

Translated Memorandum
***Expert Witness Statement on the Law
of Defamation Against the Monarchy
in Foreign Countries***

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4. As requested by the Constitutional Court to prepare a memorandum of opinion, I hereby present my written opinion as follows:

The law of defamation against the monarchy, or the law protecting the head of state in relation to public opinion, commonly referred to as “*Lèse-majesté*,” can be categorised into three groups: 1) Countries that protect the head of state as an ordinary person, such as the United Kingdom, Japan, and Belgium, 2) Countries that protect the head of state as a public official, such as France, and 3) Countries that provide special protection to the head of state, such as Germany and Spain. These categories can be summarised as follows.

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4.1) Countries that protect the head of state as an ordinary person

England and Wales

In countries within this group, there is no distinction between defamation or insult against ordinary citizens and similar actions against the head of state. For example, in England and Wales, despite having a long-standing monarchy and attempts to amend the law to grant special protection to the King (*cas royaux*),¹ measures such as the Magna Carta were implemented to prevent the King from exercising excessive power and becoming a tyrant. Although the English Parliament historically allowed for offences specifically protecting the head of state, it never fully adopted the concept of *lèse-majesté* from Roman law.²

Currently, the laws of England and Wales protect the monarch and ordinary citizens equally from insults and defamation. Under Section 5 of the Public Order Act 1986, insulting behaviour that causes harassment, alarm, or distress³ is a criminal offence, regardless of whether it is directed at an ordinary person or the head of state.⁴ The penalty for this offence is a fine not exceeding £1,000. Additionally, the offence of defamation, which was abolished on 12 January 2010 by Section 73 of the Coroners and Justice Act 2009, treated defamation of the head of state the same as defamation of any individual, without specifying it as a separate offence or imposing higher penalties.

Japan

Another example of a country with a monarchy where there are no special offences for insulting, defaming, or showing malice towards the head of state compared to similar actions against ordinary individuals is Japan. In the Japanese Penal Code, defamation and insult are defined under Articles 230 and 231, respectively. These offences must be committed publicly. For defamation, the offender faces imprisonment, with or without work, for up to three years and a fine of up to ¥500,000. For insult, the punishment is imprisonment for up to 30 days and a fine ranging from ¥1,000 to ¥10,000. Malicious threats are covered under Article 222, where threatening to harm another person's life, body, freedom, reputation, or property is punishable by up to two years of imprisonment or a fine of up to ¥300,000. None of these offences provides any aggravated sentences for actions against the head of state.

Historically, the Japanese Penal Code used to contain provisions that offered greater protection to the head of state compared to ordinary individuals. Notably, Articles 73–76 prescribed the death penalty for acts of violence against the Emperor,

¹ John G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge University Press 1970) 12 <<https://doi.org/10.1017/CBO9780511522369>>.

² *ibid* 11.

³ Similar to Section 392 in conjunction with Section 393 of the Thai Penal Code.

⁴ [Note on dates; omitted in this translation].

his grandmother, the Empress, the Crown Prince, and male descendants in the line of succession.⁵ Insults directed at these individuals, or at the Ise Shrine (a Shinto shrine dedicated to worshipping the imperial ancestors), or desecrating the burial sites of imperial ancestors⁶ were punishable by imprisonment with forced labour for three months to five years.

However, with the promulgation of the current Constitution of Japan, drafted by the United States on 3 November 1946 and effective from 3 May 1947, Article 14 of the said Constitution enshrined the principle of equality and prohibition of discrimination, including discrimination based on family origin. Consequently, the provisions in Articles 73–76 of the Penal Code, which constituted the chapter on crimes against the Imperial House and provided greater protection to the Imperial family than to ordinary citizens, were proposed in the Parliament as conflicting with the new Constitution. It was suggested that Articles 73–76 should be repealed, along with Article 131 (which imposed a harsher penalty of three months to five years' imprisonment for trespassing into the Imperial Palace or other royal residences, compared to a maximum of three years for ordinary house trespassing under Article 130).⁷

The proposal aimed to ensure that the Emperor and members of the Imperial family would not receive special protection different from that afforded to ordinary people, as the Constitution prohibited such special treatment. The Japanese Parliament at the time engaged in extensive debates. Supporters of the Emperor argued that since the Constitution recognised the Emperor as the symbol of the nation, insulting the Emperor was tantamount to insulting Japan itself.⁸ Conversely, opponents contended that special laws protecting the Emperor were no longer necessary, especially because, during the acceptance of the Potsdam Declaration (which marked Japan's surrender in World War II on 15 August 1945), the Emperor had explicitly declared that he was not divine, thus eliminating the need for special protection. Furthermore, they argued that abolishing these laws would prevent future power struggles,⁹ where such statutes could be exploited by factions seeking to consolidate power, as had happened in the past when political dissenters were prosecuted under these laws for allegedly disrespecting the Emperor.¹⁰ The members of Parliament who advocated for the repeal viewed these statutes as turning the Emperor into an absolute idol for a small group of individuals who leveraged his position to amass power, dragging Japan into war.¹¹ Without these laws, it would be significantly harder for the government to act against the will of the people, using the

⁵ Howard Meyers, "Revisions of the Criminal Code of Japan During the Occupation" (1950) 25(1) *Washington Law Review* 104, 108.

⁶ art 74.

⁷ Meyers (n 5) 109.

⁸ *ibid* 110.

⁹ *ibid*.

¹⁰ *ibid* 111.

¹¹ *ibid*.

Emperor as a shield. Given that this viewpoint held the majority in Parliament, despite efforts to delay the consideration of the repeal on 4 October 1946, the matter was eventually deliberated a few days later, leading to a vote in favour of abolishing Articles 73–76, and 131 entirely. Consequently, these Articles, which provided additional protection to the Emperor, have been repealed for over 77 years without any attempts to reinstate them.

Indeed, traces of the conflict and attempts to repeal or limit the application of statutes that provided greater protection to the Emperor than to ordinary people, particularly the offence of *lèse-majesté* under Article 74 of the Japanese Penal Code, were evident even before the promulgation of the new Constitution. On 19 May 1946, a public protest took place against food shortages, demanding that the government distribute food to the populace. During this protest, a factory worker named Matsushima Matsutaro, a communist sympathiser,¹² carried a placard styled as an imperial decree, stating, “I stuff myself. You people, starve to death.”¹³ Matsushima was prosecuted for *lèse-majesté*, but the Tokyo District Court, which ruled on the case on 2 November 1946, one day before the new Constitution was promulgated, held that the acceptance of the Potsdam Declaration, which acknowledged that the Emperor was not a deity, meant that the special status protecting the Emperor as a divine being was no longer valid.¹⁴ Consequently, the offence of *lèse-majesté* could no longer be applied. However, as the Emperor remained an individual like any other, defamation against him was still considered a punishable offence.¹⁵ Although typically, defamation of an ordinary person required the victim to file a complaint before the public prosecutor could initiate proceedings, in the case of defamation against the Emperor, the prosecutor could file the case without such a complaint. In this case, the court viewed the act as defamation of an ordinary person, not the head of state. Still, it allowed the prosecutor to proceed without the Emperor filing a complaint, deeming it an action in the public interest. This ruling was heavily criticised,¹⁶ and ultimately, the issue of who could file a complaint on behalf of the Emperor led to the amendment of Article 232 of the Penal Code, which will be discussed later. In this particular case, the court sentenced Matsutaro to eight months’ imprisonment.

However, on the following day, after the aforementioned case ruling, the new Constitution was promulgated on 3 November 1946 and came into effect on 3 May 1947. Alongside the promulgation of the Constitution, an amnesty law for the offence of *lèse-majesté* was enacted, effectively bringing all such cases to an end and halting further prosecutions in practice.¹⁷ Any ongoing appeals were dismissed by the

¹² Norikazu Kawagishi, “The Birth of Judicial Review in Japan” (2007) 5(2) International Journal of Constitutional Law 308, 326 <<https://doi.org/10.1093/icon/mom011>>.

¹³ *ibid.*

¹⁴ *ibid* 327.

¹⁵ *ibid* 328.

¹⁶ Alfred Christian Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back* (Princeton University Press 1976) 165.

¹⁷ Kawagishi (n 12) 328.

appellate courts, which led to the eventual repeal of the provisions in the Penal Code, as mentioned earlier.

An interesting aspect of Mr. Matsushima's case, which was appealed before being dismissed, is that the appellate court expressed disagreement with the notion that the offence of *lèse-majesté* was fundamentally incompatible with a democratic society. Although the appellate court knew that the case would ultimately be dismissed due to the amnesty law, it proceeded with a full hearing and re-examination of the evidence. The appellate court maintained that the defendant's actions constituted the offence of *lèse-majesté* under Article 74 rather than mere defamation of an ordinary individual. The court explained that Article 74 served two purposes:

a) Ensuring that the Emperor was revered and inviolable in his position as the head of state. Insulting the Emperor was equivalent to insulting the state itself. However, with the acceptance of the Potsdam Declaration and the enforcement of the new Constitution, this status of the Emperor no longer existed. Therefore, this function of Article 74 was no longer justifiable and could not be applied.

b) Protecting the Emperor as an individual, not in his capacity as head of state. This was akin to an aggravated form of defamation against an ordinary person, which was consistent with the new Constitution. The Constitution acknowledged the Emperor as the symbol of the state and the unity of the people and assigned him special diplomatic roles, such as conducting state ceremonies. Therefore, it was justifiable to provide enhanced legal protection.

Due to the second reason, the appellate court found that Article 74 did not conflict with constitutional principles and could still be enforced. However, the court had to dismiss the case solely because of the amnesty law. Nonetheless, Mr. Matsushima was dissatisfied with the outcome and sought a declaration of his innocence. He appealed to the Supreme Court, which, with the majority opinion, deemed it unnecessary to consider the merits of the case due to the amnesty. Consequently, the Supreme Court dismissed the case on procedural grounds without addressing the substantive issues.

As of December 2023, it has been over 77 years since the special provisions granting additional protection to the Emperor and the Imperial family were repealed. Despite these changes, the Emperor of Japan has remained the head of state continuously. This demonstrates that the Japanese Penal Code provides nearly equal protection to both ordinary individuals and the head of state. The only minor difference lies in the offences of defamation and insult. Article 232 of the Penal Code was amended to allow the public prosecutor to initiate proceedings only when the victim files a complaint, with an exception made for the Emperor, Empress, Empress Dowager, or Crown Prince. In such cases, the Prime Minister is authorised to file the complaint on behalf of the victim.¹⁸ The reason for this amendment is rooted in Article 1 of the Constitution, which designates the Emperor as the symbol of the state and the unity of the people. The legislature deemed it inappropriate for the Emperor, as the

¹⁸ If the victim is the head of a foreign state, the representative of that state shall file the complaint.

unifying symbol of the nation, to personally file complaints against citizens. Therefore, the law was amended to allow the Prime Minister to act on behalf of the Emperor in such matters.¹⁹

Belgium

Similar to Thailand, Belgium is governed under a constitutional monarchy, where the King (or Queen) serves as the head of state. Belgium previously had specific laws addressing the offence of insulting the monarch; however, these laws have been temporarily suspended following a Constitutional Court ruling deeming them unconstitutional, as will be explained further. Article 1 of the Law dated 6 April 1847 concerning offences against the King (*la loi du 6 avril 1847 portant répression des offenses envers le Roi*) stipulated that anyone who insulted the King would be subject to imprisonment for six months to three years and a fine ranging from €²⁰300 to €3,000. This offence could be committed through writing, drawing, speaking, or any other means. It is important to note that the offence must specifically target the person of the King, not the institution of the monarchy.²¹ The offence under Article 1 differed from the offence of insulting an ordinary person under Article 448 of the Penal Code in at least three significant ways:

1) Article 448 prescribes a penalty of imprisonment for eight days to two months, whereas insulting the King entails a prison sentence of six months to three years.

2) For insults against an ordinary person, the victim must file a complaint before the public prosecutor can initiate proceedings. However, for insults against the King, the public prosecutor can file the case without the need for a complaint.²²

3) Insulting the King does not require the intention to damage his reputation.

Although Belgium historically had laws against insulting the monarch, these laws were seldom enforced in practice. This limited enforcement was partly because cases under this law were not tried in regular courts but in the *Cour d'Assises*, which involves a public trial process with a jury of 12 people hearing the facts. In most cases, juries tended to find that actions falling under Article 1 did not warrant criminal punishment or should only receive symbolic penalties. Consequently, public prosecutors often chose not to pursue these cases as they were not seen as beneficial

¹⁹ Meyers (n 5) 110.

²⁰ The original law specified the currency as francs. However, due to the provisions of Article 2 of the Law dated 26 June 2000 (*la loi du 26 juin 2000, l'introduction de l'euro dans la législation concernant les matières visées à l'article 78 de la Constitution*), which mandated the change of currency from francs to euros in the criminal law without requiring the calculation of exchange rates, fines are now denominated in euros.

²¹ François Perin, *Cours de Droit Constitutionnel, I: Les Libertés Publiques* (Presses Universitaires de Liège 1958) 79.

²² The Law dated 6 April 1847 concerning offences against the King (*la loi du 6 avril 1847 portant répression des offenses envers le Roi*) s 8.

to the public and were considered an inefficient use of resources.²³ Additionally, because trials in the *Cour d'Assises* were public, prosecuting such cases often resulted in wider dissemination of the insulting remarks than if no legal action had been taken. Moreover, in Belgium, there is a general public sentiment that criticism of the King, as a public figure, should be acceptable and tolerable in a democratic society.²⁴

Given these procedural limitations and public attitudes, in the 176 years that this law was in force, there was only one instance in 2007 where imprisonment was imposed for this offence.²⁵ This case involved a defendant who accused the King of Belgium of complicity in a child abuse and bribery scandal, sending letters to the King and several politicians multiple times. The defendant was sentenced to one year in prison and fined €5,500 for defaming the King under Article 1.²⁶

Subsequently, a Spanish artist named Josep Arenas Beltran, known by his stage name Valtònc, composed and performed songs insulting the King of Spain. Spain also has specific laws against insulting the monarch, as will be elaborated further. A Spanish court convicted Valtònc for insulting the King (Article 490.3 of the Spanish Penal Code), glorifying terrorism (Article 578), and issuing threats (Article 169.2), receiving a combined prison sentence of three years and six months. The Supreme Court of Spain upheld the lower court's decision in 2018, prompting Valtònc to flee to Belgium. Spain then requested his extradition from Belgium. Under the principle of double criminality, extradition requires that the offence in question be a crime in both countries. The Belgian court found that Belgium had no equivalent offences for glorifying terrorism or issuing threats, thus disallowing extradition on those grounds. However, Belgium did have a law against insulting the monarch, but Valtònc's lawyers argued that this offence was unconstitutional. The Belgian court referred the matter to the Belgian Constitutional Court to determine whether the offence of insulting the monarch was constitutional.

On 21 October 2021, the Constitutional Court ruled that the offence of insulting the monarch violated the right to freedom of expression as enshrined in Article 19 of the Constitution.²⁷ Although the law aimed to (1) protect the reputation of the King, (2) uphold the inviolable status of the King, and (3) safeguard the stability of the constitutional monarchy, the court found that preventing the King from personally filing defamation complaints—due to his required neutrality and symbolic role—could be addressed by other special measures. However, the legislature's creation of a specific criminal offence disproportionately infringed on the right to freedom of

²³ Marnix Van Damme, *Overzicht van het Grondwettelijk Recht* (Die Keure 2015) 391.

²⁴ Jan Velaers, *De Beperkingen van de Vrijheid van Meningsuiting II* (Maklu 1991) 453.

²⁵ “La N-VA n’abandonne pas et veut toujours supprimer le crime de lèse-majesté en Belgique” *RTBF* (8 March 2021) <<https://www.rtb.be/article/la-n-va-n-abandonne-pas-et-veut-toujours-supprimer-le-crime-de-lese-majeste-en-belgique-10714282>>.

²⁶ Flip Feyten, “Vebord op Majesteitschennis is in Strijd met Grondwet” *VRT News* (28 October 2021) <<https://www.vrt.be/vrtnws/nl/2021/10/28/verbod-op-majesteitsschennis-is-in-strijd-met-vrije-meningsuiting/>>.

²⁷ Belgium Constitutional Court decision numero du role 7434 Arret no 157/2021 28 October 2021.

expression.²⁸ The court held that freedom of expression was a fundamental right protected by both the Constitution and the European Convention on Human Rights. The law imposed a disproportionate penalty compared to the general offence of insulting an ordinary person, especially given that it allowed for punishment without the intent to damage the King's reputation.²⁹ Consequently, the Belgian Constitutional Court declared the law unconstitutional, invalidating the offence of insulting the monarch.

As a result, the offence of insulting the monarch has been temporarily suspended, and the laws governing the insult of an ordinary person are being applied in the interim. This will continue until the new Penal Code, currently under parliamentary consideration, is finalised and enacted. Studies indicate that the draft will maintain separate provisions for insulting the head of state and insulting ordinary individuals. However, the elements of the offence and the penalties will be identical in both cases.³⁰ The distinction is necessary due to procedural differences, such as the authority to file a complaint, which necessitates separate provisions.

4.2) Countries that Protect the Head of State as a Public Official

France

In France, the Freedom of the Press Law dated 29 July 1881 (*Loi du 29 juillet 1881 sur la liberté de la presse*) originally established specific offences for insulting the head of state under Article 26 and for defaming the head of state and public officials under Article 31.

However, the offence under Article 26, which penalised insults against the head of state with a fine of €45,000 and was specifically designed to protect the President of France, was repealed on 5 August 2013 by Law No. 2013-711, Article 21 (*Loi n°2013-711 du 5 août 2013*). This repeal followed an incident on 28 August 2008, when Hervé Eon held up a sign reading “*Casse toi pou’con*,” which translates to “Get lost, you jerk,” as the motorcade of then-President Nicolas Sarkozy passed by. This phrase was originally uttered by Sarkozy himself on 23 February 2008 after a member of the public refused to shake his hand, leading to widespread use of the phrase by the media and public to protest and criticise Sarkozy.

Mr. Eon was immediately arrested and charged on the same day. The Laval *tribunal de grande instance* court sentenced him on 6 November 2008 to a fine of €30, with the execution of the fine suspended. The court reasoned that if Mr. Eon had not intended to insult Mr. Sarkozy but rather to teach the President a lesson on what was inappropriate, he would have written a full sign saying, “Get lost, you jerk. The

²⁸ *ibid* para B.18.3.

²⁹ *ibid* para B.19–20.

³⁰ “Lese-majesty Will No Longer Lead to Jail Sentence in Belgium” *Belga News Agency* (7 January 2023) <<https://www.belganewsagency.eu/lese-majesty-will-no-longer-lead-to-jail-sentence-in-belgium>>.

President should not say this.” However, since Mr. Eon chose to write only “Get lost, you jerk,” he effectively uttered the phrase himself, which constituted an insult to the President. Mr. Eon could not claim he had no intent to insult. Furthermore, the court noted that while Mr. Sarkozy’s utterance of the same phrase did not result in punishment, Mr. Eon’s actions did. This was not considered a double standard because Article 26 was specifically designed to protect the head of state. As an ordinary citizen, Mr. Eon could not claim to be treated the same as the President.³¹ The appellate court upheld this decision on 24 March 2009.

Mr. Eon subsequently filed a case against France in the European Court of Human Rights (ECtHR), arguing that his punishment for expressing his opinion violated his rights under Article 10 of the European Convention on Human Rights. The ECtHR found that, although Mr. Eon’s words were indeed insulting since they were originally spoken by Mr. Sarkozy, their use against him could not be deemed to damage his honour.³² Furthermore, while the right to freedom of expression may be subject to limitations, public figures in a democratic society must endure more criticism than ordinary people.³³ Any restrictions on such criticism must be strictly necessary.³⁴ Therefore, punishing Mr. Eon simply for repeating Mr. Sarkozy’s words was deemed disproportionate and a violation of Mr. Eon’s right to freedom of expression.³⁵ However, despite ruling in Mr. Eon’s favour, ECtHR denied him damages, stating that merely declaring the state’s actions as a rights violation constituted sufficient justice.³⁶

The ECtHR’s ruling on 14 March 2013 led the French Parliament to repeal the law against insulting the head of state in August of the same year. Consequently, there is no longer a specific offence for insulting the head of state in France. However, such actions may still constitute defamation or offences related to the duties of public officials. For instance, insulting a public official is covered under Article 31 of the Law of 29 July 1881 on the Freedom of the Press (*Loi du 29 juillet 1881 sur la liberté de la presse*), which, although distinct, prescribes the same penalties as defamation against an ordinary person. Similarly, under Article 226-10 of the Penal Code, such offences are punished equivalently to those against public officials, without any special provisions for the head of state that differ from those protecting other officials.

4.3) Countries that Provide Special Protection to the Head of State

Professor H. Ekut, in his 1934 book on criminal law at Thammasat University, discussed the issue of whether offences that “refer to the royal family which have a special nature,” as they were during the absolute monarchy era, should change now

³¹ *Eon v France* App no 2611/10 (ECHR, 14 March 2013) para 9 <<https://hudoc.echr.coe.int/eng?i=001-117742>>.

³² *ibid* para 57.

³³ *ibid* para 59.

³⁴ *ibid*.

³⁵ *ibid* para 62.

³⁶ *ibid* para 68.

that the King was a constitutional monarch.³⁷ He observed that, ideally, in a democratic system, offences against the King or head of state should be treated the same as offences against ordinary citizens. Thus, there should be no special penalties nor special provisions such as preparation, conspiracy to commit an offence, or failure to report a crime, which differs from offences against ordinary individuals.³⁸ However, Professor Ekut acknowledged that this strict interpretation might only apply in certain democratic republics, like France.³⁹ In other constitutional monarchies, such as Italy or Belgium,⁴⁰ special provisions protect the head of state⁴¹ because acts of violence or defamation against the monarch are not just against the individual but also against the state itself.⁴² Nevertheless, he argued that such special protection should be limited and justified within the constitutional principles of democracy. Therefore, special protection for the King, Queen, Crown Prince, and Regent is permissible as it directly relates to the state's functioning. However, extending such protection to other royal family members, such as the King's children, is unwarranted since these individuals do not represent the state. Any harm to them would be a personal matter, not affecting the state, especially since the Constitution guarantees equality and legal equality for all individuals.⁴³ In Professor Ekut's view, Sections 97–98 of the then Penal Code, which provided special protection for the King, Queen, Crown Prince, and Regent, did not violate the Constitution. However, special protection for other individuals, such as the King's children and those of the former King under Articles 99 and 100, was likely unconstitutional.⁴⁴ These latter Sections were eventually repealed.

Upon examination, it is found that some countries still maintain specific offences for insulting the head of state (*lèse-majesté*), such as Germany and Spain. A brief explanation is as follows:

Germany

The German Penal Code (*Strafgesetzbuch*, StGB) stipulates several offences related to insulting, defaming, and expressing malicious intent towards individuals, categorised into three groups based on the level of protection afforded to the Federal President, who is the head of state:

a) Offences providing greater protection to the President than to both ordinary individuals and public officials, such as the offence of defaming the President (Section

³⁷ H. Ekut, *Lectures on Criminal Law*, Thammasat University (Kanchanapim Dee Printing House 1934) 417.

³⁸ *ibid* 418.

³⁹ The offence of insulting the President of France was recently abolished by the Parliament in 2013. For details, see above.

⁴⁰ The offence of insulting the King of Belgium was recently declared unconstitutional by the Constitutional Court in 2021. For details, see above.

⁴¹ Ekut (n 37) 417.

⁴² *ibid* 419.

⁴³ *ibid* 419–22.

⁴⁴ *ibid* 421.

90: *Verunglimpfung des Bundespräsidenten*).

b) Offences provide greater protection to the President than ordinary individuals, equating the protection to that of public officials or officials in certain positions. This includes the offence of coercing the President or officeholders in constitutional bodies (Section 106: *Nötigung des Bundespräsidenten und von Mitgliedern eines Verfassungsorgans*) and the offence of insulting officeholders (Section 188: *Gegen Personen des politischen Lebens gerichtete Beleidigung, üble Nachrede und Verleumdung*).

c) Offences providing equal protection to the President, public officials, and ordinary individuals without additional provisions for the President as the head of state. This includes the general offence of defamation (Section 187: *Verleumdung*).

The differences in protection can be compared in a table as follows:

Actions	Protected Persons	Section	Punishment
Publicly insulting in a meeting or through the dissemination of information.	The President	90	<ul style="list-style-type: none"> • Imprisonment for 3 months to 5 years. • If the insult pertains to personal matters, the court may reduce the sentence. • If the act is done dishonestly or with the intent to destroy the existence of the federation or the Constitution, the sentence increases to imprisonment for 6 months to 5 years. • Prosecution for this offence can only proceed with the consent of the President.⁴⁵
	An official	n/a	n/a
	An ordinary person	n/a	n/a
Using violence or threatening to use violence to compel someone to perform or refrain from performing their	The President	106	<ul style="list-style-type: none"> • Imprisonment for 3 months to 5 years • In cases of aggravating circumstances, the sentence increases to imprisonment for 1 to 10
	Holders of positions in constitutional bodies	106	

⁴⁵ s 90(4).

duties			years.
	An official	n/a	N/A (However, if the public official uses their authority in the position to issue threats, it will be considered an aggravating circumstance under Section 240.)
Using violence or threatening to use violence to compel someone to take or refrain from taking an action	An ordinary person	240	<ul style="list-style-type: none"> • Imprisonment for up to 3 years or a fine • In cases of aggravating circumstances, the sentence increases to imprisonment for 6 months to 5 years.
Insult	The President	188	<ul style="list-style-type: none"> • Imprisonment for up to 3 years or a fine
	An official		
	An ordinary person	185	<ul style="list-style-type: none"> • Imprisonment for up to 1 year or a fine • In cases of aggravating circumstances, the sentence increases to imprisonment for up to 2 years or a fine.
Defamation	The President	187	<ul style="list-style-type: none"> • Imprisonment for up to 2 years or a fine • In cases of aggravating circumstances, the sentence increases to imprisonment for up to 3 years or a fine. • No distinction is made between ordinary individuals and the President.
	An official		
	An ordinary person		

It can be observed that nearly all the offences provide the same level of protection to the President as to ordinary individuals. For some offences, the protection is equivalent to that for public officials, without any special provisions, and the penalties are not significantly different or more severe than those for offences against ordinary individuals. The only exception is the offence under Section 90, which specifically protects the President from defamation, and there is no equivalent offence

for similar actions against ordinary individuals or public officials.⁴⁶ However, the German Penal Code ensures that no individual or organisation can misuse Section 90 for political purposes by stipulating that prosecution for this offence can only proceed with the President's consent.

Spain

The Spanish Penal Code stipulates offences against the monarchy under Title XXI, Chapter 2, encompassing Articles 485–91. The provisions related to insulting, defaming, and expressing malicious intent towards the monarch include:

Article 490(2): Anyone who expresses malicious intent towards the King, Queen, ascendants or descendants of the King or Queen, the Queen Consort, Regent, members of the Regency Council, Crown Prince, or Crown Princess shall be punished with imprisonment for three to six years. If the offender is a minor, the punishment shall be imprisonment for one to three years.

Article 490(3): Anyone who defames or insults the King, Queen, ascendants or descendants of the King or Queen, the Queen Consort, Regent, members of the Regency Council, Crown Prince, or Crown Princess in the performance of their duties shall be punished with imprisonment for six months to two years if the defamation or insult is severe. If it is not severe, the punishment shall be a day fine of six to twelve months.⁴⁷

Article 491(1): Anyone who defames or insults the King, Queen, ascendants or descendants of the King or Queen, the Queen Consort, Regent, members of the Regency Council, Crown Prince, or Crown Princess in matters not related to Article 490 shall be punished with a day fine of four to twenty months.

Article 491(2): Anyone who uses the image of the King, Queen, ascendants or descendants of the King or Queen, the Queen Consort, Regent, members of the Regency Council, Crown Prince, or Crown Princess in a manner that could damage the status of the monarchy shall be punished with a day fine of four to twenty months.

In contrast, for insulting ordinary individuals or even public officials, the Spanish Penal Code applies Article 209. Serious insults result in a day fine of six to fourteen months, while less serious insults result in a day fine of three to seven months. The penalties for insulting the monarchy under Articles 490 and 491 are significantly harsher compared to those for insulting ordinary individuals or public officials.

On 13 September 2007, two men, Jaume Roura Capellera and Enric Stern

⁴⁶ However, there are other offences of a similar nature under different sections, such as actions against national symbols (Section 90a) or symbols of the European Union (Section 90c). This indicates that these offences protect the symbols of the state or organisation, which is why the President, as the head of state, receives special protection under Section 90.

⁴⁷ The calculation of criminal fines in Spain is governed by Article 50 of the Spanish Penal Code, which uses a day fine system. This system allows for a daily fine ranging from €2 to €400, determined at the court's discretion based on the defendant's financial status, including assets, income, debts, dependents, and other obligations.

Taulats, participated in a protest against the King and Queen during their visit to Girona. They set up inverted portraits of the King and Queen, doused them with oil, set them on fire, and cheered as the flames consumed the portraits.⁴⁸ The Central Criminal Court (*El Juzgado Central de lo Penal de la Audiencia Nacional*) convicted both defendants on 9 July 2008 under Article 490(3), sentencing them to 15 months in prison, disqualifying them from running for public office during the prison term, and holding them responsible for half of the criminal proceedings costs. The prison sentence was converted to a fine of €2,700 each, with the stipulation that failure to pay the fine would result in imprisonment.⁴⁹ The court explained that while the defendants had the right to express their political opinions and their disagreement with the monarchy, their actions of turning the portraits upside down, dousing them in oil, and setting them on fire were unnecessary.⁵⁰

The Criminal Chamber of the National Court (*Pleno de la Sala de lo Penal de la Audiencia Nacional*), acting as the appellate court, upheld the verdict on 5 December 2008. The court clarified that Article 490(3) protects the honour of the King in the performance of his constitutional duties. Insults or defamation concerning his personal matters are protected under Article 208, the same as for ordinary citizens. Thus, Article 490(3) does not protect the King's individual legal virtues but rather the collective legal virtues of society (*ne protège pas des biens juridiques individuels mais collectifs*).⁵¹ The court noted that although the defendants had the right to express their dissent against the monarchy, they instead performed actions symbolising the overthrow of the institution by turning the portraits upside down, dousing them in oil, and setting them on fire.⁵²

After paying the fines, the defendants appealed to the Constitutional Court, arguing that their criminal conviction violated their right to freedom of expression. However, the Constitutional Court ruled that their actions fell outside the scope of protected expression, as they incited hatred and violence against the King and the royal family.⁵³

The two defendants subsequently filed a petition with the ECtHR. The ECtHR found that the actions of Mr. Roura Capellera and Mr. Stern Taulats constituted political criticism of the monarchy regarding its status and Spain rather than personal criticism of the King. Their actions took place during a protest against the monarchy, with the slogan "300 years under the Bourbons, 100 years under Spanish occupation." This protest occurred in the town square, with the petitioners at the centre, demanding Catalan independence. Therefore, the ECtHR disagreed with the Spanish Constitutional Court's view that turning the portraits upside down, dousing them with

⁴⁸ *Stern Taulats and Roura Capellera v Spain* App nos 51168/15 and 51186/15) (ECHR, 13 March 2018) para 6 <<https://hudoc.echr.coe.int/eng?i=001-181719>>.

⁴⁹ *ibid* para 9.

⁵⁰ *ibid* para 8.

⁵¹ *ibid* para 10.

⁵² *ibid* para 11.

⁵³ *ibid* para 14.

oil, and setting them on fire exceeded the bounds of free expression and incited hatred and violence. The ECtHR held that the portraits of the King and Queen symbolised Spanish authority as the monarch and head of state, which represents Spain in currency, stamps, and government buildings. Thus, turning the portraits upside down symbolised resistance to Spanish authority, and setting them on fire was a provocative method to draw attention to their demands, falling under the right to freedom of expression.⁵⁴ The act of burning the portraits was not an incitement to hatred against the monarch but a demonstration of dissatisfaction and protest against the status quo.⁵⁵ It was a form of public debate on whether the monarchy should continue.⁵⁶

The ECtHR emphasised that the right to freedom of expression was not limited to favourable, harmless, or neutral opinions but also included those that offend, shock, or disturb. These opinions were essential components of a pluralistic, tolerant, and open-minded society, without which a democratic society could not exist (*mais aussi pour celles qui heurtent, choquent ou inquiètent: ainsi le veulent le pluralisme, la tolérance et l'esprit d'ouverture sans lesquels il n'est pas de «société démocratique»*).⁵⁷ The ECtHR ruled that Spain's criminal punishment of the two petitioners violated their right to freedom of expression.⁵⁸ Consequently, the court ordered Spain to reimburse the €2,700 fine paid by each petitioner.⁵⁹

However, despite the ECtHR issuing this judgment on 13 March 2018, Spain did not respond in the same manner as France, which amended and repealed the specific offence of insulting the President as previously explained. Spain continues to enforce Articles 490 and 491 of the Penal Code. Even with the significant amendments to the Penal Code on 28 April 2023, addressing several Articles, particularly those related to political conflicts, Articles 490 and 491 remained unchanged and are still in effect.

5. From the explanations provided, it is evident that different countries have varied approaches to criminalising offences related to insulting, defaming, and expressing malicious intent towards the head of state. However, a common element across these nations is the effort to balance protecting the head of state, who serves as the national symbol, with the democratic right of citizens to express their opinions. Each country may find its appropriate balance that aligns with its history and social conditions (margin of appreciation) as long as the state remains genuine in protecting the fundamental right to freedom of expression.

In the context of Thailand, which is a constitutional monarchy with the King as the head of state, the Constitution recognises the King's inviolable and revered

⁵⁴ *ibid* para 38.

⁵⁵ *ibid* para 39.

⁵⁶ *ibid*.

⁵⁷ *ibid*.

⁵⁸ *ibid* para 42.

⁵⁹ *ibid* para 47.

status,⁶⁰ similar to Article 88 of the Belgian Constitution. Additionally, the Thai King is described as “the revered and respected symbol of unity and integrity of the Thai people,”⁶¹ aligning with Article 1 of the Japanese Constitution. This demonstrates that the status of the Thai King is legally and factually respected and acknowledged by the people, similar to the monarchs in the other countries mentioned.

Legally, in addition to the Constitution recognising the inviolable status of the King, the Constitutional Court has also established that the repeal of Article 6 of the Constitution, which affirms this status, is impermissible.⁶² Furthermore, any actions aimed at undermining, devaluing, or weakening this status are prohibited as they indicate an intention to overthrow the monarchy.⁶³

However, the Constitutional Court’s ruling does not preclude amending Section 112 of the Penal Code to align with the context of Thai society, which operates under a constitutional monarchy. It has been shown that many countries with similar governance structures do not have specific provisions for protecting the monarchy, or if they do, they incorporate various safeguards to balance state security with citizens’ freedoms. For instance, in Germany, the head of state must consent before any prosecution can proceed. In Spain, special protection for the head of state applies only when performing constitutional duties, while other criticisms are treated as they would be for any individual. Historical evidence shows that monarchies in countries like the United Kingdom, Japan, and Spain have maintained the respect and loyalty of their people. This indicates that it is possible to protect the monarchy while also ensuring that citizens’ rights to free expression are upheld.

6. I believe that given the inviolable status of the Thai King, the proposal to repeal Section 112 of the Penal Code, while not unconstitutional, may still be inappropriate for the current context of Thai society. Although the Penal Code can protect the King as a public official or an ordinary person, repealing this Section may not suit the deep-seated relationship Thai society has had with the monarchy, particularly over the past several decades. Such a repeal could lead to severe social conflicts and divisions among the populace.

7. However, I believe that proposing amendments to Section 112 of the Penal Code in certain areas is permissible and aligns with the context of Thai society. Such amendments could ensure that the enforcement of this provision is consistent with human rights principles, as recognised in the Constitution and international treaties to which Thailand is a party. The following points could be considered for amendments:

7.1) Penalties: The first issue that can be addressed is amending the penalties to be proportionate to the offence. This includes abolishing mandatory minimum

⁶⁰ Constitution, s 6.

⁶¹ Constitutional Court Decision 19/2564, 29 November 2021, 46.

⁶² *ibid* 46–47.

⁶³ *ibid* 48.

sentences that limit the court's discretion to impose appropriate punishments based on the severity of the offence and ensuring that the maximum penalties are not disproportionate to the offence's gravity. Grossly disproportionate sentences may violate citizens' rights not to be subjected to torture or cruel, inhuman, or degrading punishment, as guaranteed by Section 28(4) of the Constitution, Article 7 of the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which Thailand has implemented through the Prevention and Suppression of Torture and Enforced Disappearance Act, B.E. 2565 (2022).⁶⁴

7.2) Protected Persons: Currently, Section 112 equally protects four individuals: the King, the Queen, the Heir Apparent, and the Regent. While it can be argued that actions against these individuals all impact national security, the extent of the impact varies. Therefore, different penalties could be considered. Moreover, there is significant debate over court interpretations that extend protection to former Kings and Queens and include other royal family members not specified as the Heir Apparent. If the legislature intends such coverage, it should explicitly state so. Otherwise, courts must interpret the law strictly, especially since Sections 99 and 100 of the previous Penal Code have been repealed, and the current Penal Code does not include provisions extending protection to other royal family members. Courts must also be mindful that Section 112 offers special protection beyond general laws, necessitating a balance between state security and citizens' rights, as previously discussed.

7.3) Nature of the Actions: Currently, the acts of insulting, defaming, and expressing malicious intent have varying impacts on national security. Particularly, expressing malicious intent is merely a threat that has not yet caused fear or imminent danger. Therefore, different penalties could be set to reflect the varying impacts of these three types of conduct. Additionally, clear definitions for these terms are necessary, as current interpretations are inconsistent with their use in other Sections of the Penal Code. The following principles could guide the interpretations:

7.3.1) Insulting: This refers to actions that demean, belittle, or disparage, which can be verbal (such as slurs or curses), non-verbal (such as raising the middle finger, spitting, or showing the heel), or written.

7.3.2) Defamation: This involves making false statements about the victim to a third party. It includes asserting facts verbally, in writing, or through any other means to a third party in a way that is likely to harm the reputation and subject the person to contempt or hatred. These statements do not need to be obscene.

7.3.3) Expressing Malicious Intent: This refers to showing an intent to harm the victim in the future, including threats to life, physical harm, loss of

⁶⁴ Sarah J. Summers, *Sentencing and Human Rights: The Limits on Punishment* (Oxford University Press 2022) 94, and see a case involving Thailand: *Willcox and Hurford v the United Kingdom* App nos 43759/10 and 43771/12 (ECHR, 8 January 2013).

liberty, damage to reputation, loss of property, or any other rights.

7.4) Exemptions from Liability: It would be appropriate to introduce exemptions for defamation committed in good faith, such as fair criticism, which is customary for the public to engage in, similar to Section 329(3) of the Penal Code. This approach aims to balance national security with human rights, allowing the public to exercise their right to freedom of expression, as seen in Spanish law. This ensures that the monarchy can continue to coexist with Thai society. However, no exemptions should be allowed for insulting or expressing malicious intent. Nevertheless, courts should interpret these provisions strictly in accordance with criminal law principles (*lex stricta*).

8. In conclusion, I believe that the protection of the head of state by criminal law can be achieved in various ways. The three approaches proposed in this memorandum do not affect the status of the King, who is revered and inviolable. All three approaches continue to protect the dignity of the King from actions intentionally aimed at undermining, devaluing, or weakening the monarchy. This is evidenced by the fact that the monarchies in the mentioned countries still enjoy the respect and reverence of their citizens. However, in the context of contemporary Thai society, amending Section 112 of the Penal Code to align with human rights principles without repealing the Section would best reflect the values of Thai society.

[Affirmation of accuracy and truth; note on submission; signature]

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* **Indexing Thai names.** "Although family names are used in Thailand, Thais are normally known by their given names, which come first, as in English names. The name is often alphabetised under the first name, but practice varies." *The Chicago Manual of Style* (17th edn, University of Chicago Press 2017) §16.85.