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QUERYING A QUEER SPAIN UNDER FRANCO

Peter Kwan*

There should be more articles in the legal journals such as Professor Gema Pérez-Sánchez's. In *Franco's Spain, Queer Nation?*,¹ Professor Pérez-Sánchez has done a great service to legal scholarship in four respects. Firstly, she has written an appropriately far-ranging piece. In a discipline that has as one of its central missions the broadening of critical legal discourse, LatCrit can sometimes appear to suffer from symptoms of parochialism in its understandable emphasis on the Latina/o experience within American borders, or on the experience of its Latina/o immigrants once they have reached these shores. To be sure, this is not a problem unique to LatCrit. However, if LatCrit takes seriously its role in the legal academe of opening up all categories (such as race, gender, sexuality, and class) to critical analysis, thereby disrupting the hegemony of fixed meanings (and it does), it cannot simultaneously confine those investigations to a North or Latin American experience. While the influence of continental philosophy on American legal theory is undeniable,² with a few notable exceptions, the reverse effect seems far less impressive. Even though it is unlikely that Professor Pérez-Sánchez's contribution will single-handedly correct this imbalance, it is a welcomed example of American scholarship willing and interested in non-American affairs, and it is a credit to LatCrit for including a work such as this within its movement. However, it is perhaps of no coincidence that an Article such as this was written by a non-legal scholar.

The second welcomed contribution of this Article—really an extension of the first—is its comparative law dimension. Comparisons between our legal system and those of different countries and cultures can only serve to illuminate and positively interrogate our own. Nothing unsettles the easy complacency or the feeling of the inevitability of American legal structures more than an observation of how things are done elsewhere—in both better and worse ways.

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1. Gema Pérez-Sánchez, *Franco's Spain, Queer Nation?*, 5 MICH. J. RACE & LAW 943, 33 U. MICH. J.L. REFORM 359 (2000).

2. Pérez-Sánchez's own frequent application of Michel Foucault's ideas in her article is a splendid example of this phenomenon. See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & LAW at 961-65, 33 U. MICH. J.L. REFORM at 377-81.

Comparative law, now even more than Jurisprudence, is a much neglected and sorely needed part of most American law school curricula. The (d)evolution of anti-gay laws in Spain is as good a place as any (and better than many) to compare how law can deploy different modes of power in policing the bodies of queers, and in this case, the delicate interplay of culture, law, and democracy within a Spanish context.

Another respect in which Professor Pérez-Sánchez's article deserves honorable mention is the provocative way she has attempted to theoretically rework and impose feminist insights into gender roles and oppression between men and women within the framework of the relationship between Francoist Spain and other nations, on the one hand, and the relationship between the Franco dictatorship and the Spanish citizenry, on the other. According to Professor Pérez-Sánchez, "in the sexist imaginary of Franco's regime, Spain's marginality vis-à-vis Europe must have been perceived as a passive, feminized position. . . ."³ Moreover, Professor Pérez-Sánchez argues that this perceived feminization of Spain (its global marginality) led to a reaction on the part of the regime to "redefine the moral codes for Spain, a country 'debased' by the 'subversive,' 'perverted,' and 'immoral' dictates of the Republicans."⁴ Therefore, as other nations excluded Spain in trade and other international activities, thereby feminizing Spain, the regime reacted in a masculine way against its own people through, among other things, imposing "strict cultural censorship,"⁵ making the laws more "repressive and punitive,"⁶ especially against those citizens who most strikingly came to symbolize the rejection of manhood and masculinist privilege, gay men.⁷

This is a complex and difficult argument to make. There are at least two reasons for this. The first is that there is a real, yet subtle, difference between a metaphor and a demonstration of an empirical relation between two entities. What I mean is this: if, for example, I claim that the rising sun is like a fried egg in the sky, I would be analogizing my perception of the rising sun with what I

3. *Id.* at 5 MICH. J. RACE & L. at 952, 33 U. MICH. J.L. REFORM at 368.

4. *Id.*

5. *Id.* at 5 MICH. J. RACE & LAW at 953, 33 U. MICH. J.L. REFORM at 369.

6. *Id.*

7. Pérez-Sánchez has succinctly described it as a "two-fold sense of the threat of 'feminization' on the one hand, the general population must have felt as if it were located in a 'passive,' 'feminine' position, but on the other hand, the Francoist regime itself occupied a marginalized, subservient position with respect to the rest of the Western world." *Id.* at 5 MICH. J. RACE & LAW at 954-58, 33 U. MICH. J.L. REFORM at 370-71.

believe a fried egg looks like. This phrase is metaphorical. I would not, however, be making a claim that the sun consists of egg or even egg-like substances. Similarly, if I assert that my law school faculty is like a dysfunctional family, I am using a metaphor to describe the state of affairs between certain people in an institution. I am not (thank goodness) making any claims about any geneological connection between these people. Therefore, when Professor Pérez-Sánchez makes the claims that there is a gendered oppressive relationship between Francoist Spain and other Western nations (where Francoist Spain is configured feminine and other Western nations masculine), and between Francoist Spain and its citizenry (where Francoist Spain is configured masculine and its citizenry feminine), one wonders whether she is similarly using gender as a metaphor, or whether she is saying something empirical about those relationships. And if it is the latter, it leads to the unanswered question: under what conditions can those claims of empirical relationships be verifiably true? That is to say, it raises the second reason why this is a complex and difficult argument to make; namely it may simply be exceedingly difficult (perhaps even impossible) to unearth the empirical data necessary to show a gendered relationship between a state and foreign states, much less a state and its citizenry.

To be sure, Professor Pérez-Sánchez sometimes writes as if she is using a metaphor: "Similarly, the Francoist imposition of silence, its restriction of movement . . . *could be said to have* constrained Spaniards of both genders *in a manner similar to* the traditional repression of women by men."⁸ Or, another example previously quoted: "I argue that, in the sexist *imaginary* of Franco's regime, Spain's marginality vis-à-vis Europe *must have been perceived as* a passive, feminized position."⁹ Yet, one senses that she is making a stronger, substantive claim—that the Franco regime *was* one of the feminine, and that in reaction, it attempted to reassert its masculinity by, among other things, psychopathologizing homosexuality in order to control what homosexuality symbolized par excellence—its perceived deviance from the gendered "norm" where men (and the state) were allowed only to be masculine. And it is with this stronger claim that one desperately wanted to see more of a developed and

8. *Id.* at 5 MICH. J. RACE & LAW at 953, 33 U. MICH. J.L. REFORM at 369 (emphasis added).

9. *Id.* at 5 MICH. J. RACE & LAW at 952, 33 U. MICH. J.L. REFORM at 368 (emphasis added).

conclusive demonstration. This might be an unreasonable demand.¹⁰ However, at the end of the day, I remained hungry for a persuasive argument that under Franco, Spanish nationalism was somehow dependent upon or even threatened by the Spanish gay community, such as it was, since, as the author points out herself, lesbians were simply invisible to Francoism¹¹ and gay men were deeply fearful and closeted.¹² Moreover, I was left wondering whether there are other examples of queer persecution stemming from a dictatorship's gendered national anxiety. Can Hitler's internment of German homosexuals in concentration camps be explained partly as a reaction to a Nazi fear of being effeminized? "Effeminized" is not a description of the Nazi regime that comes easily to mind.

Like all interesting scholarship, however, Professor Pérez-Sánchez's article leaves one with unanswered questions. In particular, in addition to the questions mentioned above, Pérez-Sánchez does not fully explore the forces that led to Spain's oppression of homosexuality and those who opposed this aspect of Francoism. As Professor Pérez-Sánchez describes it, the early versions of the Spanish penal code in 1822, influenced by the new ideas of the French revolution,¹³ were very liberal documents. The first version of the code removed homosexuality as a violation of Spanish criminal law, and successive versions either continued this or the recriminalization of homosexuality did not last long before it was once again deleted from the code. It was not until the 1970's, according to Professor Pérez-Sánchez, that Spain started to police and regulate homosexuality by including homosexual activity within the Law of Social Danger and Rehabilitation, thereby subjecting gay men (lesbians were ignored) to surveillance, social

10. This is especially so since, in the spirit of honest, full disclosure, these are issues I have myself struggled with in print, a struggle wherein I am probably exposed to the same questioning I have asked of Pérez-Sánchez's scholarship. See Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman, in The World of Suzie Wong*, M. Butterfly, and The Adventures of Priscilla, Queen of the Desert, 5 *ASIAN L. J.* 99, 110-16 (1998).

11. "Unable to think female sexual pleasure independent of male heterosexual pleasure, lesbianism was erased from the sexual horizon of late Francoism. For all practical purposes, this sexual option did not exist." Pérez-Sánchez, *supra* note 1, at 5 *MICH. J. RACE & LAW* at 970, 33 *U. MICH. J.L. REFORM* at 386.

12. "De Fluvià's characterization of Spanish gay activists as being in 'the catacombs stage' is quite accurate; because of the strict censorship of Francoism had imposed on Spanish society, any contestatory group or person had to operate underground, much as early Christians in Rome had to hide and fear for their lives." *Id.* at 5 *MICH. J. RACE & LAW* at 967-68, 33 *U. MICH. J.L. REFORM* at 383-84.

13. See *id.* at 5 *MICH. J. RACE & LAW* at 961, 33 *U. MICH. J.L. REFORM* at 377.

banishment, confinement,¹⁴ and draconian “reeducation measures” that included “electro-shock and . . . aversion therapy.”¹⁵ While the United States was certainly no stranger to these methods of queer control during roughly the same time,¹⁶ what is notable in Professor Pérez-Sánchez’s account of the Spanish experience in comparison to the American experience, is two-fold: one, that it seems from this narrative that Spanish gay men had actually “enjoyed” a period of around 156 years under the code from 1822 to about 1978 (except during 1928 to 1932) when their sexuality and sexual behavior was not criminalized; and two, according to Professor Pérez-Sánchez, its recriminalization was a function both of Spain’s opening up—its exposure to tourism and western capitalistic influences—as well as Franco’s post-Civil War agenda of asserting a masculinist regime as an anxious response to its own feeling of marginalization within European and global affairs.¹⁷ Which raises the interesting question of why, in the face of both the liberalizing effects of having long adopted a French-inspired code and the opening up of Spain to western capitalistic freedoms, Spanish people were nonetheless by and large accepting of Franco’s restrictive regime? The answer no doubt lies somewhere in the pervasiveness and oppression of a fascist dictatorship, so this reader would have been grateful for more of an account of the regime’s grip that did not loosen until Franco’s death. Moreover, if fascist dictatorship by its very nature and almost by definition is highly corrosive of personal liberties and freedoms, can its attention to and regulation of homosexuality really be attributable to anxiety over western influences?

14. See *id.* at 5 MICH. J. RACE & LAW at 965–66, 33 U. MICH. J.L. REFORM at 381–82.

15. *Id.* at 5 MICH. J. RACE & LAW at 966, 33 U. MICH. J.L. REFORM at 382.

16. At the turn of the Twentieth Century, and with the rise of Darwinism leading to a eugenics movement, certain states in the United States followed other countries in castrating or compulsorily sterilizing certain “degenerate” offenders, such as the mentally retarded, habitual criminals, and sex offenders, including homosexuals. See DAVID F. GREENBURG, *THE CONSTRUCTION OF HOMOSEXUALITY*, 419–20 (1988). Behaviorist psychology in the 1960’s and 1970’s also gave rise to behavioral therapies for homosexuals that included electric shocks and even “chemicals to induce convulsive shock in homosexual patients.” See *id.* at 431. It was not until 1973 that the American Psychiatric Association finally removed homosexuality as a mental illness from its Diagnostic and Statistical Manual of Psychiatric Disorders. *Id.* at 429; see also RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1981) (providing a chilling account of the political background, including the gay and lesbian civil rights movement, that led to its delisting as well as to the bitter internecine battle waged within the American Psychiatric Association).

17. See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & LAW at 952–56, 33 U. MICH. J.L. REFORM at 368–72.

Another puzzling feature of this article is its almost passing references to the complicity of the Catholic Church by the Franco regime's fusion of church and state¹⁸ and the contribution of church ideology to the assertion of masculinist structures and the oppression of women.¹⁹ Was there an overt partnership between Franco's dictatorship and the Catholic Church? To what extent is the Church accountable through silent assent for the excesses of the dictatorship? And where were the Catholic voices of outrage during the 156 years when the Spanish penal code effectively decriminalized homosexuality and homosexual behavior?

The final respect in which I have found this an admirable piece is the way in which Professor Pérez-Sánchez has so elegantly used literature to illuminate her claims about Francoism, state regulation of homosexuality, and the political radicalism of queerness. Opening up a small window to the richness of Spanish fiction, Professor Pérez-Sánchez has allowed plenty of fresh air into what is (let us face it) usually pretty dull reading found in law journals today.

18. See *id.* at 5 MICH. J. RACE & LAW at 952-54, 33 U. MICH. J.L. REFORM at 368-70.

19. See *id.* at 5 MICH. J. RACE & LAW at 954, 33 U. MICH. J.L. REFORM at 370.