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# SPAIN MUST BE DEFENDED: EXPLAINING THE CRIMINALIZATION OF POLITICAL DISSENT IN CATALONIA

*Ignasi Bernat and David Whyte*

**Abstract:** This paper asks how we can explain the remarkable punitive turn against the political opponents of a liberal democratic state in twenty-first-century Europe. It uses Michel Foucault's analysis as a point of departure for understanding how the form of state power witnessed in Catalonia is entirely consistent with a Westphalian fixation with the indissoluble unity of statehood. Moreover, we identify a classic dual strategy of criminalization and depoliticization that will be familiar to critical students of the criminal justice system. The form of justice resorted to by the postfascist Spanish state is one that seeks to replace politics with law; to impose a kind of legalized violence that is at the same time a proxy for war *and* a proxy for politics. Yet, in the process of presenting state repression as having only legal – rather than social or political content – all the Spanish state can do is repackage this political struggle in a form that reflects the war-making origins of the state. We argue, therefore, that in the Catalan case, as in countless other political conflicts, the autonomy of the political realm is a fallacy: the political realm cannot hide its violent origins.

**Keywords:** Spain; postfascism; state repression; political prisoners; Catalonia; criminalization; depoliticization; Foucault

## Introduction

A number of commentators have noted how the repression of political dissent in Spain has, compared with other liberal democratic states, been a more prominent function of the criminal justice system (Bergalli 1997; Brandariz García and Faraldo Cabana 2015). Key reforms in criminal law and the criminal justice system, particularly since 2011, have been introduced to deal with the rise of social protest. Amendments to the Criminal Code and a Law of Citizen Security (known widely as the Gag Law) introduced new restrictions on the right to protest and political expression in the wake of the financial crisis and the social unrest that ensued (Oliver et al., 2015). Like other European nations, Spain has used anti-terrorism laws widely to deal with domestic political protests (Bergalli 1997; Brandariz 2007; Jiménez Franco 2019).

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In the struggle over the right to self-determination in Catalonia, we have witnessed a deliberate show of police strength aimed at preventing both the use of the ballot box and the campaign of civil disobedience in the streets. In the run-up to the 2017 Catalan referendum, websites were closed down, ballot papers were seized by the million and post was intercepted and confiscated. The extremity of Spain's response to the referendum was remarkable. Human Rights Watch's assessment of the events of 1 October 2017 concluded that Spanish police engaged in excessive force when "using batons to hit non-threatening protesters and causing multiple injuries" (Human Rights Watch 2017).

The level of criminalization of political opposition and political protest connected to those events is unprecedented in contemporary Europe. A total of 712 town mayors were charged with "assisting the referendum," and many were detained for questioning by the police. The sentences imposed against the nine high-profile political prisoners on 14 October 2019 have fuelled the conflict. The police violence that followed created a conveyor belt of more political prisoners, many of whom are likely to go to jail for a decade for their participation in public demonstrations.

Amnesty International has condemned the trial of the political prisoners, arguing that it "contravenes the principle of legality and permits the imposition of disproportionate restrictions on conduct" (Amnesty International 2019). The UN Working Group on Arbitrary Detention had previously demanded the release of political prisoners (Reuters, May 19 2019). In other words, two of the largest human rights NGOs, along with a key UN body, have explicitly accused Spain of committing state crimes in its repression of the Catalan self-determination movement. This condemnation has been replicated in a ruling of the Court of Justice of the European Union that the Spanish Supreme Court had no right to judge or to condemn Oriol Junqueras, the vice-president of the Catalan Government during the referendum, due to his subsequent election to the European Parliament. The Court therefore declared the verdict of 14 October against him null and void and ordered the Spanish Court to release him. At the time of writing, the Spanish Supreme Court has refused to do so.

This paper asks how we can explain this remarkable punitive turn against the political opponents of a liberal democratic state in twenty-first-century Europe. It uses Michel Foucault's analysis as a point of departure for understanding how the form of state power witnessed in Catalonia is entirely consistent with a Westphalian fixation with the indissoluble unity of statehood. The paper then discusses the recent historical context for the state violence that we have witnessed in recent years in Catalonia, highlighting a continuity in political, economic and cultural power that we describe as postfascism. Spain's postfascism is materially and ideologically driven by politics. We depart from the usual critique of *politicized*

justice, pointing to how deeper historical forces shape the institutional structures of power. We conclude with a discussion of the particular form of state that is being defended in Spain, and the consequences of this for understanding what is unfolding in Catalonia.

## Spain must be defended

The events described above have been widely explained in the global media and in more critical commentaries as a result of the rise of *Catalan* nationalism. This paper develops a different perspective. It argues that the events of the past few years must also be understood in the context of *Spanish* nationalism. As this section will argue, there can be no doubt that the events of 1 October 2017 and the subsequent repression represented a serious internal threat to Spanish unity. They also represented a threat to the status quo that would be a severe blow to the integrity of the Spanish state. As this paper unfolds we will begin to see how the conflict in Catalonia is primarily shaped by the *Spanish* nationalist question (Taibo 2014). In order to frame our approach, we begin this section by briefly discussing some of the key passages in Michel Foucault's now classic text *Society Must Be Defended*.

In this text Michel Foucault famously inverted the Clausewitz aphorism to assert that politics is the continuation of war by other means. He gives three reasons for drawing this conclusion. First, the power relations that we find in liberal states are essentially anchored in a pattern of force that was established in and through war. This is the history of the Westphalian state system, in which the modern state was born from an ability to dominate a territory or a people through violence. Second, what appears as "civil peace" is really a process by which political struggles and clashes over power continue this relationship of war/force through state institutions. Third, only violence and force – war – can be the final arbiter in political struggles. In setting up this framework, Foucault builds upon a long history of sociological work that has noted that the Western states were founded on principles of violence and/or war, and that this legacy shapes power relations in the modern state (e.g. Weber 1919/1965; Benjamin 1921/1978; Tilly 1985).

We return to discussing those three points as a framework for understanding the conflict in Catalonia in the conclusion to this paper. For the moment it is important to note that Foucault's formulation becomes useful for the task of understanding this conflict, if we view the current political regime in Spain as "postfascist" (Bernat and Whyte 2020). That is, that whilst the Spanish state cannot be described either as Fascist or Francoist, it does at the same time retain the same rationales, the same bureaucratic structures and the same basic pattern of authoritarianism that existed under Franco.

Following Foucault, we argue that the current Spanish regime of power has its roots in the Franco dictatorship, which, in a very direct sense, illuminates the idea that politics is the continuation of war by other means. The Spanish regime of power in the Franco period was strongly concentrated in the military (Payne 1986). It is difficult to see how the regime of power could be configured any other way. After all, Franco's state was born after a coup d'état perpetrated by the army and a civil war that lasted three years. We would argue that the Second Spanish Republic government that Franco defeated in the civil war was also shaped by the historical foundations of violence and/or war. Not only did the government of the Second Republic resort to violence to preserve state power, but it could not survive without doing so (see e.g. essays by Frances Lannon and Adrian Shubert in Preston, 2002). This is not to say that the violence that underpins different state formations is of a unified character. Whereas the Second Republic sought to diminish Spain's perpetuation of colonial wars, Franco's coup d'état was orchestrated by a *colonial* army (with the help of banks and a fascist party). It was a colonial army that had suffered major military defeats over the previous 50 years, including the loss of Cuba, Puerto Rico and the Philippines. In the years preceding the civil war it had been defeated in Morocco several times, most notably at the Battle of Annual in July 1921. The Spanish civil war was understood by the nationalist cause as a crusade to restore the integrity of Spain. In this sense, we can say that the civil war was part of the response by a humiliated army to reassert control over the domestic population and a government that challenged property relations and the class system, and provided too many rights to workers, women and peripheral nations (Balfour 2002). It is also important to keep in mind the role played by the Catholic Church in providing ideological support to the coup d'état, particularly since it cemented the subsequent dictatorship through what was called "National Catholicism" which remained as a main ideological foundation of the dictatorship until Franco's death (Preston 2011; Carr 1982).

The subsequent regime remained tightly controlled by the army (Payne 1986), which was able to exert considerable political power through the figure of Franco, a general of the Spanish Army who promoted himself to *Generalísimo* (Balfour 2001). The Vice-President was a Navy admiral. Academic power was highly controlled by the Army; many professors appointed to the universities came from an Army background. In the criminal justice system, the martial courts were influential in perpetuating the most brutal and unrestrained repression (Richards 1999). Perhaps most importantly, the Army played a key role in the economic system of power; its most senior officers were appointed to many of the key positions in the state-led corporations (Balfour 2001; Maestre 2019). According to Franco's grandson, the last words that the dictator said to the Spanish King were: "Highness, the only thing I ask you is to defend Spanish unity."

Following the demise of the Franco regime, the Spanish transition to democracy failed to bring accountability to the regime and the members of the Army. As part of the settlement, the Army was supposed to have a minor role in the political, cultural and economic life of the new regime (Navarro 2006; Fontana 2014). However, many retained the key positions that the Army had previously secured for them. As Maestre (2019) has argued, the result was that the regime of power was not so concentrated in the hands of the Army as an institution, but its influence was effectively exerted through the continuity of this elite with their leading roles in other social and economic institutions. We mean this in both the sense that ruling elites have close interconnected ties that are consolidated through their political, economic and social origins (Miliband 1969) and in the sense that the form of relations across elites is a function of the form that the state adopts (Poulantzas 1969). As Poulantzas argues:

*[e]ach particular form of capitalist state is thus characterized by a particular form of relations among its branches, and by the predominance of one or of certain of its branches over the others: liberal state, interventionist state, Bonapartism, military dictatorship or fascism. (Poulantzas 1969: 75)*

From our perspective, the continuity of Franco's state apparatuses and the preservation of so many of the constitutional arrangements and cultural practices shape both state and civil society in contemporary Spain. This is a crucial aspect of the continuity of the *postfascist* system. But the continuity that we find in the bureaucratic and cultural practices of the state do not of themselves say anything definitive about the *form* of the capitalist state in Spain. Rather, they provide a basis for the continuity of the ruling class. Nor can the *social connections* across elites alone account for the cohesiveness and longevity of ruling class power. Rather those ruling elites are bound together by a *nationalist* internal unity – perhaps more than in any other European state (though some, such as the UK or France, are close rivals) that provide a unifying logic and thus provide a means of binding together the form that capitalism takes in Spain. The unitary idea that the defence of Spain is paramount exists as the dominant logic which binds ruling elites together. Without their capacity to organize a common hegemonic project around this dominant logic, it is doubtful whether those elites could retain their pre-eminent position.

As this paper will argue, it is a dominant internal logic that, in order to remain credible, must keep the Francoist elements of today's ruling class in Spain hidden. At the same time, Franco and Francoism cannot be entirely disrespected in “official” Spain. The settlement underpinning the 1978 regime ensured that the new Spanish state did not officially recognize the dictator's treatment of political

prisoners, the generation of “stolen children” or even his mass graves (Navarro 2006; Hernández de Miguel 2019). Hugely symbolic though this wilful institutional blindness was, this does not constitute the specific internal unity that enables elites to express their right to rule. That specific internal unity we characterize as the all-embracing claim that the apparatuses of the state must be organized around the project to “defend Spain”. The idea that the unity of Spain must be defended, for us, sums up the internal logic or unity that binds Spain’s ruling elites together as a hegemonic force. This idea gives meaning to the defence of *Spanish* capitalism. Of course, it is not the only logic; Spain follows other capitalist liberal democracies in using the tropes of liberal freedom, open competition, formal equality and so on to justify its social and economic policies. But, as this paper argues, if there is one dominant internal logic that binds ruling elites to a specific liberal capitalist project – uniting the armed forces, the monarchy, the financial and corporate class and political elites – it is the centrifugal logic that Spanish unity must be defended.

## An incomplete transition

Elsewhere, we have warned of the tendency in the left to overuse the term “fascism” to condemn the authoritarian practices of Western governments; and we cannot call Spain “fascist” (Bernat and Whyte 2019). It has a liberal-democratic political system and a liberal market economy.<sup>1</sup> Yet, as we have pointed out (2019), there are key features of the Spanish system of government and administration, and indeed, the structure of Spanish industry, that never fully completed the transition to democracy. We can call Spain a postfascist state precisely because the Franco regime has left an enduring mark on the ways that the Spanish state exerts control over its bureaucratic apparatuses of government, its economy and over its culture. Spain’s formally *benign* transition from dictatorship to democracy lacked a clear moment of rupture, thus allowing its postfascist legacy to persist long after Franco’s death in 1975. It is Spain’s benign transition that explains the remarkable spectacle that took place at the Valle de los Caídos (the Valley of the Fallen) on 24 October 2019.

The Valley of the Fallen is the ostentatious monument commissioned by Franco as a tribute to those who died in the Spanish Civil War. He lay in state there until his body was removed on 24 October 2019. The removal of his body had been ordered by the PSOE government ostensibly as a way of formally separating the legacy of Franco from the Spanish state. Yet, the removal itself was organized as a state ceremony. The body was removed in the presence of a government minister who stood alongside far-right figures who were singing Francoist songs, waving Spanish flags and giving the Fascist salute (Benavides 2019). This spectacle was



broadcast live on network TV. This spectacle is all the more remarkable if we remember that Franco is the dictator who presided over the disappearance of more bodies than any other regime in the twentieth century apart from Cambodia. It is impossible to imagine this kind of ceremony occurring in any other European context. When Germany exhumed Rudolf Hess's body in 2011 because it had become a site of pilgrimage for neo-Nazis, they burned his remains and dumped them at sea. No ceremony. No national TV broadcast. It is not only Franco's physical remains that the Spanish state has struggled to deal with; the institutional remnants of Franco's fascism were not completely eradicated from its power structures.

The coat of arms has been changed, but the red and yellow flag reinstated by Franco remains the basic outline of Spain's national banner. Indeed, the democratic transition of the late 1970s consigned the republican tricolor to the status of a mere historical artefact. Spain still celebrates its national day on 12 October, the anniversary of Christopher Columbus's arrival in the Americas (Navarro 2006). This "day of the race" was consecrated by decree by Franco in 1958, with the explicit aim of venerating "a system of principles and norms created to better defend the Christian civilization across the Hispanic community of nations". Under Franco, this national holiday explicitly celebrated the country's conquistador traditions and even today it remains closely bound to a colonial, anti-republican nationalism.

The ongoing state funding of the Franco Foundation by successive democratic governments in Spain, the preservation of the Duchy of Franco (a hereditary title gifted to the Franco family by King Juan Carlos), the statues of the dictator in public places and the streets named after him all highlight the cultural longevity of the regime.<sup>2</sup> The Spanish state has consistently opposed any efforts to record the missing and identify the bodies, and this basic approach remains unchanged. The Report of the UN Working Group on Enforced or Involuntary Disappearances regarding Spain claimed that 114,226 bodies were still missing as of 2013. Four years later in 2017, the same Working Group expressed its strong concerns over Spain's failure to take the most basic steps to allow access to justice for the relatives of the dead.

Perhaps more than any other feature of Franco's regime, the continuity of economic elites represented a failure to disturb the power structure. The same economic elites directly inherited the mantle of Franco's state-established corporations (Jiménez Franco 2017). For example, construction corporations like OHL, Entrecanales, ACS and Naturgy expanded rapidly under Franco and today continue to play a key role in Spain's economy (Maestre 2019). The banks played a key role through financing the coup d'état (Banca March) and the subsequent dictatorship (Santander) and continued to flourish after the transition (Juste 2017). This continuity was perhaps more obvious under PP governments (for example, in



the period 1996–2004); the economic elite was strategically protected by the PSOE governments that immediately followed the regime (1982–96). Indeed, it was the privatization of the former state monopolies, beginning in the 1990s, that opened a new opportunity for that same business elites to consolidate their dominant position (Bernat and Whyte 2019).

The deep constitutional legacy of Franco has very clearly shaped the Catalan conflict. The role of the monarchy is the centrepiece of this legacy because, according to the Spanish constitution, the monarch symbolizes the indivisibility and permanence of Spanish national unity. The role of the monarchy in elevating the constitutional principle of Spanish unity above the rights of actual citizens represents a direct continuity with the fascist “Principles of the National Movement” (Taibo 2014). Importantly, Franco officially appointed Prince Juan Carlos in 1969 – the grandson of the former king, Alfonso XIII – as his future successor. In exchange for this appointment, Juan Carlos swore allegiance to Franco’s “Principles of the National Movement” (Soto 1998). The 1978 constitutional settlement also preserved continuity with Francoism in other, more hidden, but equally significant ways. The 1977 “Amnesty Law” gave an official amnesty to Franco’s political prisoners. But it also granted Franco’s assassins and extensive torture network impunity for crimes related to the regime. In 2012, the Office of the UN High Commissioner for Human Rights made a formal request to Spain to repeal this law, because it prevents the prosecution and recognition of crimes against humanity. Civil servants who played a key role in the Franco dictatorship, judges and police officers – including those who had tortured countless civilians – quietly remained in place under the terms of the post-Franco amnesty (Balfour 2001). This continuity of personnel, coupled with the institutional amnesia relating to Franco’s mass graves, ensured that the institutional culture of fascism went unchallenged inside the state.

The pre-eminence of the military, and the other repressive apparatuses of the state, is perhaps the most obvious feature of the Spanish state which reveals the structure of war/force which anchors the state. But this continuity could not be guaranteed simply by leaving the layers of generals, police chiefs, civil servants, corporate leaders and the middle level of military and police officers intact. The continuity was more rigidly protected in the *structure* of the institutions aimed to secure the power of the central state in which conservative forces are in command (Taibo 2014). Consider the peculiar role of the Spanish Constitutional Court. This Court is very different to comparable institutions in other liberal democracies; it is not part of the judicial system, nor is it regulated by the same law that regulates judges and magistrates. Its members do not have to be accredited judges and are chosen directly by the organs of government (the Spanish parliament, central executive and the administrative body for the courts).<sup>3</sup>

If Francoism officially left the government buildings almost half a century ago, the form of historical memory preserved by the state, its constitutional structure, its political administration and the law, the police and the military have inhibited a full transition from the previous regime.

When King Felipe VI addressed his people on network television on 3 October 2017, he specifically asserted the indissoluble unity of Spain. In the same speech he made explicit accusations against Catalonia and its government of disloyalty. In doing so, he opened the political space for the application of Article 155 of the Spanish constitution, suspending Catalan autonomy.

Felipe's intervention, only two days after the 1 October referendum and on the evening of Catalonia's largest general strike since 1934, represented the significance of the role of the monarchy at the heart of the Spanish state. Monarchal power in Spain seeks to preserve the same economic elites and the same observance of Spain's colonial legacy. This is how we summarize the Spain that must be defended: a colonial, monarchist Spain, one that is, in a classically Foucauldian sense, anchored in war/force.

At the same time, it is this colonial, monarchist Spain that preserves a deep inequality within the economic system. As the final two sections of this paper explain, in Spain, it is the commitment to a particular social order that must be defended that also spreads, capillary-like, through the legal system.

## The origins of the crisis

The roots of the current constitutional crisis can be found in the political right's bid to revive a Spanish identity that exploits the paraphernalia of Spanish cultural nationalism (Taibo 2014). In 2004 the conservative People's Party (PP), developed a more explicitly nationalist-authoritarian position on Catalonia – and Spanish nationhood generally – as it sought to destabilize the Socialist Party (PSOE) in government and build voter loyalty through explicit appeals to Spanish patriotism. The PP's renewed nationalism was part of a calculated effort to recover political ground after a series of disastrously unpopular policies, including Spain's role in the 2003 invasion of Iraq, the sinking of the *Prestige* oil tanker and the terrorist attacks in Madrid in 2004.

This renewed patriotism represented a cynical and calculated bid to shift the role of the state from being a welfare and social provider to being a guarantor of Spanish unity. The idea was to shift the role of the state (and voter allegiance) from social issues to matters of national identity. Challenging Catalan claims for more political autonomy have become part of this strategy. Bizarre as it may sound outside Spain, a boycott of Catalan products, including Cava, was encouraged by

the extreme right both inside and outside the PP. This boycott campaign – a clear example of what has become known in Catalonia as Catalanophobia – sought to exploit an idealized and homogenized Spanish identity, and in doing so it either knowingly or unwittingly bolstered support for far-right groups who claim the mantle of Franco. The boycott is perhaps the most extreme example of Catalanophobia that has in the past few years seen a growth in the use of racialized jokes about the Catalans by comedians and in popular songs and a growing number of petty cases in which people have been penalized for using the Catalan language in courtrooms, and in other forms of official communication (Bamberg and Kerevan 2019).

A starting point was the denial of a new Statute of Autonomy, passed by the Catalan and Spanish parliaments in 2006, and ratified by a Catalan referendum. The only major political party to oppose the new Statute of Autonomy, the PP initiated the challenge to the legality of the Statute in the Constitutional Court. After four years, the Constitutional Court declared in 2010 that key parts of the proposed document were unconstitutional, interpreted Catalonia's political autonomy in highly restrictive terms and rewrote or blocked key proposals on the status of the Catalan language, the legal system and fiscal policy.

There is some history that is worth noting here. The first Statute of Autonomy for Catalonia was introduced in 1932 during the Second Spanish Republic (Vilar 1984). It was subsequently abolished by Franco in a move largely believed to discipline Catalonia for its resistance during the Spanish Civil War. The withdrawal of the Statute of Autonomy by Franco is hugely significant in his project for Spanish unity and marked a long period of harsh repression of Catalan culture and politics (Fontana 2014). Following the transition a second Statute of Autonomy was approved in a public referendum. So, when the Constitutional Court denied the legality of the third Statute of Autonomy, and rewrote much of what had been agreed, most of Catalonia could see the hand of history resting on its shoulder. This was not history repeating what Franco had done, but as a political response to the PP, the Court's decision was widely perceived as *Francoist*.

The Constitutional Court has continued to deploy its powers routinely against the autonomous parliaments. Indeed, since 2006 more than 40 laws passed by the Catalan Parliament have been blocked by the Constitutional Court. Most of the blocked laws were concerned with securing social rights and protecting people from austerity. Most important was a July 2015 law which banned the eviction of people before they were offered social housing, also including a measure to protect the vulnerable against having their water and electricity cut off. This law had cross-party support in the Catalan Parliament, but the Spanish Constitutional Court overturned it, effectively making thousands homeless in its own crude bid to narrow the Catalans'

freedom of action. More recently, the Spanish Constitutional Court has ruled that the Catalan Parliament has no right to debate the issue of self-determination, the monarchy or even the court verdict that condemned the political prisoners.

In those pronouncements by the Spanish legal and political institutions, obedience is sought, above all else, to the principle of Spanish unity. It is this principle that drives the deep structural politics behind the strategy of repression. As Foucault argued, what appears as “civil peace” is really a process by which the enduring structure of war/force determines the outcome of political struggles. This only becomes apparent when we understand precisely how Franco’s structure of war/force was preserved in the legal system.

### Depoliticizing the crisis through law

The legacy of the Franco regime is very obvious in the repressive function of the courts in recent events. In particular, we can observe very clear continuities in the way that political control is exerted over the national courts. The Audiencia Nacional was the court responsible for initiating the prosecution of the nine Catalan political prisoners before their cases are passed to the Supreme Court for trial. This court was created in the image of Franco’s notorious Public Order Tribunal, maintaining the judges, prosecutors and legislation. The court explicitly deals with issues of conflict deemed to be “political”. The Audiencia Nacional has been condemned internationally for imprisoning Basque political leaders and for a string of highly controversial political convictions.

The sentencing of the political prisoners needs to be understood in precisely this context. The court system is organized around *political* modes of appointment and decision-making. Yet the purpose of the court and the legal system generally is the opposite. As we have noted above, the process of individualizing responsibility and blame enabled the state to mask the political and social content of conflicts. In political conflicts, the overarching function of law, and especially criminal law, is to mask the political content of those political conflicts.

Thus, one of the most frequent assertions that has been made by government sources about the political prisoners is that they are “common criminals”. They are not, therefore, *political* prisoners. By masking the political content, the state does not need to explain why it is locking up its opponents for protesting or organizing against it. It merely asserts that what they did was unlawful and therefore criminal. In this way, collective political subjects and demands are turned into individuals that broke the law (Rodríguez 2003). If this is a rationale that we find at the heart of all legal systems, it is one that is turbo-charged in the context of the Catalan conflict. The grossly disproportionate sentences are testimony to this, and so is the nature of the offences that they were charged with.

The nine political and civil society leaders sentenced on 14 October 2019 were charged with sedition. This is an offence that was invented in the sixteenth-century courts of Europe to assuage the paranoia of the not-yet-fully-formed democratic state. In Britain, as in most European countries, the offence of sedition no longer exists. Yet in Spain, the paranoid logic of sedition is drawing a growing number of political dissenters and protestors into the criminal justice system. The crime of sedition, used to condemn the “big” political prisoners to long custodial sentences in October 2019 assumes the rupture of the *public* order. This is understood as a disruption of the normal functioning of the public institutions. That is, the crime of sedition is not a breach of the peace or a crime that disrupts everyday life, but very specifically criminalizes a challenge to state institutions and their regular functioning.

A similar logic pervades the rise in numbers of people accused of “hate crimes” and “discrimination” against the state. In one case in 2018, a local mayor was accused of “discrimination against the Spanish nation and the corps of the Guardia Civil” for making public statements against state violence.<sup>4</sup> Bizarre as it might seem, his experience is not unique. Numerous ordinary people who have dared to condemn police violence – or even talk about it in public – have been hauled in front of the judiciary, facing prison for “hate crimes” against the Spanish state. Some witnesses have been charged with such “hate crimes” for posting Facebook statements and teachers have been charged with the same offence for daring to discuss the violence of the Spanish National Police and the Guardia Civil in school classrooms (Bernat and Whyte 2020).

When stripped of political content, deeply *political* disputes and *political* conflicts can be devoured by the state and regurgitated as conflicts necessitating a purely legal or repressive response (if there is no political content, then the state has a compelling right to respond with force rather than politics). This process, one in which political disputes are resolved by the naked practice of war/force, is a very pure example of what Foucault means when he concludes that only war/force can be the final arbiter in the political struggles that occur in the modern liberal state.

Yet in his analysis in *Society Must Be Defended*, Foucault does not see this as an explicit process of depoliticization. In the sense that politics is war/force by another means, Foucault does not see war/force as a set of practices and logics that displace or eradicate politics. Yet the eradication of the political content of struggles does seem to be apparent in the strategy of the Spanish state; the Spanish state is seeking to displace or eradicate politics. This much is obvious is the consistent repetition of the judges and prosecutors in the trial of the nine political prisoners sentenced in October 2019 that they must be described as “common criminals” (thus they are not worthy of political recognition). Recognizing the

criminalization process as one that seeks *depoliticization* brings us closer to a Gramscian analysis. We say this in the sense that the narrative of the political prisoner seeks to bolster a popular (Spanish) consent for the criminalization of political prisoners. In the absence of meaningful consent for the project of Spanish unity across the Catalan population, the state relies on the techniques and apparatuses of repression. The penal system is the most frequently used instrument of social control (Bergalli 1997). And the construction of the state as the victim of “hate crimes” or any other crimes for that matter is part of this (Sim 2004). In this sense, what is going on represents a highly unstable mode of power in which the Spanish state is struggling to achieve any degree of hegemony or consent for its rule. This clear challenge to the hegemony of the state reflects the fundamental *vulnerability* of the project of Spanish unity. As it becomes more vulnerable to accusations of political repression by its opponents, the state resorts to modes of punishment that depoliticize; modes that mask any political content that might reveal the real problem for the state: that the unity of Spain is under threat. The response to this has been simply to criminalize disobedience to authority. This is essentially what criminal accusations against those that criticize state violence are: crimes of disobedience to authority. The Catalan political prisoners can therefore never be “political” prisoners in the eyes of the state: they are either terrorists or common criminals, and both labels have been used by the Spanish state to label all of those arrested and convicted of offences relating to civil disobedience and peaceful political protest. And this is essentially what the crime of sedition is. Sedition in Spanish law means preventing “the application of the Law or any authority . . . from legitimately carrying out their functions” using means that are outside the law (Fernández 2020). Sedition is the offence that outlaws civil disobedience and requires subservience to authority. It requires no other test other than some level of unlawful disobedience and therefore requires minimal political justification.

The Catalan crisis can therefore be read as a moment that has its roots in the way that social grievances have been dealt with through a prism of war/force. The Spanish Constitutional Court has been used to reinforce the central power of the Spanish state – and ultimately resort to militarized force – to quell the social demands of the Catalan political institutions. In doing so, it has depoliticized those claims through the resort to war/force.

In the Catalan conflict, the law has effectively sought to replace the social and political content of the dispute. The reduction of the current conflict to a “national” or even “terrorist” conflict obscures the long political crisis faced by the Spanish state, and in particular the state revanchism in the period following the 2008 financial crisis. This is a general point we can make about all legal systems. The overarching function of law, and especially criminal law, is to mask the social content

from conflicts and disputes. By individualizing responsibility and blame, and by removing all context, criminal law reinforces the *appearance* of equality whilst in reality upholding inequality. In the Catalan conflicts, the overarching function of law, and especially criminal law, has been to mask political content from all aspects of the dispute, no matter how palpably political the dispute: a referendum called by a parliament that sought to uphold its result, supported by political protests and political action on the streets.

## Conclusion

The struggle in Catalonia is the result of a deep affiliation to a state nationalism that is able to represent itself as natural and banal. This “banal” nationalism has the capacity to represent peripheral nations as the only nationalists, selfish and particular, while reinforcing the repressive apparatuses of the central state (Billig 1995: 47).

In a key passage that comes towards the end of *Society Must Be Defended*, Foucault uses the death of Franco as a rhetorical device to show how power is not only concerned with governing life, but is equally concerned with governing political continuities. Here, Foucault illuminates a political process by which Franco’s legacy itself was kept alive as a means of exercising power.

*And so the man who had exercised the absolute power of life and death over hundreds of thousands of people fell under the influence of a power that managed life so well, that took so little heed of death, and he didn’t even realize that he was dead and was being kept alive after his death.* (Foucault 2003: 248–9)

As we have shown, one consequence of Franco’s life after death is that the form of justice resorted to by the Spanish state is one that seeks to replace politics with law; to impose a kind of legalized violence that is at the same time a proxy for war *and* a proxy for politics. What appears as a process of depoliticization cannot entirely rid the system of political disputes. After all, if the Spanish state is attempting to depoliticize the bid for self-determination in Catalonia through all the techniques described in this paper, this does not mean that the state can make this political conflict disappear. It only makes politics more war-like. And by making politics more war-like, it seeks to further mask the content of political struggles.

As we have noted in the earlier sections of this paper, in *Society Must Be Defended*, Foucault identifies three enduring features of the war-like nature of political power. First, political power in liberal states is anchored in a pattern of force that was established in and through war. This is a point that has been reinforced in different ways by a range of authors, most famously, Charles Tilly (1985). Spain’s postfascist regime is essentially anchored in a pattern of force that



was established in and through its colonial wars, and latterly through the civil war. The referendum and its aftermath have brought to the surface some shocking examples of residual Francoism and fascism in the police and the military. There have been numerous cases of police officers displaying Francoist symbols, and even giving the fascist salute in public. In one case, a Spanish National Police officer was photographed brutally beating a well-known pro-independence journalist while shouting “Viva España y Viva Franco.”<sup>5</sup>

Second, what appears as “civil peace” is really a process by which political struggles continue the relationship of war/force through state institutions, a point that echoes Max Weber’s famous essay, written in 1919, *Politics as a Vocation*. The application of article 155, the police brutality on 1 October and the imprisonment of politicians and activists committed with self-determination are the logical outcome for a process that aims to challenge the national settlement, and therefore the social settlement. The legal and judicial systems are part of this wider institutional arrangement, but the part in charge of securing its continuity.

Third, the Spanish state, by ramping up the violence in the courts and on the streets, and appearing to recognize no limits on its own application of force, is testimony to Foucault’s warning that only violence and force can be the final arbiter in political struggles. This is a point that has similar origins in Walter Benjamin’s thesis on the relationship between law and violence. For Benjamin, the type of police violence witnessed in Catalonia and the application of extreme laws to defend the integrity of the state result from a position in which the state “can no longer guarantee through the legal system the empirical ends that it desires at any price to attain” (Benjamin 1921/1978: 287). Violence, in Benjamin’s terms, is necessary to uphold law, to preserve the rule of law and also to expand the state’s law-making capacity.

Spanish nationalism appears as the ideological form taken by the current social order. Thus, criminalization works by blocking social groups and demands from a legal point of view, emptying their political content. This is precisely what Foucault means when he says that society must be defended: a society that presents itself without social content, and without political justification. Yet, in the process of presenting itself without social content, and without political justification, the state is not actually eradicating politics; it is merely *masking* and *repackaging* political struggles as something else. This repackaging of politics, to follow Foucault, is sought in a form that reflects the war-making origins of the state. We argue, therefore, that in the Catalan case, as in countless other political conflicts, the autonomy of the political realm is a fallacy: the political realm cannot hide its violent origins.

This is not to say, however that there are not important distinctions between different political formations. We cannot ignore the specific content and the purpose of the war-making origins of the state and how this is reshaped by social

forces. State-making and war-making has always sought to preserve or to challenge the dominance of particular social groups. State-making and war-making has always sought to defend a particular social order. And this, in many ways, is the missing link in Foucault's analysis. The idea that society must be defended on its own terms is powerful. But what is at stake in this power game is the *type* of society that must be defended. We cannot underestimate the importance of *class* continuity within the Spanish state. We have described this in more detail elsewhere (Bernat and Whyte 2020), but the ruling elite in Spain displays a remarkable degree of longevity across the economic and political worlds. Franco's ruling elite has retained its position in finance and business, and in legal and cultural spheres. This is not to say that those ruling elites have been reconstituted in many domains, but it is to say that the core of power has been largely undisturbed.

The project of Spanish nationalism has consequences that should not merely be measured in terms of explicit forms of state repression. This is a form of Spanish unity that reproduces a strong social inequality. As Navarro points out (2006) the causes of this unfair social system can be found in an institutional structure of power, centred in the power of monarchy, that consolidates conservative social forces in Spain. The project of Spanish unity and the legacy of the post-Franco settlement helps explain why Spain has one of the less developed welfare states of the EU-15. It helps explain the origins of the gross inequalities in the health and education system (Navarro 2006). It also helps explain why the institutional structure has been able to defend a regressive fiscal policy that underfunds social spending. And as we have already seen, this institutional structure relies particularly on the judicial system as a keystone of this conservative dimension. For example, in a key case in 2017, the Supreme Court ruled in favour of the banks against more than a million citizens, who were estimated to have been forced to pay an average of more than €40,000 per mortgage (León 2019). Two years later, in 2019, the same court ruled against the possibility of municipalizing public services in a controversial case between the *City of Barcelona* and the *Water Company*. The former, it ruled, must honour a contract granted by Franco (Solé and Rodríguez 2019). The violent depoliticization that lies at the heart of the Spanish national project has a purpose. Its purpose is to defend Spain, yes, but more importantly it is to defend the longevity of the Spanish ruling class.

## Notes

1. Entry into the EU was the best way to safeguard the liberal market economy while getting into a first world developed economy. It became included within an international division of labour, although semi-peripheral within the EU.

2. [https://www.lasexta.com/noticias/nacional/franquismo-espana-monumentos-calles-dictadura-que-impiden-reparar-memoria-sus-victimas\\_201903315ca0f1e00cf2de7721edb3cc.html](https://www.lasexta.com/noticias/nacional/franquismo-espana-monumentos-calles-dictadura-que-impiden-reparar-memoria-sus-victimas_201903315ca0f1e00cf2de7721edb3cc.html).
3. Between 2012 and 2017, the Spanish Constitutional Court was presided over by Francisco Pérez de los Cobos, a member of the PP, and the brother of Diego Pérez de los Cobos, who was in charge of coordinating the police operations in Catalonia on 1 October and had been a senior official in the PP government. Andrés Ollero, who previously spent 17 years as a MP in the Congress of Deputies representing the PP, is currently the magistrate of the court (Bernat and Whyte 2019).
4. *Diari de Tarragona*, La jutgessa manté l'acusació de presumpte delictes d'odi contra l'alcalde de Reus. 10 December (<http://diaridigital.tarragona21.com/la-jutgessa-mante-el-presumpte-delictes-dodi-contra-lalcalde-de-reus/>; accessed 2 January 2020).
5. ARA, L'agressor de Jordi Borràs és un policia nacional, 17 July 2018 ([https://www.ara.cat/societat/fotoperiodista-Jordi-Borràs-individu-identificat\\_0\\_2052394943.html](https://www.ara.cat/societat/fotoperiodista-Jordi-Borràs-individu-identificat_0_2052394943.html); accessed 2 January).

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