JUDICIAL INDEPENDENCE IN AN AUTHORITARIAN REGIME: THE CASE OF CONTEMPORARY SPAIN*

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The present Spanish regime is not a democratic one if by democracy we mean a political situation which

> supplies regular constitutional opportunities for peaceful competition for political power (and not just a share of it) to different groups without excluding any signifcant sector of the population by force (Linz, 1964).

Rather, it has been characterized as authoritarian, using that term to describe a distinct *genus* besides democracy and totalitarianism.[1] Generally, political democracy and judicial independence tend to be associated, the former being considered a necessary though not sufficient precondition for the latter. Thus, one might be inclined to expect contemporary Spain to display a strongly politicized and ideologically uniform judiciary. The first section of this paper will suggest, however, that this is far from being the case: recent survey data from a national sample of Spanish judges[2] testify to the existence of a remark-

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1. The three main features of authoritarianism as depicted by Linz (1964), may be summarized as follows: (a) the presence of limited pluralism: i.e., the existence of a coalition of political forces (not too distant ideologically) at the élite level; (b) as a result of such a relatively plural, non-monolithic base, lack of an official ideology (in the sense of a concrete, explicit formulation of principles and goals) since its existence could originate conflicts between the different sectors of the coalition. Instead, it is characterized by the general predominance of a diffuse set of basic values and attitudes; (c) the consequence both of a plural base and the lack of a structured ideology is the low profile of the regime in everyday life: no effort is made to politicize the country. On the contrary, political apathy is encouraged. (Besides, it would be difficult to politicize a country just on the basis of diffuse attitudes). The basic rules which seem to govern the daily life of an authoritarian regime, may be expressed as follows: coopt rather than repress whenever possible; do not disturb what is not a clear source of disturbance for the political system.
2. In 1972 I surveyed a sample of 194 judges (about a fifth of the total universe). Supreme Court Justices were not included in the sample.

able degree of ideological diversity among the members of the Spanish judiciary. Such a pattern is explained in the second section of the paper as the correlate of the considerable degree of independence from the political system which the Spanish judges seem to enjoy with respect to their selection, training, promotions and everyday activities. This unexpected coexistence of a non-democratic political system with a substantially independent judiciary may be seen as a puzzling paradox requiring explanation. The last section of this paper attempts to provide it, pointing to the *de facto* existence in contemporary Spain of two parallel systems of justice: the ordinary and the extraordinary (the second being in charge of all cases with an actual or potential political relevance). The existence of an independent ordinary judiciary, it is argued, is thus made possible by the existence of a parallel set of special courts closely supervised by the regime.

I. THE JUDGES' ATTITUDES: A CONSIDERABLE DEGREE OF IDEOLOGICAL DIVERSIFICATION

To establish the ideological profile of the Spanish judges, I shall analyze their conceptions of social reality (as based primarily on consensus or on coercion) and their views on the protection of civil liberties, the death penalty, divorce and the use in court of languages other than Castilian[3]. In the present Spanish context these value-laden topics may be used as touchstones to detect the existence of the postulated common, uniform and rigidly authoritarian ideological outlook.

In order to explore the extent to which the judges perceive consensus or coercion as the predominant binding cement of social reality, I confronted them with two grand models: the first model implied that for any conflict situation it would be

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The sampling procedure was strategic (only five judicial territories —out of the fifteen into which Spain is divided—were selected; these represented all major types of socio-economic contexts to be found in the country), stratified (distinguishing between District—or unipersonal—*Jueces* and *Magistrados*,—or collegial judges) and random (respondents were selected within each category for each territory with the help of a table of random numbers).

3. The official language in Spain is Castilian, commonly referred to as "Spanish." Several other languages (most notably Catalan, and to a lesser extent Basque and Galician) are also spoken in important regions. The language question (official versus vernacular languages) has always been a politically conflictive issue in Spain. The diffidence—when not open hostility—of the present regime toward regional languages seems to be based on the fear that their extended use might rekindle regional nationalism, alive—in a more or less latent form—ever since the Middle Ages. Consequently, to favor the use of regional languages has a strong politically liberal connotation in present-day Spain.

possible to find a rational solution which would be equally beneficial for each and all of the parties or groups involved in the conflict, as well as for society at large. The second model implied that in any conflict situation a solution that would satisfy equally all social groups or sectors is impossible; as a consequence, conflicts are basically unsolvable. The best that can be achieved is a compromise which will necessarily favor one sector or group more than others and is thus transitory.

The first model points to what in the sociological literature is usually labelled an order conception of society, that is, to the notion that order, consensus and integration are the normal state of society. It also clearly implies the idea of a common good, transcending the individuals' private good, with reference to which any conflict between private parties could be solved. The second model, on the contrary, clearly reflects a conflict conception[4] of social reality, namely, that social life is conflictive by its very nature. It also doubts the possibility of a just solution being worked out for any conflict since any possible solution is but an imposition of the stronger party on the weaker. Consequently, conflicts can only be appeased momentarily, but never definitively solved.

Surprisingly enough, when asked to indicate which of the two models provided a better description of social reality, just 32% of the judges chose the order model, whereas 65% referred to the conflict one (the remaining 3% refusing to answer or not knowing what to answer). Such a distribution of responses is certainly surprising. First of all, we have to keep in mind that the respondents are professional judges. That is, they are individuals devoted occupationally to the resolution of legal conflicts. Their massive adoption of the second model as a better description of social reality seems to indicate a considerable disillusion, if not cynicism, with respect to the possible effectiveness of their task. In any case, it provides a good indication of the extent to which the Spanish judges appear disenchanted with the conservative utopia of an a-conflictive social order—a significant disenchantment when it is recalled that presentation of society as a unified a-conflictive whole is one of the main themes of

4. This is not the appropriate occasion to enter into a detailed discussion of the merits, shortcomings and explanatory potential of the theoretical approaches conventionally labelled as "order" and "conflict" theories of social reality. Synthetic, somewhat oversimplified formulations of both may be found in Horton (1966), P.S. Cohen (1968) and Dahrendorf (1958). For our purposes, it suffices to note that in general a conservative implication is usually attached to the order model, whereas the conflict approach tends to be thought of as reflecting a more critical outlook.

official political propaganda. The respondents serve in an authoritarian regime with strong corporatist ideological undertones, which stress the natural tendency of societies to organic integration and present social conflict as artificial, resulting from overt bad faith or deliberate provocation.

On the other hand, the respondents are not only professional judges, but also judges trained in a legal tradition in which the belief in Natural Law plays a basic role. The idea of a Natural Law implies the possibility of a just order and denies that conflict is unavoidable or insoluble. A society ordered in full accord with Natural Law should be, by definition, just and as a consequence a-conflictive. Since the Spanish judges have been formed within such a tradition, we might have expected them to hold an order rather than a conflict conception of society. However, it is not so.

In sum, the judges' perception of the basic nature of social reality seems to be considerably detached from the dominant legal culture and official ideology of the regime. Such a departure probably results more from the judges' daily professional experience (what we might call their *déformation professionnelle*) than from an explicit, conscious disaffection with the regime or with the prevailing legal culture. A lifetime spent in considering an unending flow of conflictive situations may condition judges to perceive social reality as conflictive or potentially so, very much as doctors may tend to see all individuals as sick or potentially sick. Whatever the reason, the fact remains that the judges are far from uniformly sharing the official ideology of the regime in this respect.

Judges' attitudes toward the protection of defendants' rights and liberties provides a significant touchstone of overall judicial mentality. In this respect, the findings cannot be more conclusive: none of the 189 judges I interviewed declared himself in favor of a strict criminal system which would not let any criminal escape unpunished, even at the risk of occasionally condemning an innocent; on the contrary, all of them favored a more flexible criminal system whose main aim would be above all to avoid condemning an innocent person, even at the risk of occasionally letting a criminal escape unpunished. There is even data to suggest that in this respect the judges are more liberal than both law students and Spanish society in general[5].

5. 15% of a sample of first and third year law students at the Universidad Autónoma de Madrid that I interviewed in May 1973, declared themselves in favor of a strict criminal system. In a 1972 survey by the *Instituto de la Opinión Pública* (Public Opinion Institute)

Though legally established the death penalty in Spain traditionally was rarely applied. Most death sentences have been commuted. In the period 1909-1913, for example, a total of 116 death sentences were pronounced, of which just 8 (that is to say, a mere 7%) were actually carried out. Since 1939 this traditional pattern seems to have considerably altered. In the period 1954-1963, a total of 45 death sentences were carried out. However, in recent years, a decline can be discerned in the application of the death penalty: in the decade 1964-1974, just six persons were executed, all of whom had been tried by military tribunals. So, in the last ten years, no death sentence has been carried out in a case tried in the ordinary courts. The judges' attitude toward the death penalty provides a highly significant indicator of their overall mentality. Interestingly enough, an absolute majority (54%) believe that the death penalty should not exist, 28% consider that the death penalty should exist in legal texts but should be commuted in 99% of the cases and just 19% consider that the death penalty should exist and be applied as provided by the law (see Table 1). In this respect, the judges turn out to be even more liberal than a sample of law students: just 40% of the latter declared themselves to be unqualifiedly against the death penalty (versus 54% among the judges), whereas 24% indicated that they were totally in favor (versus just 18% among the judges). To the extent that law students may be assumed to reflect more directly the ideology on the topic transmitted by the law schools the judges might be thought to have liberated themselves from the legal culture in which they were socialized. However, judges born after 1925 (that is, those who were socialized in the legal and political culture of the present regime) are much less likely than those born before 1925 (and consequently socialized in a less authoritarian culture) to be against the death penalty (see Table 1).

In the Spanish context, principled opposition to the death penalty implies a clear liberal outlook which finds expression in the fact that judges in favor of the introduction of divorce tended to favor suppression of the death penalty (see Table 1). Though the number of cases considered is unfortunately small[6], they suggest a strong association between the attitudes with respect to both questions.

29% of a national sample of the Spanish population considered that the judges were too lenient with the defendants in criminal trials, whereas 39% considered their degree of severity as normal and just 4% as too harsh (The data are reported in *Boletín del I.O.P.*, March 1973, p. 18).

6. When the interviewing was already under way, I had to drop some

Table 1

Spanish judges' attitudes with respect to the death penalty, by age of the respondent, attitude with respect to the introduction of divorce and in comparison with a sample of law students in Madrid

The death penalty . . .	Madrid Law students†	Total Judges	Judges born before 1925	Judges born after 1925	Judges favoring divorce	Judges opposing divorce
Must exist and be applied as provided by the law	24%	19%	37%	56%	28%	53%
Should exist in legal text but should be commuted in 99% of the cases	36%	28%				
Should not exist	40%	54%	63%	44%	72%	47%
(N)	(60)	(54)	(27)‡	(27)‡	(15)‡	(18)‡

† Data from a survey I carried out in 1973 with a sample of first and third year law students at the Universidad Autónoma de Madrid.

‡ On the number of respondents, see note 6.

A further set of highly revealing data is furnished by the judges' attitude with respect to the use in court of regional languages (namely, Basque and Catalan). The question of regional languages, always a delicate issue, has become increasingly conflictive recently, especially with respect to Basque. Basque defendants in the *Tribunal de Orden Publico* (a tribunal charged mainly with the repression of political crimes) have frequently refused to answer any question not addressed to them in their regional language. The *Tribunal de Orden Publico* has tended to react in such cases by declaring the defendant guilty of contempt of Court. However, the Supreme Court has recently overruled some of these convictions and has opened the possibility of using regional languages in the Courts of Justice[7]. In this context, it is indeed significant that almost half the judges asked this question declared themselves in favor of the use of regional languages even when the defendant speaks Castilian fluently.

As expected, attitudes regarding the use in Court of regional languages are clearly associated with attitudes respecting divorce, death penalty and *foral* law.[8] On the one hand, 60% of the judges unqualifiedly against the death penalty favor the use of regional languages in the Court, but only 29% of those in favor of the death penalty. On the other hand, 65% of the judges favoring divorce also favor the use of regional languages in Court, but only 33% of those opposing divorce. Finally, 63% of those judges in favor of the maintenance of *foral* law favor also the use of regional languages in Court, but only 30% of those opposed to the conservation of *foral* law (see table 2).

We may conclude that the Spanish judiciary does not form

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questions from the questionnaire (including the ones analyzed here, which explains the number of respondents). This was the only way to overcome last minute resistance by some key members of the judiciary to the carrying out of my survey. Although it was not possible to ask all the questions to all the judges in the sample, all those to whom the questions were asked did respond; hence there are no No Response's.

7. Such a possibility is recognized by the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) for defendants who do not know how to speak Castilian. I refer here to the quite different case of defendants who though fluent in Castilian would refuse, for political reasons, to use a language other than their regional one when in the courtroom.

8. In some regions (significantly enough, those with a nationalistic tradition) bodies of rules which originated in the early Middle Ages (and in any case well before the political unification of Spain into a single kingdom) are still in force for the regulation of some legal areas (generally, inheritance law). During the nineteenth century the movement towards a general codification did not succeed in eradicating those survivals. Recently, the survival of *foral* laws (as these bodies of rules are named) has come to symbolize the survival of regional cultures, especially among more liberal persons. Paradoxically, given its strong traditionalistic character, *foral* law is thus becoming a touchstone of political liberalism.

a homogeneous and rigidly authoritarian-minded body. On the contrary, a considerable ideological diversity is found within it, including some clearly liberal patterns of thought.

II. A BASICALLY INDEPENDENT JUDICIARY . . .

Such a pattern of responses suggests that the members of the Spanish judiciary are subject to little (or in any case, fairly ineffective) indoctrination into the regime's political culture. Their general ideological outlook as reflected in the responses discussed above seems that of a politically non-mobilized institution rather than that of an intensely and thoroughly politicized elite. In the light of the responses a fairly high degree of independence of the judges from the political sphere can be hypothesized. As I have reported elsewhere in greater detail (Toharia, 1974a) this appears to be the case. The Spanish judges at present seem fairly independent of the Executive with respect to their selection, training, promotion, assignment and tenure.

Selection of new judges is entrusted to the judiciary itself. That is to day, the judiciary constitutes a self-recruiting elite[9]. The selection is made through a fairly demanding competitive examination, ordinarily held once a year[10]. Selection is thus

9. Among other consequences, such a system of selection decisively favors candidates having family ties with the legal and judicial world: 26% of the present Spanish judges are sons of judges or legal professionals; the corresponding percentages for contemporary French and Italian judges are just 13% and 16%. See Toharia (1974b).

10. The present competitive examination to enter the judiciary consists of four different eliminatory exercises. The first of these is a written essay in a limited amount of time (normally two hours) on a general legal topic decided by the examining board (which is presided over by the Director of the Judicial School—always a Supreme Court Justice—and is composed of members of the judiciary). The second exercise consists of the delivery by the candidate (in the maximum time of an hour) of five topics selected at random from a long and previously established list of 262 topics (115 corresponding to civil law, 91 to criminal law, 56 to commercial law). The third exercise consists of the oral delivery by the candidate of five more topics from a second list (also established long before the examination) of 227 topics (91 of which correspond to procedural law, 43 to judicial organization, 25 to labor law, 45 to administrative law and 15 to private international law). For the second and third exercise the candidates have, as an average, twelve minutes to develop each topic, which means that they have to rely on memorization and rote learning (and delivery) of the topics, since any time used to reflect or to organize the materials would seriously impair a candidate's chances. The fourth and last exercise consists of a practical case which the candidates have to solve. Traditionally, the elimination of candidates considered unsuitable has already taken place in the first three exercises, so this last exercise has virtually no bearing in the selection. Normally, no candidate is failed in the last exercise. All those candidates managing to get more than 5 of the possible 10 points in each of the four exercises are then ranked according to the total number of points achieved. If the number of candidates passing the competition is larger than the number of vacancies (as sometimes happens) the top ranking candidates will be appointed; the re-

Table 2

Spanish judges' attitude with respect to the use of vernacular languages in the Court-room, by attitude with respect to the death penalty, the introduction of divorce and foral† *law.*

In the court-room the use of regional tongues . . .	Death penalty: Should exist	Death penalty: Should not exist	Favor divorce	Oppose divorce	Favor *foral* law	Oppose *foral* law
Should be admitted	29%	60%	65%	33%	63%	30%
Should not be admitted	71%	40%	35%	67%	37%	70%
(N)	(14)‡	(20)‡	(15)‡	(17)‡	(16)‡	(20)‡

† On *foral* law, see note 8.
‡ On the number of respondents, see note 6.

based on the technical (rather than ideological) qualifications of the candidates. In a few exceptional cases the government may have forced the acceptance of a specific candidate through more or less explicit pressures on the members of the selecting committee, but as a rule the selection of new judges is free from governmental interference.

Once selected, the new judge has to spend a certain period (normally a year) in the *Escuela Judicial* (Judicial School) before being appointed to his first assignment. Intended at the time of its creation in 1944 to be a center for the explicit professional (and probably political) socialization of the new judges, the Judicial School has so far not managed to function effectively. Attendance at it has become a meaningless *rite de passage*. The judges I interviewed tended to be fairly critical about its performance[11].

Assignments are voluntary, that is, based on the choice of the

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maining ones, though successful in passing the examination, will have no right whatsoever—neither then nor in the future—to appointment into the corps. To be appointed they would have to pass again the whole examination and to attain a rank that would secure appointment. A candidate "who missed being selected one year because he was number twenty-six (and there were only twenty five vacancies) may fail to be selected if he is number seven the following year when here are six vacancies" (Murray, 1963). An average of 20 candidates was registered for each vacancy during the period 1961-65, thus making the examinations highly competitive. As a consequence, candidates had to prepare thoroughly: of the judges I interviewed, 64% declared that between receiving the law degree and admission into the judiciary they had devoted themselves exclusively to preparation for the competitive examinations.

Two important conclusions may be drawn from these data: (a) the *oposición* system seems to discriminate in favor of middle-class candidates, who can rely on their families' financial support and devote themselves full-time to the preparation of the competitive examination; and (b) since adequate preparation seems to require full-time dedication to study, most candidates enter the judiciary without having had previously any practical contact with the world of legal practice: two out of every three judges had no direct contact with legal practice previous to their entrance into the judiciary. However, things seem to have been changing since 1965: in the period 1965-70, the average number of candidates for each vacant post dropped to 8.6. This downward trend seems to be common to most other competitive examinations and to a large extent may be due to the fact that the economic development of the country has made competitive examinations (and the time and effort they require) less appealing as other occupational opportunities have increased. In this sense, the system of *oposiciones*, never very popular but generally perceived as the lesser evil which permitted allocation of scarce and widely sought after posts as universalistically as possible in an economically underdeveloped and highly particularlistic society, seems to be entering a serious crisis (see Junquera, 1972).

11. 58% of the younger judges (that is to say, those more likely to have attended the Judicial School, which started functioning only in 1950) give a negative evaluation of the School's effectiveness in transmitting to its trainees an adequate professional socialization. Furthermore, 88% of the judges I interviewed considered indispensable to a judge training in fields not purely legal (such as psychology, sociology and so on); just 21% considered adequate the training provided in this respect by the Judicial School.

judges. Any judge wishing to serve a given vacant post may file a formal application to the Ministry of Justice (provided he fulfills the seniority requirements for that post). If he is the only one applying to such a post, the Ministry will grant it to him automatically. If several judges apply for the same post, seniority in office will provide the basis for decision. Once assigned to a post, no judge can be removed from it against his will[12]. Nor can he be removed from the judiciary (unless found guilty of improper behavior—a finding to be made by his own colleagues, not government officials)[13].

The *cursus honorum* of the judicial career consists at present of three steps: *Juez, Magistrado* and *Magistrado del Tribunal Supremo.* The promotion from the first (*juez*) to the second (*magistrado*) is automatic: any vacant post of *Magistrado* is filled with the *juez* ranking highest in seniority. On average, it will take five years for a *juez* to be promoted *magistrado.* The distinction between *juez* and *magistrado* has nothing to do however with the nature of the tasks performed (a *magistrado* may serve as single judge in unipersonal tribunals just as *jueces* do, only in larger cities); it simply refers to rank achieved in the judicial career.

The rule of automatism in promotion is abandoned in two places: in promotion to *Magistrado del Tribunal Supremo* (Supreme Court Justice) and in promotion to certain judicial posts involving considerable power and influence, such as President of an *Audiencia* (collective tribunals deciding criminal cases in the first instance and acting as Court of Appeals in civil cases) or President of a Chamber (*Sala*) within an *Audiencia* or within the Supreme Court. In both instances the final decision lies exclusively with the government[14]. With respect to the specific case of the Supreme Court, the mechanics of promotion is as follows: when a vacancy in the Supreme Court occurs (normally

12. Except when serving in a city with less than 100,000 inhabitants, in which case he is in principle bound to apply for a new post after 10 years (though in practice this rule is never enforced). Also, when he is promoted to *Magistrado* he may be sent to any vacant post for which this category is required (though, *de facto*, he is unofficially allowed to choose his new assignment among those available at the time of his promotion). When he reaches the age of 60, he can no longer apply for unipersonal judgeships, but only for posts in *Audiencias.* He is not forced, however, to leave his judgeship.

13. The inspection of the judges' activities and behavior is entrusted to the *Inspección de Tribunales*, an office staffed with career judges and directly under the President of the Supreme Court.

14. The mechanism is similar to the one already examined with respect to promotions to the Supreme Court. The Judicial Council draws a three-member list from which the government makes the final selection.

by death or retirement of the incumbent) the *Consejo Judicial* (Judicial Council, a body formed by the highest ranking members of the judiciary) establishes a list of three candidates. The final choice among the three names lies with the Executive (which may refuse all three names and ask for a new list, though this practically never happens). Once promoted to the Supreme Court, a Justice may be transferred from one of its Chambers to any other by the Government[15]. However, in no case can a Supreme Court Justice (or any other member of the judiciary) be forced to retire before the compulsory age for retirement (set at 70 with the possibility of an extension for two more years).

On the whole, we may conclude, the judiciary enjoys independence from control by the Government. Only in the case of promotions to the highest posts of the judicial structure is such independence qualified. This constitutes, certainly, an important and significant exception. However, since it affects only the terminal steps of the judicial career it is not likely to exert a decisive influence in shaping the outlook of judges (except, of course, for those ambitious enough to adopt the ideological requirements of the sought after posts so as to enhance their eligibility).

III. . . . BUT A BASICALLY CONTROLLED JURISDICTIONAL STRUCTURE

How are we to reconcile the existence of an independent judiciary with that of an authoritarian regime? Is not such a coexistence a flagrant paradox? The answer may be that the paradox is just apparent: the judges in contemporary Spain are independent but they are powerless. Or, as a *Magistrado* I interviewed put it to me, they are independent *because* they are powerless. Their basic powerlessness stems from the fact that they control but a small fraction of all legal cases. Their jurisdiction is strictly limited to what can be described as the private sphere of social life (that is, to those conflicts between private parties the existence and solution of which makes little impact on the structure and functioning of the larger social environment). In a sense, such a situation of basic powerlessness in public affairs (that is, in affairs directly affecting the collectivity

15. At present the Supreme Court is composed of seventy Justices and is functionally divided into six Chambers of Justice. The first one is devoted exclusively to civil appeals; the second, to criminal appeals; Chambers 3 to 5 to cases involving the Public Administration; and Chamber 6 to appeals in labor cases. Thus, in a sense, ordinary courts have the last word in administrative and labor cases.

at large) is not peculiar to contemporary Spanish judges, but is common to most civil law judges[16]. However, the present Spanish regime has greatly enhanced such powerlessness, mainly through the creation of a large number of special tribunals with jurisdiction over cases which are politically conflictive (either actually or potentially). Thus, at present, the organization of justice in Spain is divided *de facto* (though not formally) into two sectors of roughly comparable size (if we take the volume of cases handled as an indicator of size): the ordinary tribunals, on the one hand, and the special tribunals, on the other.

Special tribunals are generally staffed with judges drawn from ordinary tribunals. This certainly increases their technical proficiency but it does not equate them with ordinary justice: judges serving in special tribunals are freely appointed (and removed) by the Government. They are not integrated within the ordinary administration of justice, but constitute a different administrative body, normally subordinate to ministries other than that of Justice. Their patterns of promotions and assignments are not mechanically set, but largely discretionary. That is, the judge serving in a special jurisdiction does not enjoy the same degree of independence from the Executive as the ordinary judge.

There has always been in Spain a tradition of jurisdictional fragmentation. However, the significance of the existence of special jurisdictions is totally different in present-day Spain than in old regime Spain. In old regime Spain the fragmentation of the organization of justice was the institutional expression of a society fragmented into a plurality of estates. In contemporary Spain the existence of specialized tribunals can be interpreted as an attempt on the part of the regime to limit the sphere of action of the ordinary judiciary. The special tribunals subtract cases from the ordinary courts in civil, commercial and criminal matters. A brief review of some of the more significant special tribunals[17] may give us an indication of their importance.

(a) Special Tribunals in the field of Civil Law.[18]

Labor Courts: The prevailing system of Labor Courts was

16. For characterizations of the civil and common law systems, see Merryman (1969) and Pound (1963). Generally, it can be said that the basic powerlessness of civil law judges stems from the fact that they lack control over constitutional legality and cases involving the government.
17. A more detailed examination of special tribunals in Spain may be found in Toharia (1974 c).
18. The term "civil" is used here in the specific narrow sense in which

created in the early years of the present regime to replace the former and rather complex jurisdictional situation in labor relations. The judges of Labor Tribunals are selected from judges and prosecutors with more than five years of service in the ordinary courts who have not attained the rank of *Magistrado*[19]. Once admitted into the Labor magistracy, they loose all connections with the Ministry of Justice and with the judicial career line. The new administrative corps they join is under the Ministry of Labor, and has its own internal structure and system of economic rewards. Just as the judges who apply for a post in the *Tribunal de Orden Publico* tend to be considered by their colleagues as cherishing political ambitions, those judges who apply to the Labor magistracy are viewed as motivated mainly by the considerably higher salary enjoyed by Labor judges (and perhaps also by the opportunity to escape residence in villages, since the Labor Tribunals (*Magistraturas de Trabajo*) are located in provincial capitals). A judge who leaves the judiciary to enter the Labor magistracy can, at any time, apply for readmission into the judiciary; upon readmission, time served as Labor judge will be taken into account for promotions and seniority.

The volume of activity of the Labor Courts has been very high, although somewhat lower than that of ordinary Courts[20]. In recent years, however, as the process of industrialization has significantly increased the number of industrial workers, the activity of the Labor Courts has rocketed. In 1967 their total volume was about 30% greater than that of the ordinary courts in civil, commercial and criminal areas (see Table 3). These data indicate how the existence of separate Labor tribunals has curtailed and reduced the potential power and impact on social life of ordinary courts.

(b) Special Tribunals Concerned With Commercial And Economic Life.

In the field of economic and commercial relations three main

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it is used in a civil law system, i.e., to refer to such aspects of private law as family law, property law, contract law, inheritance law, and so on.

19. The selection is very informal: candidates apply and the Ministry of Labor selects among them. Labor Tribunals seem to be very attractive to ordinary judges, probably because of their larger salaries and the fact that they are all located in cities (not villages), unlike a sizable proportion of ordinary District Courts. It is commonly estimated that some 80% of all eligible judges do apply for transfer into Labor Tribunals.

20. The competence of the labor jurisdiction extends to everything related to an existing (whether tacit or explicit) labor contract: breach of stipulated obligations, compensation for work accidents, duration of vacations, etc.

special jurisdictions should be mentioned: the Tribunal for the Defense of Commercial Competition, the Tribunal for Currency Crimes and the Tribunal for Customs and Tariffs Infractions. In spite of the potential importance of their tasks, all three tribunals now present a very low profile. They have in common two basic features: their members are freely appointed by the Executive (they are not required to belong to the judiciary) and their existence may be described as vegetative.

The *Tribunal de Defensa de la Competencia* (Tribunal for the Defense of Commerical Competition, or simply, Anti-Trust Tribunal) was created in 1963, at the time of the First Plan of Economic Development, to prevent and punish commercial practices considered damaging to free competition in economic life.

Table 3

*Volume of activity of the Labor Courts, compared with Courts of ordinary jurisdiction.**

Years	Total Number of New Cases		Total Number or Cases Resolved	
	Labor Courts	Ordinary Jurisdiction	Labor Courts	Ordinary Jurisdiction
1956	46,885	51,838	46,822	50,246
1957	52,052	50,425	50,890	49,724
1958	49,314	53,415	50,703	52,709
1959	51,573	55,987	50,815	54,232
1960	49,865	56,894	51,102	56,041
1961	44,862	57,611	44,684	56,540
1962	43,929	59,556	43,581	56,992
1963	54,981	65,436	52,941	61,913
1964	58,339	67,093	56,024	65,466
1965	63,784	67,256	62,259	65,008
1966	68,914	67,105	69,676	66,136
1967	86,233	64,384	81,476	62,049

* First instance tribunals only, that is, *Magistraturas de Trabajo* and District Courts.

Source: I.N.E., *Estadísticas Judiciales de España* (for the years indicated).

Its creation had a strong symbolic value since it conveyed official recognition of the capitalist nature of the Spanish economic system after more than two decades of largely verbal and, in any case, rather ineffective tutelary control of the state over the economy. Also, it was interpreted as an effort to adjust Spanish economic institutions to those prevailing in the European Economic Community (which Spain hoped to join eventually and where anti-trust tribunals have always existed). An anti-trust tribunal seemed necessary to smooth and control the transition from a controlled economy to an economy of free competition. However, the performance of the Tribunal has fallen short of the high hopes aroused by its creation. From March 1965, when it started to function, to January 1973, the Tribunal has handled

just 98 cases,—a really meager figure considering the enormous growth of the Spanish economy between those two dates. The internal structure of the Tribunal may account for this failure to attain the prominence which might have been expected. The *Tribunal de Defensa de la Competencia* has no judicial initiative whatsoever; it cannot proceed to investigate directly potential anti-competitive practices. Such a task lies exclusively with the *Servicio de Defensa de la Competencia* (Agency for the Defense of Competition), an administrative agency under the Ministry of Commerce. This agency conducts investigations and submits to the Tribunal only those cases it considers to be violations of anti-trust laws. The *Servicio* thus acts as a decisive filter between economic behavior and the Anti-Trust Tribunal. The Tribunal considers only the cases sent to it by the *Servicio,* and the penalties it assesses must be confirmed and approved by the Government. If there is a question of criminal responsibility, the specifically criminal aspects of the case will be referred to the ordinary courts.

The Tribunal is empowered to determine that a given anti-competitive practice should be allowed on grounds of overall economic benefit. Of the 92 cases resolved by the Tribunal between 1965 and 1972, 74 were cases forwarded by the *Servicio* in relation to potential violations of anti-trust legislation. In only 14 cases was such a violation confirmed by the Tribunal; 60 cases were dismissed. The remaining 18 cases were applications from business firms to have their anti-competitive practices approved on grounds of their general utility; approval was granted by the Tribunal in just four cases.

The Tribunal for Currency Crimes *(Tribunal de Delitos Monetarios)* was created in 1938 during the civil war as a way of preventing the flight of capital. Once the war was over, it vegetated with only occasional, scattered activity, in spite of the apparent sizable flight of capital in recent years[21]. No statistics about the Tribunal's activities are published and all information regarding them is secret. The members of this Tribunal are appointed by the Government, normally from among high civil servants of the Ministries of Commerce and Finance.

Since their creation in 1944, the Tribunals for Customs Infractions *(Tribunales de Contrabando)* have passed practically unnoticed. Structurally subordinate to the Ministry of Finance,

21. The prestigious Madrid newspaper *ABC* estimated capital flight to have reached about 1,200 million pesetas (some 20 million dollars) in 1973.

they are staffed with civil servants, freely appointed by the Government.

Unlike the Labor courts, the special tribunals concerned with economic activity do not take away from the ordinary courts a sizable volume of actual cases, but rather, just of potential ones (that is, acts now un-prosecuted but punishable under the strict terms of the law). Given the remarkable economic growth of the country over the last decade, it seems safe to assume that the number of illegal practices related to economic life must have also increased. However, the laws devised to check these practices remain largely unapplied since their application has been entrusted to non-professional tribunals directly subordinate to the Public Administration and consequently more motivated to consider the Government's interests and policies than to enforce the terms of the law strictly. There seems to be sufficient ground to confirm the suspicion that these special jurisdictions have been established, more or less intentionally, not so much to accomplish a task as to remove control over key economic problems from ordinary courts to institutions closely dependent upon the Executive. This removal is likely to increase the latter's bargaining capacity when dealing with the representatives of the economy.

(c) Special Jurisdictions Concerned With Criminal Law.

Military Jurisdiction: Traditionally, in Spain, the military jurisdiction was limited to military crimes committed by professional military or enlisted men. But since the turn of the century, the military jurisdiction has continuously expanded its sphere of competence, which has reached its peak in the present regime. The first step in this expansion came with the enactment, in 1890, of a Code of Military Justice. Article 7 of that Code contained a list of crimes to be tried exclusively by military tribunals *whether or not* the accused was a member of the military. This list included acts such as insult or defamation of military authorities (leaving the definition of an insult or an act of defamation to be established by the military courts).

In 1896 it was decreed that crimes committed with the use of explosives or flammable material would fall under military jurisdiction, whatever the condition of the accused. In 1906 the *Ley de Jurisdicciones* (Law of Jurisdictions) established the competence of the military courts in cases of insults or offenses against the armed forces committed by means of print, whether in the form of articles, cartoons, caricatures or simply allusions.

During the dictatorship of Primo de Rivera (1923-1930) the military jurisdiction gained further strength. By a decree of September 23, 1923, the military tribunals were made competent to try all cases relating to dissemination or support of separatist ideas (mainly, that is, cases concerning Basque and Catalan nationalists). A decree of April 13, 1924, established the competence of the military tribunals in cases of armed robbery. Finally, a decree of December 25, 1925, established that all attempted crimes against the head of the state would fall within the military jurisdiction.

The proclamation of the Second Republic on April 14, 1931, meant an abrupt break in this trend. A decree of April 17, 1931, abolished the 1906 *Ley de Jurisdicciones*, and a second decree (of May 11, 1931) restored the military jurisdiction exclusively to its traditional scope: military crimes committed by military men.

This state of affairs did not last long. In the Franco regime the military jurisdiction again expanded its competence at the expense of the ordinary courts. A new code of military justice enacted in 1945 established the competence of the military jurisdiction in all cases involving insults or offenses to military authorities or symbols, or to the Spanish anthem and flag (an addition to the Code of 1890). Acts of banditry and terrorism were subjected to military jurisdiction by a Law of April 18, 1947. The contents of this law were expanded and re-adjusted in 1960. An act of terrorism is so loosely defined that either a bank robbery or the kidnapping of a diplomat could be fitted under that label. This legal indeterminacy leaves wide room for maneuver to the military tribunals. They could, —should they want to—, indict the performer of practically any politically subversive act on charges of terrorism (a crime penalized with up to 30 years of prison, or the death penalty).

The military tribunals have been widely used by the present regime for the repression of anti-regime political activities. The extreme brevity of their proceedings and their traditional harshness in sentencing made them the ideal instrument for fast, exemplary punishment of subversive activities. However, since the creation of the *Tribunal de Orden Público* in 1963, most political repression has been carried out by that body. (Its creation probably resulted from strong pressures from some sectors of the military which objected to the political use of military institutions.) As Table 4 shows, the percentage of civilians tried in military courts has decreased substantially in the last years. From an

Table 4

Percentage of civilians among persons convicted by the Military Tribunals for the years 1955-66.

Year	Total convicted	Civilians convicted	Percantage of civilians in total
1955	2,406	902	38%
1956	2,143	902	42%
1957	1,972	723	37%
1958	1,735	727	42%
1959	1,684	529	30%
1960	1,674	605	36%
1961	1,513	414	27%
1962	1,208	376	31%
1963	1,358	312	23%
1964	1,375	372	27%
1965	1,331	329	24%
1966	1,447	332	23%

Source: Alto Estado Mayor, *Anuario Estadístico Militar* (several years).

average of 40% of total defendants for the years 1955-1958, it has dropped to an average of just 24% for the years 1963-1966. Even with this decrease, however, a considerable number of civilians are tried and sentenced outside the ordinary courts.

Tribunal de Orden Público (State Security Tribunal): Of all special jurisdictions the *Tribunal de Orden Público* (henceforth T.O.P.) is the newest and the one which has aroused the strongest reactions. Created in 1963, it is staffed with ordinary judges (usually appointed there at their request). The T.O.P. is located in Madrid but has competence throughout the nation in cases relating to: the security of the state; acts against the head of state, the *Cortes* (Corporative Parliament), the Council of Ministers; acts subversive of the form of government, such as rebellion, sedition, public disturbances, illegal propaganda (whether political or social); kidnapping of minors; threats and coercions; and publication of state secrets.

In the last decade the T.O.P. has been very active and highly publicized by the mass media on account of the countless incidents it has occasioned (such as demonstrations against its existence, defense lawyers' boycotts of its activities, etc.). However, no statistics are available on the T.O.P. since such information is considered secret. All that is known is that trial number 1,001 was held in December 1973 (a fact stressed by the press). This means an average of 100 cases yearly have been handled, a considerable number, in the light of the fact that most cases involve several defendants.

The judges of the T.O.P. are appointed freely by the government (the judges must, however, belong to the judiciary). At first, prospective candidates (for judge and prosecutor) apparently exceeded the posts available. Generally speaking, it may

be hypothesized that judges requesting an appointment in the T.O.P. are those with ambitions (either professional or political) who want to make themselves known—and appreciated—by the judicial and political authorities. As a judge told me, "the Ministry of Justice will never forget them afterwards, and they can be sure of fast promotions to one of the discretionarily granted appointments." Also, the incentive of serving in Madrid (a factor of the utmost importance in such an administratively centralized country as Spain) should be kept in mind.

However, as the T.O.P. has enjoyed a bad press (both on account of its unabashed politicization and of the unrelenting opposition of the legal profession) appointment to it has become less and less desirable for the judges. Such an appointment has come to imply in the eyes of society an overt, unquestioning identification with the political regime. The Government seems to have recently encountered some troubles in filling vacant posts in the T.O.P. In January 1973, a Prosecutor even took the unprecedented step of appealing to the Supreme Court against his forced appointment as Prosecutor of the T.O.P.

The strong negative reaction to the T.O.P. results mainly from its undisguised political character. The last meeting of the Spanish Bar Associations (held in León, in June 1970) produced a statement (unanimously approved) asking for the dissolution of the T.O.P. Also, during 1970 and 1971, most lawyers tended to boycott the functioning of the T.O.P. simply by refusing to defend cases before it. This open denial of its legitimacy was considered by the T.O.P. to be contempt of court, and as a consequence, several lawyers were indicted and later tried by the T.O.P. itself. The attempt to boycott the tribunal came to a halt when the T.O.P. decided to sentence defendants even if their counsel refused to defend them. In general, it can be said that the T.O.P. followed a very tough line in dealing with the lawyers' hostility, which certainly did not contribute to its popularity. Talk about the dissolution of the T.O.P. is common—even in official circles—but there is nothing so far to indicate that this is likely to happen in the near future.

In sum, the situation of the ordinary courts under the present Spanish regime is characterized, on the one hand, by the considerable degree of independence allowed to the judges (with a consequent lack of political indoctrination and the existence among them of a certain ideological diversity) and, on the other by the sharply curtailed and relatively unimportant sphere of action afforded them. This pattern should not be interpreted

however to mean that the present regime has not attempted to control the administration of justice. Rather, the point I have been trying to establish is that the regime has done it in a purely "authoritarian" style; that is, avoiding as much as possible the political mobilization of individuals and institutions. As has become apparent in the previous pages, the course followed has been the systematic reduction of the area of competence of ordinary tribunals. In this way, the regime has not had to control the judiciary in order to control those areas which it considered essential. Independence of the judiciary and control of the administration of justice have thus been made compatible. With such an elaborate, fragile balance of independence and containment of ordinary tribunals the political system had much to gain in terms of external image and internal legitimacy. By preserving the independence of ordinary courts (even at the cost of reducing them to practical powerlessness) it has been able to claim to have an independent system of justice and, as such, to be subject to the rule of law. For the traditional touchstone for determining if a political system is subject to the rule of law has been that its courts be independent, not that they be strong.[22]

22. It might be suggested that the present situation of the ordinary administration of justice in Spain provides a prototypical instance of the way in which authoritarianism (as contrasted with democracy or totalitarianism) influences the organization of justice. The contrast is illuminated if we visualize the situation of the administration of justice in all three ideal types of political regimes along two main dimensions. One dimension is the extent of the competence allowed to the ordinary jurisdiction. When the power to administer justice is not fragmented into a plurality of unrelated tribunals, but lies concentrated exclusively in the ordinary tribunals, we can speak of a *comprehensive* administration of justice (and as such, strong, since its competence covers all possible types of legal cases). Besides jurisdictional reach, other factors certainly intervene in the determination of the strength of a court or type of court. However, for our purposes (and on grounds of simplicity of analysis) they can be momentarily ignored. In the opposite situation, we can speak of a fragmented (and as such, and with the qualifications already indicated, weak) administration of justice. The second dimension is the situation of the judge with regard to the political system. The judge may be basically independent of the political power, in the sense that the latter is not likely to exert any major influence on his career and/or decisions, or dependent, in the opposite case.

Combining these two dimensions, we can generate the following table:

		Ordinary jurisdiction	
		Comprehensive	Fragmented
Ordinary Judge	Independent	I	II
	Non-Independent	III	

Box I represents the case in which ordinary tribunals are strong (that is, the extent of their competence is not curtailed by other parallel tribunals) and the judge independent of the political power:

I submit—very tentatively and always in ideal-typical terms—that this might be said to be the case of the administration of justice in a democracy. Box III corresponds to an administration of justice which enjoys a jurisdictional monopoly but whose members are closely controlled by the political power. This could be hypothesized as the most likely situation of the administration of justice under totalitarianism. Finally, Box II represents a case in which judges are independent, but the ordinary jurisdiction in which they serve is weak: this is the case of present-day Spain. By extension, it could be said to represent the most likely situation of the administration of justice within authoritarian systems (in Linz's [1964] sense of the term).

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