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# Blocking Access to the Recent Past: Threats to Academic Freedom in Post-dictatorial Spain[1]

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## Abstract

*To understand threats to academic freedom in the United States today, it is useful to consider the experience of other countries. This article looks at Spain, where—despite explicit constitutional protection—scholars have faced different forms of censorship. While most of the threats it faces in Spain can be traced back to the country's democratic transition, academic freedom has also been undermined by the erosion of job security, the steady privatization of higher education, and university administrations concerned with their institutions' public image.*

To understand the state of—and threats to—academic freedom in the United States today, it is useful to consider the experience of other countries. This article looks at Spain, where, despite explicit constitutional protection of academic freedom, scholars who work on twentieth-century Spanish history and culture have faced difficult challenges, including forms of censorship imposed by universities and the courts.

In June 2019, for example, the University of Alicante responded to a citizen complaint by censoring an academic article posted to its open-access institutional repository. The author of the article, Juan Antonio Ríos Carratalá, is a professor of Spanish literature at the university; his essay was on the Communist poet Miguel Hernández (1910–42), who supported

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the progressive Republic in the Spanish Civil War, was tried during the right-wing military dictatorship that followed it, and died in prison. In his text—a preprint of a peer-reviewed essay published in 2015—Ríos Carratalá describes the 1940 court-martial in which Hernández was convicted and mentions that Antonio Luis Baena Tocón, an army officer, served as judicial secretary for the trial. Almost eighty years later, Baena Tocón's son demanded that the university remove the mention of his father from Ríos Carratalá's text. He based his demand on Spain's privacy law, which includes a "right to be forgotten."

To the indignation of many Spanish academics, the university promptly complied and redacted the article in question, replacing Baena Tocón's full name with his initials and removing the name from its search engine index. When, faced with protests, the university reversed course a month later, the complainant took it to court. In September 2021, a judge sided with the university and Ríos Carratalá, ruling that academic freedom should prevail over privacy concerns when the information in question is relevant to the public—which the court concluded was the case in this instance (*elDiario* 2021).

It was not the first time in the history of Spain's young democracy that citizens have resorted to the courts to block public knowledge of their relatives' involvement in right-wing repression during the three-year civil war (1936–39) and the Franco dictatorship (1939–75). In a well-known case from 1981, less than six years after the dictator's death—and less than three after the adoption of a new constitution—a lawsuit was brought against *Rocío,* a documentary produced the previous year by Fernando Ruiz Vergara about right-wing repression in a small town in Andalucía. As Richard Ryan writes, the film was "in effect the first documentary on the Francoist repression that actually named those responsible for extrajudicial killing." The suit was brought by the families of the individuals identified as vigilantes. The judge ruled that the film was defamatory and imposed a heavy fine on the filmmaker (Ryan 2013; Espinosa Maestre 2009).

In the case of *Rocío*, the plaintiffs did not invoke the right to privacy but the right to honor, which is protected in Spain's criminal code and is often understood to extend to the dead as well. Since then, Spain has seen

more cases of this type, thirteen of which are described in Francisco Espinosa Maestre's seminal study *Callar al mensajero* (2009, 2013). As Rafael Escudero (2013, xviii) writes, the judges in question "have not hesitated to interpret [the] supposed 'right to honor' in a nearly categorical fashion, placing it above other fundamental rights such as freedom of expression and freedom of information." Although in 2004 Spain's Constitutional Court affirmed the academic freedom of historians, including those working on the twentieth century, historical research continues to be curbed by the courts.

All of this may seem surprising: Spain has been a democracy for more than forty years and has a strong legal basis for the protection of academic freedom. Unlike the United States, Spanish academics' rights as teachers and researchers are explicitly incorporated in the Constitution. Article 20 protects *libertad de cátedra* (interpreted as applying primarily to classroom teaching at the high school and college level) and the right to "literary, artistic, scholarly, and technical creation," while Article 44 guarantees that the state will promote "scholarly and technical research to the benefit of the general interest."

In practice, Spanish courts have left a relatively narrow margin for the exercise of academic freedom in the classroom, Joaquín Urías, a professor of constitutional law at the University of Sevilla, told me. "*Libertad de cátedra* is an oft-invoked but unclearly defined right. The few legal cases that have been brought to the courts have almost always involved religious schools, particularly at the secondary level." Here, the Spanish courts have walked a fine line. "A biology teacher at a religious high school, for example, cannot be forced by the school administration to teach that God created man. But she is also not allowed to use the theory of evolution to attack Catholicism directly." Something similar occurs when it comes to college-level course content: "The courts have decided that *libertad de cátedra* does not include a professor's right not to teach the curriculum set by the Ministry of Education and the university administration. The professor may decide how she teaches the material but must accept the exams as they are designed by the authorities."

Unlike course content, scholarly research is judicially protected from interference by university administrations and the government. Still,

researchers working on twentieth-century Spanish history have seen their academic freedom curbed in at least five different ways. Most can be traced back the country's democratic transition: a negotiated agreement between the Franco regime and the opposition that all but ignored questions of transitional justice and allowed for a high degree of institutional continuity between the dictatorship and the country's new democracy (Faber 2021a).

The first way academic freedom has been restricted is through a blanket Amnesty Law covering all crimes of a political nature committed since the beginning of the Civil War. Although the Spanish parliament passed the law in 1977, before the Constitution was ratified, it's still considered the law of the land. Widely celebrated at the time, the amnesty not only achieved the release of the dictatorship's political prisoners—a demand of the opposition—but also covered all representatives of the regime. In recent years, the 1977 Amnesty Law has been interpreted by the Spanish courts as a full-stop law, barring not only judicial convictions but also any type of criminal investigation into the regime's repressive methods and those responsible for them. In 2007, when the Spanish parliament passed a "memory law" meant to achieve some measure of support and justice for victims of Francoism, it notably left the amnesty in place. A possible new memory law, which is still being debated in parliament as of this writing, may include some improvements but will likely stop short of annulling the amnesty, despite pressure from the United Nations (Faber 2021a, 32). Second, while the Franco regime imposed a sharp juridical break with the legal framework of the Second Republic (1931–36), declaring all Republican laws null and void—and in fact treating support of the Republic and opposition to the 1936 military coup as a form of treason—post-Franco democracy was built on a juridical *continuity* with Francoism. The judiciary, meanwhile, was not purged; judges who had sworn fealty to Franco continued in their seats and were often allowed to continue climbing the career ladder. Third, the Spanish state, even in the democratic years, continued to rely on a highly restrictive Law of State Secrets dating from the Franco years that shields key government archives from public scrutiny. In comparison, the US Freedom of Information Act is a miracle of government transparency. In

the remainder of this essay, I'll discuss the two final factors curbing academic freedom in democratic Spain: the ways courts have interpreted the right to honor and the hierarchies and clientelism of Spanish academic culture.

Spain's criminal and civil code classifies insults (*injurias*) and slander (*calumnia*) as violations of their target's honor, the right to which is guaranteed by the Constitution. To be sure, the criminal code allows for accusations or potentially offensive qualifications under certain specific conditions: they are not punishable by law if their truth can be demonstrated, if their target is a public figure, and if the charge relates to the target's public function. The only case in which the truth of the charge does not matter is when it targets the monarchy. Not only does the Spanish Constitution guarantee the monarch´s inviolability, but the criminal code penalizes any disqualifications directed toward members of the royal family—however true those accusations may be—to the extent that they may "harm the Crown's prestige."

In the Spanish Constitution, the right to honor appears in Article 18, which guarantees the rights to honor, individual and family privacy, and one's own image, and Article 20, which signals these three rights (to honor, privacy, and image) as the *limits* to four other rights: freedom of speech, creative freedom, academic freedom, and freedom of information. How to balance these rights in Spain's forty-four-year-old democracy—where exactly to draw the limit between the right to honor and other fundamental rights—has been up to the courts, whose decisions in these matters have often proven controversial and, to some, symptomatic of more deep-seated deficiencies in Spain's judicial culture.

In June 2020, for example, the National Criminal Court in Madrid (the Audiencia Nacional) opened an investigation for insults and slander against a group of reporters and interviewees who, two years earlier, had been a part of a TV documentary about the financial fortune of the Franco family (which some estimates put at $550 million; Torrús 2017). The former dictator's grandchildren had brought both a civil and a criminal suit, claiming that the program's content had been "clearly slanderous." The program, they argued, had presented a biased image of the

dictatorship, leaving out "any connotation that could have been favorable to the previous regime" (Pascual 2021).

In May 2019, María del Rosario Campesino Temprano, a judge in the Provincial Court of Madrid, slapped Teresa Rodríguez with a €5,000 fine for libel. According to the judge, Rodríguez, who at the time was a deputy for Podemos in the regional parliament of Andalusia, had "harmed the right to honor" of José Utrera Molina, who had served as minister in one of Franco's last cabinets (Rocha 2019) and who had died in April 2017. What had happened? In March 2018, Rodríguez had posted a tweet that recalled the execution, in 1974, of Salvador Puig Antich, a young Catalan anarchist, and included José Utrera Molina, a minister in the Franco government, among those responsible for his death. When the Utrera Molina family accused Rodríguez of libel, the judge ruled in their favor, arguing that to call Utrera Molina "responsible" for the "assassination" of Puig Antich was an "offense" to the deceased and therefore manifested a lack of "respect for the pain of the family caused by the loss of a loved one" (Riveiro and Escribano 2018). The judge also argued that Rodríguez had falsely characterized Puig Antich's death as an assassination. The death sentence, which the cabinet Utrera Molina was part of could have commuted, "followed the legislation then in force," the judge wrote. If Utrera Molina held any responsibility, it was merely "political" in nature (Bocanegra 2019). Critics were quick to point out that the judge's verdict appeared to justify what in effect had been the execution of a political dissident by a dictatorial regime, making it appear as if Puig Antich's trial had taken place under the rule of law. To make things worse, the legal scholar Joaquín Urías pointed out, the judge's opinion privileged the family's right to honor over Teresa Rodríguez's constitutional rights, in particular her right to freedom of speech (Bocanegra 2019). Rodríguez was finally exonerated by the Supreme Court.

The 1994 broadcast of *Sumaríssim 477,* a documentary by Dolors Genovès about a summary judgment in the Francoist-controlled zone that led to the execution of the Catalan politician Manuel Carrasco i Formiguera. The film prompted a lawsuit by the family of one of the individuals involved in the case, Carlos Trias Bertrán, who had been a witness for the prosecution and had died in 1969. A court ruled in the first

instance that the program swayed its audience toward an "undeservingly negative judgment of Mr. Trias Bertrán that is harmful of his honor and that of his children." Confirmed on appeal, the sentence was finally overturned in 1999 by the Supreme Court, which ruled that the information contained in the documentary was protected by the right to freedom of information and speech, and that the accuracy and public relevance of that information trumped Trias's and his family's right to honor. The court's verdict also argued that it was not the judiciary's role to "pass judgment on History, but rather . . . to apply the law." The plaintiffs appealed the case to Spain's Constitutional Court, whose 2004 verdict confirmed the Supreme Court's ruling and further affirmed historians' academic freedom ("la libertad científica del historiador") and the social importance of "free and methodologically grounded historical scholarship" ("la existencia de una ciencia histórica libre y metodológicamente fundada").

At the time, the ruling in the Genovès case was celebrated by jurists, among them Bartolomé Clavero Salvador, a professor of legal history at the University of Seville. ("I took it as an outstanding proclamation of the civic value . . . of historiography," he recalled in a recent article; Clavero Salvador 2019, 13.) Today, however, Clavero believes his initial reaction was naive. He's particularly skeptical of the clear distinction the court established between history, on the one hand, and the law, on the other. While the court appears to affirm historiography as a scholarly practice entitled to academic freedom, he explains, it also seems to assume that historians' research is not relevant to the courts. It assumes, in other words, that whatever an historian may discover about, for instance, the actions of a Francoist official, can no longer be the subject of a criminal court case (Clavero Salvador 2019).

This view, Clavero suggests, would also explain why Spain's Constitutional Court has consistently refused to revise judicial sentences issued during the Franco years that would be considered unconstitutional today. In fact, this refusal shows that the Spanish judiciary is unwilling to fully accept international law in the areas of human rights and transitional justice. This, Clavero concludes, points to deeper issues affecting Spain's juridical culture, which, when it comes to the crimes of the dictatorship,

has no trouble accepting impunity. "Here in Spain, the constitutional jurisprudence with respect to the Francoist dictatorship may accept the right to truth—but not the right to justice," writes Clavero (2019, 22).

For Urías, the interpretation of the right to honor by Spanish judges over the past couple of decades, including in recent cases like the one brought against Teresa Rodríguez, are deeply problematic. "Strictly speaking, the right to honor does not mean one can demand that people only speak well of you," he told me. "All it means is that your reputation should match your behavior." Precisely because the constitutional freedom of information guarantees the right to transmit and receive truthful information, in principle there should be no conflict between that right and the right to honor. "The problem, therefore, is not the way that the courts have been interpreting the notion of honor. It's the way they have been interpreting the notion of truth," Urías said. "That's what we saw in the suit against Rodríguez. The judge assumed the truth of the Franco regime's decision as if it had been made under a democratic rule of law." This, he added, is absurd: "In effect, a minister in Franco's cabinet *was* a murderer, because he contributed to maintaining a criminal system. But since that is a truth about the Franco dictatorship that has never been established *judicially*, every judge must make up their own mind."

According to the legal scholar Alejandro de Pablo Serrano, the invocation of the right to honor in lawsuits, even on behalf of the dead, is culturally understandable but judicially problematic. "The Spanish concept of honor is still quite literary," he told me. "As a result, Spanish law allows it to limit the freedom of expression and information to a larger extent than we see in other European countries. Moreover, the right to honor cannot strictly be applied in the case the person is deceased," he added, "except to the extent that the descendants are affected."

If, theoretically, the right to honor can be viewed as a radical affirmation of equality before the law—it's a right connected to personhood, regardless of social status—in practice it has functioned, rather, to reinforce inequality. "In reality, the right to honor has been a birthright for only certain social sectors," the historian Francisco Espinosa told me. Espinosa, who has spent several decades researching Francoist repression in the Spanish south, argues that the courts have systematically

privileged the honor of individuals associated with the Franco regime over that of its victims. "It's no coincidence," he told me, "that the archive of the massive judicial investigation that the Franco regime undertook of its opponents—the so-called *Causa General*—has been accessible online for many years, whereas the judicial documentation of the military, much of which has also has been digitized, can only be consulted, per agreements with the Ministry of Defense, in situ at the institutions in question." The stream of lawsuits, moreover, has had a chilling effect on historical research, Espinosa says: "Scholars are aware of the risks involved in this kind of work and, as a result, resort to self-censorship."

In addition to the guarantees offered by the Spanish Constitution when it comes to academic research and teaching, Spain's traditionally public university system has long offered faculty the legal protections that come with being a state employee (*funcionario*). Yet, much like in other Western countries, the foundations of this system have been steadily undermined. Two central factors in this process have been the rise of private universities—which in some regions have grown to offer between 25 and 44 percent of all university education—and, even at public institutions, the increasing percentage of teaching personnel hired on nonpermanent or nonfunctionary contracts. "The bulk of classroom teaching, at both public and private universities, rests on the shoulders of a corps of badly paid, exhausted professors without permanent contracts, who barely have time to think about political issues," the sociologist Leopoldo Moscoso told me. "In Spain, higher education has turned into a factory that issues diplomas in exchange for money."

As in the United States, moreover, university administrations are increasingly worried about their institutional image and threats to it posed by the activities of their teachers and researchers—a worry that tempts them to tread on their faculty's academic freedom as well as their extramural activity on platforms such as Twitter. "University administrations pay increasing attention to social media," Alfons Aragoneses, a professor of legal history, told me, pointing to the "fierce competition among universities to recruit students, especially from outside of the European Union."

Those faculty at public universities in Spain who still hold state-employee status enjoy a high level of job security, Urías said. "Unlike what we've seen happening in the United States, we are much less vulnerable to pressures or limitations from donors or private owners. The students have less power, too. It's practically impossible for them to get a faculty member fired." José Luis Villacañas, a professor of philosophy, agreed. For state employees in a permanent position, he told me, "there is very little oversight." He also added:

> There is a specific explanation for that. Faculty are not controlled in the exercise of their jobs because the control occurs at the hiring stage. This is related to the way the university has been viewed in Spain. It's seen not as a neutral professional space but above all as a public space that must be occupied and controlled. At the hiring level, that means that you get in if you are one of us, even if there are better candidates who are not. In this process, a central role is played by large religious corporations such as Opus Dei.

Furthermore, this trend has "become more powerful than the friendship-based clientelism that has traditionally shaped academic hiring in Spain," Villacañas said, pointing to "the extreme politicization of the Right" in response the 15M or *indignados* movement of 2011, which called for a renewal of Spanish democracy and attracted significant support from students and faculty. "Among the Right, the fear of losing control of the university prompted a strong reaction from Catholic and conservative elites, who became more openly ideological and militant."

The politicization of academic space in Spain is not new, Moscoso points out. In fact, it is one of the reasons why in Spain, unlike the United States, academic freedom is rarely viewed as a form of collective autonomy rooted in, and controlled by, a community of peers (Reichman 2021). "For such a community to exist and be functional, we'd need a university in which academics debate one another," Moscoso said. "In Spain, there is no such thing."

Given the politicization of the universities, the high levels of precarity, and the fact that *catedráticos* (full professors) exercise an almost autocratic authority, junior academics often feel constrained in choosing the subjects of their research, David Jorge, a historian, said. "It is commonly assumed

that anyone who aspires to a job at a Spanish university should avoid complications. This means not picking a research topic that may raise hackles." Moreover, "the old-school *catedráticos* are still stuck in practices inherited from the Francoist university. The institution is shaped by fiefdoms, the need for control and the defense of spheres of power, the desire to create loyalties—real or false—and servility, which are often driven by fear more than by earned respect or authority. Sadly, these practices are perpetuated among the younger generations, who came up through the ranks playing by the same rules."

Aragoneses agrees that increasing job insecurity has affected academic freedom in Spain—"especially in the context of specialization a space continues to exist in which the *catedrático* wields enormous power over the direction or focus of scholarship and the curriculum." The fact that research financing is generally connected to research groups does not help, says Marina Echebarría Sáenz, a professor of commercial law at the University of Valladolid. "Faculty are under pressure to join research groups in their own department, because being connected to other departments or universities complicates things." Sometimes the pressure rises to the level of censorship, Echebarría says.

The system's rigid hierarchies make it easy for powerful academics to interpret academic freedom as a license for bad behavior, Aragoneses said. "Some professors with state-employee status think they can do whatever they want. That includes abusive treatment of PhD students." The historian Esther Pascua Echegaray, who teaches at a private university in Madrid, agrees. "The threats to academic freedom and freedom of speech in Spain are less significant than the threats to the quality of teaching and research," she told me. "The quality of teaching is eroded by excessive workloads, inefficiencies, the pressure to publish, the fact that many faculty juggle multiple jobs, and the ridiculously low pay for part-time appointments. It's also eroded by bad teachers, obsolete pedagogies, and the fact that full professors wield near-despotic sovereignty. The situation is deeply discouraging."

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