***Case Title: Case of J.M.A (Valtònyc)***

**Case Analysis**

***Meta-Data*:**

* **Case Number**: 157/2021
* **Date of decision**: October 28, 2021
* **Featured case**: N/A
* **Region**: Europe and Central Asia
* **Country**: Belgium
* **Type of expression**: Audio / Visual Broadcasting
* **Judicial Body**: Constitutional Court
* **Type of law**: Criminal Law, Constitutional Law
* **Main Themes**: Artistic Expression, Defamation / Reputation, Hate Speech, Political Expression
* **Outcome**: Expands Expression (the crime of slander against the Crown is considered unconstitutional)
* **Status**: Closed
* **Tags**: Rap, Slander, Crown, Terrorism

***Analysis:***

* **Summary and Outcome**: In the case of J.M.A., the Constitutional Court declared that the special crime of insulting the King violated the fundamental right to freedom of expression, as guaranteed by Article 19 of the Belgian Constitution, read in conjunction with Article 10 European Convention on Human Rights (ECHR). The Belgian Constitutional Court was asked to interpret the constitutionality of this crime in a prejudicial question asked by the Ghent Chamber of Indictment. The case pending before the ordinary court was an extradition request of J.M.A., a rapper better known as Valtònyc, by the Spanish authorities. According to the European Arrest Warrant Framework, the execution of the arrest warrant depends on the principle of dual criminality: This meant that Valtònyc could only be extradited if his actions were also considered illegal on Belgian territory. This was not the case, since the Constitutional Court, referencing ECtHR jurisprudence, concluded that providing a special regime of protection for insults directed against heads of states was an unconstitutional interference with the right to freedom of expression.
* **Facts**: On February 21, 2017 J.A.B., a Spanish rapper better known under his pseudonym Valtònyc, was convicted by the Spanish National High Court (Audiencia Nacional) for publishing several rap songs on his YouTube channel and personal webpage. In his songs, he joked about previous terrorist attacks by ETA and GRAPO (two Spanish terrorist groups). He also made several insults towards the King and the royal family in general, [calling them](https://www.washingtonpost.com/world/europe/to-prison-for-singing-spanish-rappers-to-serve-time-for-their-lyrics/2018/03/17/d8e4b88c-18cd-11e8-930c-45838ad0d77a_story.html) “corrupt” or a “mafia gang”, and including [lyric](https://english.elpais.com/elpais/2018/02/21/inenglish/1519204313_494974.html)s such as: “the king has a date in the people’s square, a noose around his neck that will feel like the weight of the law.” For writing and publishing these songs, the Spanish Audiencia Nacional condemned J.A.B. for threats ([Article 169 Spanish Penal Code](https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444#a169): hereafter, SPC), glorifying terrorism and humiliating its victims ([Articles 578 and 579 SPC](https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444#a578)) and slander against the Crown ([Article 490.3 SPC](https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444#a490)) to a total of three and a half years of imprisonment (see: GFoE, [Case of Jose Miguel Arenas (Valtonyc)](https://globalfreedomofexpression.columbia.edu/cases/case-jose-miguel-arenas-valtonyc/)). Valtònyc was supposed to surrender himself to the authorities to undergo his prison sentence, but instead he [fled to Belgium](https://english.elpais.com/elpais/2018/05/24/inenglish/1527149930_882802.html#?rel=mas) in May 2018. In their attempt to have him extradited, the Spanish authorities came across different legal hurdles. The Ghent Council Chamber refused the Public Prosecutor’s request to extradite Valtònyc since this would violate [Article 5.1 of the “Law of December 19, 2003](https://etaamb.openjustice.be/nl/wet-van-19-december-2003_n2003009950) regarding the European Arrest Warrant (EAW)”, which states that Belgium will not extradite if the offense covered by the EAW is not punishable under Belgian law, in other words: when the criterion of dual criminality is not met. The public prosecutor appealed the Council Chamber’s decision in front of the Ghent Chamber of Indictment. Here, the Chamber concluded again that it could not extradite Valtonyc for the crime of glorifying terrorism and humiliating its victims since this crime does not exist in the Belgian legal order (Belg., [Cass. P.21.1692.N,](https://justice.belgium.be/sites/default/files/P.21.1692.N-18012022-EAB.pdf) para. 23). The crime of Slander against the Crown, however, does exist under the “[Law of April 6, 1847 regarding the criminalization of insulting the Kin](https://www.ejustice.just.fgov.be/eli/wet/1847/04/06/1847040650/justel)g”. Article 1 of this Law declares that:

“Whoever, whether in public places or meetings, by utterances, cries or threats, or by any writings, publications, illustrations or signs, which are displayed, distributed or sold, before the eyes of the public, is guilty of insulting the person of the King, [and] shall be punished by imprisonment from six months to three years and by a fine from 300 to 3,000 [euros]."

In front of the Chamber, J.A.B. claimed that the Belgian version of the crime of insulting the King violates his right to freedom of expression, as safeguarded by Article 19 of the Belgian Constitution read *junto* with Article 10 of the European Convention of Human Rights (ECHR) (Belgium, [BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), p. 3). When a party casts serious doubts about the constitutionality of a law, it falls upon the ordinary courts to send a preliminary question to the Belgian Constitutional Court, who is in charge of deciding whether the law in question violates the constitution or not. In casu, the Ghent Chamber of Indictment send the Belgian Constitutional Court the following prejudicial question (Belg., [CC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), p. 2): "Does Article 1 of the [Law of April 6, 1847 regarding the criminalization of insulting the Kin](https://www.ejustice.just.fgov.be/eli/wet/1847/04/06/1847040650/justel)g, which penalizes, among other things, publicly expressed insults to 'the person of the King', violate article 19 of the Constitution read in conjunction with article 10 ECHR ?". It now falls upon the Constitutional Court to answer this question.

* **Decision Overview**: The Court starts by declaring that Article 19 of the Belgian Constitution and Article 10 European Convenvtion of Human Rights (ECHR) share the same scope, because they both protect citizen’s right to freedom of expression: Even more so, the Constitutionial Court considers them “inseperable”. (Belgium, [BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), para. B.11.2.). Thus, when it falls upon the Constitutionial Court to check the constitutioniality of the crime of insulting the King, their analysis includes the European Court of Human Rights’ (ECtHR) jurisprudence on Article 10 ECHR (the right to freedom of expression). The Constitutional Court thus proceeds to repeat the basic established principles of the ECtHR’s jurisprudence (Id., para. B.11.-12.): freedom of expression is one of the pillars of democratic society and the principles of pluralism and tolerance apply “not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb” (ECtHR, [Handyside v. U.K](https://globalfreedomofexpression.columbia.edu/cases/handyside-v-uk/)., App. No. 5493/72 (Dec. 7, 1976), para. 49; ECtHR, [Lehideux en Isorni v. France](https://globalfreedomofexpression.columbia.edu/cases/lehideux-and-isorni-v-france/), App. No. 4662/94 (Sept. 23, 1999), para. 55; ECtHR, [Öztürk v. Turkey](https://globalfreedomofexpression.columbia.edu/cases/ozturk-v-turkey/), App. No. 22479/93 (Sept. 28, 1999), para. 64; ECtHR, [Mouvement raëlien suisse v. Switzerland](https://globalfreedomofexpression.columbia.edu/cases/mouvement-raelien-suisse-v-switzerland/), App. No. 16354/06 (July 13, 2012), para. 48). The exercise of the right to freedom of expression, however, can be subjected to certain “duties and responsibilities” (ECtHR, [Gündüz v. Turkey](https://globalfreedomofexpression.columbia.edu/cases/gunduz-v-turkey/), App. No. 35071/97 (June 14, 2004), para. 37), such as “respect of the reputation and rights of others” (ECtHR, [De Haes en Gijsels v. Belgium](https://hudoc.echr.coe.int/spa#%7B%22itemid%22:%5B%22001-58015%22%5D%7D), App. No. 19983/92 (Feb. 24, 1997), para. 37; ECtHR, [Fressoz en Roire v. France](https://globalfreedomofexpression.columbia.edu/cases/fressoz-roire-v-france/), App. No. 29183/95 (Jan. 21, 1999), para. 45). Accordingly, Article 10(2) ECHR allows for certain limitations to the exercise of the right to freedom of expression. Nevertheless, the ECtHR holds that these limitations must be interpreted strictly (ECtHR, [Pentikäinen v. Finland](https://globalfreedomofexpression.columbia.edu/cases/pentikainen-v-finland/), App. No. 11882/10 (Oct. 20, 2015), para. 87). Following these principles, the Constitutional Court declares that “by criminalizing publicly expressed insults to the person of the King, Article 1 of the law of April 6, 1847 constitutes an interference with the right to freedom of expression.” (Belgium, [BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), para. B.13.1.). The Constitutional Court must thus check if this limitation is permitted under the ECtHR’s regime of Article 10(2) ECHR. Under this regime, a limitation to freedom of expression is allowed if it survives a three-tier test: legality: “the interference must be provided for by law”, legitimacy: “it must pursue one or more of the objectives listed in [Article 10, paragraph 2 ECHR]”, and proportionality: “it must be necessary in a democratic society, which presupposes that it meets a compelling social need and is proportionate to the objectives pursued” (Ibid., para. B.13.2.). The Constitutional Court then proceeds to apply this test to the case at hand.
* The Constitutional Court establishes that the interference is “determined by a sufficiently accessible and precise law” (Id., para. B.14). The interference also pursues one of the listed objectives in Article 10.2 ECHR, namely “the protection of the reputation or rights of others''. Another legitimate goal of the interference can be deducted from the parliamentary documents, because the 1847 legislator also wanted to guarantee the “inviolability of the King and the stability of the constitutional system”(Id., para. B.15.2.). Taking the historical context into account, the Constitutional Court considers that these objectives also fit within the Article 10(2) Framework, more precisely the “interests of national security” and the “prevention of disorder or crime” (Ibid.). The Court, however, admits that “this historical context is fundamentally different from the current context” and should thus investigate if the interference is *still* “necessary in a democratic society” (Ibid.)
* According to the ECtHR, “contracting States have a certain margin of appreciation in assessing whether such a need exists”, there is, however, “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” (Belgium, [BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), para. B.16.1.; ECtHR, [Otegi Mondragon v. Spain](https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%222034/07%22%5D,%22documentcollectionid2%22:%5B%22CHAMBER%22%5D,%22itemid%22:%5B%22001-103951%22%5D%7D), App. No. 2034/07 (Mar. 15, 2011), para. 49-50; ECtHR, [Stern Taulats and Roura Capellera v. Spain](https://globalfreedomofexpression.columbia.edu/cases/stern-taulats-roura-capellera-v-spain/), App. No. 51168/15 (Mar. 13, 2018), para. 31-32). The Constitutional Court then includes “critical expressions about public institutions or personalities, such as the King” as part of the “political debate or matters of public interest”, even when “they are shocking, disturbing or offensive” as long as they do not “incite to violence or constitute hate speech” (Belgium, [BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), para. B.16.2). The Court then repeats the ECtHR definition of hate speech: “all forms of expression that [promote, incite or justify] racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance" (Ibid.; ECtHR, [Stern Taulats and Roura Capellera v. Spain](https://globalfreedomofexpression.columbia.edu/cases/stern-taulats-roura-capellera-v-spain/), para. 41). The Constitutional Court continues that “the imposition of a prison sentence for an offence in the area of political speech will be compatible with freedom of expression [...] only in exceptional circumstances, [...] as, for example, in the case of hate speech or incitement to violence” (Belgium, [BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), para. B.16.2.; ECtHR, [Otegi Mondragon v. Spain](https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%222034/07%22%5D,%22documentcollectionid2%22:%5B%22CHAMBER%22%5D,%22itemid%22:%5B%22001-103951%22%5D%7D), para. 59). The Constitutional Court then turns to the ECtHR jurisprudence on specific criminal provisions regarding insulting a head of state, which have 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” ([BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), para. B.18.1; ECtHR, [Otegi Mondragon v. Spain](https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%222034/07%22%5D,%22documentcollectionid2%22:%5B%22CHAMBER%22%5D,%22itemid%22:%5B%22001-103951%22%5D%7D), para. 55). Thus, a head of state is entitled to “the protection of his reputation, just like other persons”. However, it is in principle not justified “to provide for that head of state protection beyond that provided for other persons” (Ibid.). This applies to both heads of states of republics (ECtHR, [Pakdemirli v. Turkey](http://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2235839/97%22%5D%7D), App. No. 35839/97 (Febr. 22, 2005), para. 52) as well as monarchies (ECtHR [Otegi Mondragon v. Spain](https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%222034/07%22%5D,%22documentcollectionid2%22:%5B%22CHAMBER%22%5D,%22itemid%22:%5B%22001-103951%22%5D%7D), para. 55-56; ECtHR, [Stern Taulats and Roura Capellera v. Spain](https://globalfreedomofexpression.columbia.edu/cases/stern-taulats-roura-capellera-v-spain/), para. 35). The Belgian Constitutional Court, again citing [Otegi Mondragon v. Spain](https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%222034/07%22%5D,%22documentcollectionid2%22:%5B%22CHAMBER%22%5D,%22itemid%22:%5B%22001-103951%22%5D%7D), para. 56, thus concludes that although the “inviolability of the King” and his “symbolic function as Head of State” may justify different penal procedural rules, they “do not justify giving the King a broader protection than ordinary citizens” ([BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), para. B.18.3.). The Constitutional Court then checks whether Article 1 of the [Law of April 6, 1847](https://www.ejustice.just.fgov.be/eli/wet/1847/04/06/1847040650/justel) creates such a special regime of protection. The Court notes that both the maximum prison sentences and fines are heavier for insulting the King as opposed to the regular system of slander and defamation ([Articles 275, 276, 277, 444, 445, 448 and 449 of the Belgian Penal Code](https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1867060801&table_name=wet)). Furthermore, the King receives increased protection since the crime of insulting the King has a different *mens rea*: a *dolus generalis* suffices as opposed to the *dolus specialis* required for slander and defamation ([BCC 157/2021](https://www.const-court.be/public/n/2021/2021-157n.pdf), para. B.19). The Constitutional Court thus concludes that this special crime of insulting the King violates the right to freedom of expression, as guaranteed by Article 19 of the Constitution, read in conjunction with Article 10 ECHR.

Dissenting Opinions of Judges …: N/A

***Direction:***

* **Outcome**: Expands Expression
* The Constitutional Court’s rulings on the constitutionality of prejudicial questions set a binding precedent for future cases. Thus, for future reference, it will be impossible for Belgian courts to condemn possible perpetrators for insulting the King under Article 1 of the [Law of April 6, 1847](https://www.ejustice.just.fgov.be/eli/wet/1847/04/06/1847040650/justel). The unconstitutionality of this crime meant that the dual incrimination requirement of the European Arrest Warrant was no longer met. Accordingly, the ordinary courts [refused to extradite](https://english.elpais.com/elpais/2018/09/17/inenglish/1537177941_473971.html) the Spanish rapper, who remained in exile on Belgian territories until his Spanish prison sentence expired.

***Perspective***:

* **Related International and/or regional laws**:
* [ECHR, art. 10](https://www.echr.coe.int/Documents/Convention_ENG.pdf)
* **National law or jurisprudence**:
* [Belg. Constitution, Article 19](https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf)
* [Law of April 6, 1847 regarding the criminalization of insulting the Kin](https://www.ejustice.just.fgov.be/eli/wet/1847/04/06/1847040650/justel)g
* [Law of December 19, 2003](https://etaamb.openjustice.be/nl/wet-van-19-december-2003_n2003009950) regarding the European Arrest Warrant (EAW)
* [Articles 275, 276, 277, 444, 445, 448 and 449 of the Belgian Penal Code](https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1867060801&table_name=wet)

**Other national law or jurisprudence**:

* [Spain, STS 78/2018](https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2018/02/Valtronyc-ruling-Supreme-Court.pdf)
* [Spanish Penal Code](https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444#a169)

***Significance***:

* **Binding or persuasive precedent within jurisdiction**; **Decision establishes influential or persuasive precedent outside jurisdiction**; **Explanation**:

This ruling, BCC 157/2021, has influenced the execution of the Spanish Supreme Court’s confirmed conviction of Jose Miguel Arenas (Valtònyc) in SSC 79/2018. You can find more information on the Spanish Court’s decision [here](https://globalfreedomofexpression.columbia.edu/cases/case-jose-miguel-arenas-valtonyc/).

**Original:** NOTE: Valtonyc was expected to surrender himself to the authorities voluntarily in May 2018 but he fled to Belgium. Spain has attempted to have him extradited from Belgium but on September 17, 2018 the Belgian Tribunal of Gand (Ghent) rejected the extradition request finding that Valtonyc’s lyrics could not be considered as incitement to terrorism under Belgian law. The Public Prosecutor of Gand (Ghent) appealed this sentence, arguing that extradition should be granted. This appeal is still pending.

**New:** NOTE: Valtonyc was expected to surrender himself to the authorities voluntarily in May 2018 but he fled to Belgium. Spain attempted to have him extradited from Belgium, but the Belgian authorities refused to extradite the rapper since the dual incrimination requirement was not met. The Valtònyc case led the Constitutional Court to question the constitutionality of the Belgian version of the crime of slander against the crown. The Belgian Constitutional Court concluded that it is no longer justified to give the King a broader regime of protection against slander and defamation as opposed to ordinary citizens, and thus declared the crime unconstitutional. Consequently, Valtònyc remained in Belgium until the statute of limitations on the execution of his sentence was reached. In October 2023, he [returned to Spain](https://www.spainenglish.com/2023/10/30/mallorcan-rapper-returns-spain-belgium-after-years-avoiding-extradition/). You can read our analysis on the Belgian judgment here. *[hyperlink to this case’s webpage].*

* **Related Cases**: Self-generated
* **Date updated**: N/A

***Docs***:

* **Official Case Documents**:

**Examples:**

Judgment (in Dutch) [[Attached]](https://www.const-court.be/public/n/2021/2021-157n.pdf)

Judgment (in French) [[Attached]](https://www.const-court.be/public/f/2021/2021-157f.pdf)

Press Release issued by the Belgian Constitutional Court (in Dutch) [[Attached]](https://www.const-court.be/public/n/2021/2021-157n-info.pdf)

Press Release issued by the Belgian Constitutional Court (in French) [[Attached]](https://www.const-court.be/public/f/2021/2021-157f-info.pdf)

* **Reports, Analysis, and News Articles**:
	+ M. KITSON, Spanish rapper flees country to avoid prison for lyrics praising terrorism, El Pais, May 24, 2018, [link](https://english.elpais.com/elpais/2018/05/24/inenglish/1527149930_882802.html#?rel=mas).
	+ S. URRQ, Belgian court refuses to extradite Spanish rapper Valtònyc, El Pais, Sept. 17, 2018, [link](https://english.elpais.com/elpais/2018/09/17/inenglish/1537177941_473971.html).