imprisonment for up to five years, and in Portugal for up to three years. By contrast, Belgium provides for different types of penalties for these offences. Norway, which until 2015 punished such crimes with up to five years' imprisonment, now only provides for financial compensation to be settled through civil proceedings. To assess the outcome of such changes, it will be necessary to observe the practical application of these regulations.

Could abolishing prison sentences for defaming the head of state be a reasonable solution in Spain? The answer to this question is complex. There are three options: (i) abolishing prison sentences for defamation offences against the Crown, as in Belgium; (ii) abolishing these offences and treating such conduct as equivalent to violating the honour of other authorities, as in the Netherlands or France; or (iii) abolishing them and treating them as equivalent to ordinary defamation.

In Spain, the first option would mean retaining prison sentences for ordi-

nary libel/slander, but not for libel/slander against the head of state. The second option would yield the same result. The third option would mean that prison sentences would still be possible in some cases. This would apply unless prison sentences for serious general slander were also abolished. Therefore, a change in this regard would require a broader reform of crimes against honour, rather than merely eliminating imprisonment for the specific crime against the head of state.

ON LEGAL ACTION

In Spain, ordinary insults and slander are private offences, meaning they can only be prosecuted if the injured party files a complaint. Offences relating to the defamation of the Crown, however, can be prosecuted ex officio. Eliminating them would raise questions about how criminal action should be exercised in cases of defamation of the monarch or members of the royal family who are specially protected.

Once again, Spain is no exception, and examples from neighbouring countries can provide insight into this issue. This report outlines several models. For instance, legislation in the Netherlands, which equates punishment for such conduct with defamation of other public officials or institutions, provides for ex officio prosecution and requires the king to request it from the Public Prosecutor's Office. Sweden has a similar system, whereby the Public Prosecutor's Office requires the monarch's permission to initiate proceedings for these offences. In Denmark, where ordinary defamation offences require a complaint from the injured party or public action at the request of the injured party in order to be prosecuted, when they are committed against the king or the prime minister, they are subject to public prosecution, which is carried out by order of the Minister of Justice.

This report concludes that any reform of these criminal offences must be based on an evidence-informed debate. Domestic and international court rulings must be taken into account, and a rigorous and detailed analysis of neighbouring countries' cases must be conducted. Furthermore, any amendment to the provisions on defamation of the Crown must not be made in isolation. To avoid a flawed outcome, consideration must necessarily be given to other related sections of the Criminal Code. Effectively overhauling these provisions requires responsible work that goes far beyond mere symbolic acts.

Abstract

Lèse-majesté crimes are rooted in Roman law tradition. These types of provisions have evolved over time and across different political systems. Today, specific offences relating to the defamation of heads of state exist in both European monarchies and republics. In some countries, these laws have recently been amended. In others, such as Spain, the possibility of reforming them is the subject of public debate. There are arguments for and against their continuation. This report examines Spanish national and international legislation and court rulings, as well as how such conduct is regulated in other European countries. The aim is to provide a factual basis for a debate on possible reform in Spain.<

Keywords

Defamation the Crown, libel and slander, head of State, Spain, Europe.

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