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Judicial Institutions and the Dilemmas of Power-Sharing and Control in Authoritarian Regimes¹



Importante

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Resumen

En este artículo argumentamos que los dictadores utilizan las instituciones judiciales (fiscales, jueces y tribunales de varios tipos y niveles) para resolver sus dos problemas fundamentales: cómo controlar a las masas y cómo mantener unida a la coalición gobernante. Argumentamos que las instituciones judiciales pueden servir para resolver el problema del control mediante el monitoreo de los opositores existentes y potenciales, y para afrontar el problema de la cohesión de la coalición gobernante haciendo creíbles los compromisos del dictador con los miembros de su coalición: bien recompensándolos mediante la creación de jurisdicciones especiales para lidiar con sus propios asuntos (por ejemplo, militar, laboral o eclesiástica), bien garantizando la neutralidad (relativa) de ciertas instituciones (judiciales) para la resolución de conflictos dentro de la élite gobernante. Ilustramos estos distintos roles mediante los casos de México bajo el régimen hegemónico del PRI y de España bajo el Franquismo.

Palabras clave: instituciones judiciales, regímenes autoritarios, fiscales, jueces, cortes especiales, represión, control, cooptación.

Abstract

We argue that authoritarian leaders use judicial institutions (different types and levels of prosecutors, judges, and courts) to deal with their two fundamental problems: The problem of authoritarian control, i.e. the relation between the autocrat and the masses, and the problem of authoritarian power sharing, i.e. the relation between the autocrat and his ruling coalition. Specifically, judicial institutions can contribute to solve the problem of control by monitoring actual and potential political opponents. We also sustain that they can contribute to solve the problem of authoritarian power-sharing by making credible the commitments made by the authoritarian leader to the members of his ruling coalition, either by awarding them with the privilege of special jurisdictions to deal with their own affairs (e.g. military, labor, or ecclesiastical), or by guarantying the (relative) neutrality of certain (judicial) institutions to solve intra-elite conflicts. We illustrate these different roles of judicial institutions in the cases of Mexico under the hegemonic system of the PRI, and of Spain under Francisco Franco.

Keywords: judicial institutions, authoritarian regimes, prosecutors, judges, special jurisdictions, repression, control, cooptation.

Introduction

Authoritarian regimes have historically dealt in very different ways with judicial power. In Egypt, Hosni Mubarak empowered the Supreme Court (Moustafa 2007); in Chile, Pinochet bragged about maintaining judicial independence of ordinary Chilean judges but, simultaneously, he grossly expanded the military jurisdiction (Correa Sutil 1997); in Spain, the Francoist dictatorship expanded the military jurisdiction even further, and various special jurisdictions were created for political repression; but, in exchange, some degree of independence for the ordinary justice was preserved (Toharia 1975); in Burma, the military dictatorship created special jurisdictions; its aim was not to insulate ordinary judges from politically delicate cases, but to increasingly defeat judicial independence (Cheesman 2011); in Mexico, the Public Prosecutor served at the pleasure of the President and was in charge of creating (sometimes inventing) legal files to prosecute and repress opposition figures (Magaloni 2010). In sum, examples of authoritarian empowerment/subordination of judicial institutions abound and they are more intricate and intriguing than the well-known pressures to subordinate and/or co-opt the judiciary (Levitsky and Way 2002). Why authoritarian regimes empower some judicial institutions and weaken others? What is the role of judicial institutions under authoritarian regimes?

We argue that authoritarian leaders use judicial institutions to deal with their two fundamental problems: the problem of authoritarian control, i.e. the relation between the autocrat and the masses, and the problem of authoritarian power sharing, i.e. the relation between the autocrat and his ruling coalition (cfr. Svobik, 2012).² Specifically, we posit that judicial institutions can contribute to solve the problem of authoritarian control by monitoring actual and potential political opponents. We also sustain that they can contribute to solve the problem of authoritarian power-sharing by making credible the commitments made by the authoritarian leader to the members of his ruling coalition, either by awarding them with the privilege of special jurisdictions to deal with their own affairs (e.g. military, labor, or ecclesiastical), or by guarantying their involvement in certain judicial institutions to solve intra-elite conflicts.³

We connect the literatures on institutions in authoritarian regimes and on judicial politics in authoritarian regimes that, paradoxically, have no dialogued much between them.⁴ On the one hand, our account is grounded and builds on the insights of the literature on authoritarian regimes, particularly the one that connects authoritarian institutions with the survival of these regimes. This literature has so far principally

² The need to solve the coordination problems among the regime elites and to maintain the cohesion of the authoritarian ruling coalition has been also pointed out, among others, by Barros (2002), and Ginsburg and Moustafa (2008).

³ The later tends to occur in “contested autocracies” (Svobik 2012), of which Schedler’s “electoral authoritarianisms” are a key subset where the role of institutions is more relevant (Schedler 2013). In some cases, as we will see, the supreme courts have been used for this purpose.

⁴ One recent example of this lack of dialogue is Brancati’s article on authoritarian institutions, which does not contemplate at all judicial institutions or judicial actors (Brancati 2014).

focused on a limited number of political institutions –namely, parties, legislatures, and elections, and on how these serve either to co-opt opposition forces (e.g. Gandhi and Przeworski 2007; Gandhi 2008; Smith 2005), or to alleviate credibility problems present in power-sharing agreements (e.g. Boix and Svobik 2013; Magaloni 2008). We complement this literature by focusing on how judicial institutions and actors may contribute to the autocrats’ strategies to stabilize their rule and remain in power.

On the other hand, our view of the role played by judicial institutions under authoritarian regimes builds on existing accounts (notably, Ginsburg & Moustafa 2008), but it also differs and tries to go beyond these. Firstly, our account grounds the functions that judicial institutions may play in authoritarian regimes in institutional theories (e.g. they help to solve the monitoring, credibility, or coordination problems). Secondly, we define clearly and precisely the key dimensions of “neutrality” and “scope” of judicial institutions in authoritarian regimes.⁵ Thirdly, we claim that there is a crucial distinction between judges and prosecutors and that their interaction is critical for serving the dictator’s purposes. Finally, we also distinguish among different types of special jurisdictions, which can be relevant both for the problem of authoritarian control and for the problem of power sharing.

The remainder of the article is organized as follows. First, we introduce our basic theoretical framework, including the distinction between the two sets of judicial actors: judges and prosecutors; and two key concepts related with the judicial power: “neutrality” and “scope”. Then, we develop our theory of judicial institutions under authoritarian regimes and provide hypotheses to explain why and how a dictator would use judicial institutions to solve the fundamental problems of authoritarian control and power sharing. In this part, we also distinguish between two different types of special jurisdictions (some devoted to repression, and others aimed at awarding key actors of the ruling coalition for their support). In the last section, we illustrate our hypotheses with the analysis in depth of two case studies: Mexico under the PRI-regime and Spain under Franco. We have chosen these two countries to explore the validity of our premises because they have experienced prolonged and stable dictatorships with judicial institutions that were useful to the regime and never represented a real challenge to the political power. Specifically, in Mexico and Spain we find interesting mixes of passive, though relatively neutral ordinary judges, and active prosecutors biased in favor of the autocrat playing a monitoring function to help solve the problem of authoritarian control (we define the concept of neutrality below). Moreover, interestingly, in both countries -though in different ways- the military jurisdiction contributed to solve the problems of control and power sharing. Finally, in

⁵ Ginsburg and Moustafa correctly identify the dimensions of “autonomy” and “scope”, but, as we will show, some ambiguity regarding the first dimension remains that can be theoretically consequential. Their definition of *scope* is also not always clear. For instance, citing Toharia (1975), they argue that the “scope of judicial involvement” is crucial because authoritarian regimes can control such scope by channeling different cases to different arenas (Moustafa and Ginsburg 2008, 4). But it is not clear whether “scope” is related to the number of issue areas for which there are special courts or, alternatively, to regular or special courts with an expanded jurisdiction.

Spain, but not in Mexico, special jurisdictions devoted to political repression and elites' rewarding were created.

Definitions and Distinctions of Judicial Institutions Under Autocracies

The literature on judicial institutions in authoritarian regimes has made considerable progress showing that these institutions are not totally subservient to authoritarian power and, therefore, politically irrelevant. Moreover, that judicial institutions are much more than mere “window dressing” has been shown for a considerably large and varied sample of authoritarian regimes (Barros 2002; Ginsburg and Moustafa 2008; Hilbink 2007; Moustafa 2007). However, these studies usually focus on a single salient court, such as the Supreme Court or the Constitutional Tribunal (e.g. Moustafa 2007; Barros 2002), or on the Supreme Court and a subset of the lower courts (Hilbink 2007). Moreover, for all their virtues, these studies tend to provide somewhat vague definitions of the concepts of judicial independence, judicial autonomy, and judicial power under dictatorship, and usually argue that “some”, “limited”, “not too much” of these two elements must be present in order for the courts to play a relevant role under these regimes.

In contrast, we depart from Svoblik's strong assertion that one of the two key features of authoritarian regimes is that, by definition, there can be no independent authority “with the power to enforce agreements among key political actors” (Svoblik 2012, 2).⁶ However, we also posit that judicial institutions are much more than “window dressing” in authoritarian regimes and that in order to be politically relevant these institutions should not be completely subordinated to the autocrat. In order to make that these two propositions are consistent, we first precisely define two central concepts of judicial institutions in authoritarian regimes, which we are calling “neutrality” and “scope”. Additionally, we introduce a crucial distinction between two different sets of judicial institutions: judges and prosecutors.

“Neutrality” and “Scope” of Judges and Prosecutors in Authoritarian regimes

Any justice system has two key sets of institutions with their corresponding crucial actors: (1) the prosecutorial set, in which prosecutors of different types and levels are in charge of detecting, investigating, and taking cases to court for an eventual trial, and

⁶ According to the other key feature, the use of brute force is the “ultimate arbiter of conflicts in authoritarian politics” (Svoblik 2012, 2).

(2) the administration of justice set, in which judges sitting in different types and levels of courts decide over the cases that are brought before them.⁷

Under democracy, two features of judicial institutions are particularly relevant to analyze whether –and, if so, how- they can become effective means to obtain certain outcomes. The first is their degree of independence. At the broadest level, independence of judicial institutions and actors “expresses the aspiration that judicial decisions should not be influenced in an inappropriate manner by considerations judged to be normatively irrelevant” (Vanberg 2008, 202). In the most basic scheme of courts under democracy as third-party dispute settlers (Shapiro 1981) independence breeds the credibility of judicial decisions and thus is the bedrock for their legitimacy before the parties in the dispute, the political actors, and the public at large. The second key feature of judicial institutions is related to their capabilities or, more generally, their powers. In general, judges are more powerful the broader the set of parties that can bring their disputes to them (*access*), the broader the set of issues they can resolve (*scope*), and the broader the legal base they have to use to decide on them (*review powers*) (Ginsburg 2003).

In authoritarian regimes things are different. Interestingly, and in contrast with other authors such as Toharia (1975), Ginsburg and Moustafa, tend to use the expression “autonomy” rather than “independence”, but they do not define “autonomy”, nor do they explain if there are any differences between both. Also, sometimes they are not fully consistent when arguing if real judicial independence or autonomy can exist or not in an authoritarian setting. For instance, they sustain that “formal judicial independence can clearly exist within an authoritarian state” –meaning “institutional autonomy from other branches of government”-, even if they recognize that it can be “insufficient by itself to produce effective checks on power”. Additionally, they sustain that the success of the “regime-supporting functions” than courts can play under dictatorships “depends upon some measure of real judicial autonomy”. However, when discussing some of these functions, they also argue that courts, under dictatorships, can have no real autonomy. For instance, when analyzing the social-control function they say: “One might categorize the levels of autonomy of courts involved in implementing regime policies, ranging from pure instruments in which outcomes and punishment are foreordained to situations of relative autonomy in which courts can find defendants innocent” (Ginsburg and Moustafa 2008, 15-16; 13; 4).

We build on the premise that it does not make sense to think of independent institutions of any kind under dictatorships (Svolik 2012).⁸ Nonetheless, we sustain

⁷ The bulk of social science research on judicial institutions focuses on courts and judges, forgetting the prosecutorial organ and the prosecutors. Strictly speaking prosecutors are part of the criminal justice system, i.e. their job is the prosecution of *crimes*, understood as violations of a law in which there is injury not only the victim but also to the public. Because crimes can take place in any area of political or social life –a family dispute, a business transaction, a sports venture, a political campaign, or a government decision-, the functioning of the criminal justice system affects all areas of social and political life, making the prosecutors and the prosecutorial organ an essential part of any justice system (see Tonry 2012).

that, under certain circumstances, judicial institutions under authoritarianism can be *neutral* in their decisions, particularly vis-à-vis the different groups of the ruling coalition, in the sense of not being totally biased in favor of the interests of any of those actors. In general terms, judicial institutions and judicial actors under authoritarian regimes would share the broader goal of wanting the regime and their own benefits to survive, but they would not necessarily share the interests of a particular dictator or a particular group within the ruling coalition. They are dependent from the regime but can be neutral with regard a particular dictator and members of the ruling coalition.⁹ This is more clearly seen in institutionalized authoritarian regimes where the identity of the dictator changes but the dictatorial nature of the regime remains. In these settings, dictators may be interested in creating, for instance, neutral supreme courts in order to provide for the ruling coalition a venue where conflicts among them can be solved with a certain degree of neutrality.¹⁰ Notice also that the relative degree of neutrality towards groups of the ruling coalition can vary across different types and levels of courts and prosecutors.¹¹

In relation to this, the capabilities of judicial institutions under authoritarian regimes are also important, but in these regimes what becomes crucial is the *scope* of these institutions' decisions, because their review powers (i.e. their capacity to check and undo an autocrat's decision) would tend to be minimum. This is the case because authoritarian constitutions tend to institutionalize the interests of the regime and judges have to uphold them. Or, if the regime's constitution were liberal on paper, then the judicial review powers would be minimal to impede judges to become a threat to the regime. In turn, under autocracy prosecutors' scope in terms of the set of issues *and* persons they can pursue, and the discretion they have to choose which crimes to investigate and how they investigate them, would tend to be very wide.

Notice that the two basic features of judicial institutions, "neutrality" and "scope", apply to both judges and prosecutors. Moreover, notice also a key difference between prosecutors and judges that can affect the institutional design of the justice system: While the former are "active", the latter –notwithstanding differences among judicial systems- are "passive". In other words, judges normally only decide on the cases that are brought to court by someone else (in the criminal justice system generally by

⁸ In a similar fashion, Schedler (2009, 331) sustains: "Authoritarian rulers cannot tolerate genuine institutional autonomy. They will always strive to constraint, contain and control their own institutional creations." Consequently, we do not use the concepts of judicial autonomy or judicial independence in our theoretical framework.

⁹ If they don't, and they are act as if they were independent of the regime, then they would be undermined, sacked, or worse, by the dictator. In other words, the dictator would not tolerate individuals or institutions who want to undermine the regime's foundations.

¹⁰ Alternatively, autocrats can count on other neutral institutions (in the sense we have already defined this term) and resort to judicial institutions to repress different groups of the ruling coalition, as was the case of the Supreme Court in the USSR (we thank Juan Antonio Mayoral for bringing this example to our attention). In this case, they would be using judicial institutions for the purpose of repressing and controlling, not for power-sharing.

¹¹ This would be related to what Ginsburg and Moustafa (2008) call "regime/state" fragmentation, which took place, for instance, in Pinochet's Chile, when there were divisions within the military regime because the Air Force, the Navy and the Army disagreed among them and each had a separate force to back their preferences (cfr. Barros 2002).

prosecutors). In the famous words of Hamilton, judges do not have “will but merely judgment”. In contrast, prosecutors have both will and judgment, they can actually decide whether to go after specific cases in order to investigate crimes that have been committed (and to prevent others that could be committed). Moreover, after they decide which cases to pursue they also have discretion to decide whether or not to take a particular case to court. In essence, prosecutors have the keys that open the courtroom’s door in criminal cases (cfr. Tonry 2012).¹²

The institutional design of the justice system involves, then, combining in a specific way the institutional actors –judges and prosecutors– and their institutional features – neutrality and scope. For instance, in an autocratic regime it may be better to have ordinary courts that are relatively neutral, but whose scope is limited (so that potential effects of decisions can be better controlled), and biased prosecutors (towards the dictator) with a broader scope so that the autocrat can monitor political opponents and use prosecutors as his “legal arm”. More specifically, we argue that the institutional design of judicial institutions under autocracy would respond to the problem they are addressed to solve: Control and/or power sharing. In what follows, we make use of institutional theories and of our own theoretical framework to hypothesize on the particular institutional architecture that judicial institutions should display given the different roles that they play in authoritarian regimes.

The Autocrat’s Dilemmas: Control and Power-Sharing

The recent literature on authoritarian regimes has shown that institutions in such regimes are more than “window dressing”, and that institutional choice determines the mix of repression and cooptation these regimes need to survive. Some institutions, such as political parties, legislatures –particularly those were opposition parties hold seats-, and semi-competitive elections, have proved to be particularly useful to extend the tenure of the dictatorship (e.g. Brownlee 2007; Gandhi and Lust-Okar 2009; Gandhi and Przeworski 2007; Smith 2005; Svobik 2012). Different functions have been attributed to the above-mentioned institutions. For instance, whereas Gandhi and Przeworski (2006, 2007) sustain that political parties and legislatures serve to channel the demands of relevant social groups and to co-opt the opposition,¹³ Svobik (2012) emphasizes the role that parties and legislatures can play for facilitating intra-elite

¹² There is a vast and important literature on “judicial activism” that underscores proactive moves by judges, such as making bold interpretations of law, creating judges’ associations, or providing guidance to victims’ associations (see, e.g. Shapiro 2013). Nonetheless, it is accurate to characterize judges as passive in the sense that in general they have to be activated by a party that brings a case before them, whereas prosecutors are active because they can go after cases they deem important.

¹³ According to these authors, autocrats “often establish narrow institutions, such as consultative councils, juntas, and political bureaus, as a first institutional trench against threats from rivals within the ruling elite”. But, “when they need to neutralize threats from larger groups within society and to solicit the cooperation of outsiders, autocrats frequently rely on nominally democratic institutions”, such as legislatures and political parties, which allow them to broaden “the basis of support for the ruler” and to involve the opposition “in the ruler’s survival” (Gandhi and Przeworski 2007, 1280).

bargains between the dictator and his supporting elites (the “problem of authoritarian power-sharing”).¹⁴

The inexistence in authoritarian regimes of an independent authority able to enforce agreements and to hold the government accountable creates serious commitment and monitoring problems. The above mentioned institutions can play a crucial role for dealing with these problems, though only, according to Svulik, if the threat of rebellion by the ruling elite is credible enough (Svulik 2012). He also claims that the dictator has to face as well the threat that emerges from the unsatisfied masses excluded from power (the “problem of authoritarian control”). Besides the role that the military, the police, or other security agencies can play in the repression of the opposition, political parties can also serve the purpose of co-opting it.¹⁵ Paradoxically, in spite of the great importance attributed by these authors to formal institutions, they have largely overlooked the role played by courts, judges and prosecutors in authoritarian contexts.

Monitoring, Authoritarian Control, and Judicial Institutions

Dictatorial regimes and rulers rely on two basic instruments for dealing with the external opposition; namely, repression and the mobilization of support through cooptation (Wintrobe 1998; Desai et al. 2009). Our contention is that judges, prosecutors, and courts can contribute to the first strategy. Concerning repression and social control, the judiciary may be another piece of the regime’s security apparatus and thus be used to deal with politically sensitive cases and to sideline opponents. Specifically, in order to optimize the combination of the main available strategies – sticks and carrots- the autocrat needs information about the real intentions of the opposition, the nature of their demands, their strength, and their capacity to act in a coordinated fashion. Given that repression –even if always available under autocracies¹⁶- is a rather costly choice, certain configurations of the judicial system can help the dictator to be more selective and efficient in the use force and to avoid turning to paralegal violence. Undoubtedly, prosecutors and judges can help the dictator to obtain relevant information about the opposition and to monitor their activities.¹⁷ But he can also use prosecutors and special courts and jurisdictions

¹⁴ More specifically, he focuses on “high-level, deliberative and decision-making bodies within both authoritarian parties and legislatures”, such as politburos and councils (Boix and Svulik 2013, 301).

¹⁵ Svulik sustains that “regime parties under dictatorship serve to co-opt the most capable and opportunistic among the masses” (Svulik 2012, 13).

¹⁶ As Svulik claims: “for every institutional solution of a political conflict under dictatorship, there is a crude alternative in which force plays a decisive role” (Svulik 2013, 11).

¹⁷ Sievert (2013, 19) claims that autocracies “can have an incentive to create an independent court in order to learn information about the public regarding their willingness to challenge the status quo; information they would not otherwise have, or may have to pay a higher cost to obtain”. We believe that different types of judicial neutrality can be found under dictatorships, and we share with Sievert and others the positive contribution this neutrality combined with scope can have for the regime. But, contra Sievert, we believe that no institution is really independent or autonomous, particularly from the executive, under dictatorships.

(notably, but not only, the military jurisdiction) to harass and repress the opposition while keeping up the appearances of legality.¹⁸ Under autocracies, as Svobik claims (though, in his case, referring to parties and legislatures), “nominally democratic institutions serve quintessentially authoritarian ends” (Svobik 2012, 13).

In a dictatorship, if judicial institutions survive (or if new judicial institutions are created) is because they are useful, in different ways, to the autocrat.¹⁹ In different authoritarian regimes some judicial institutions may be more neutral and have a greater scope than others, but we claim that empowerment would tend to be beneficial to his regime in various ways. However, it is also true, as Schedler puts it, that “the institutional creatures the authoritarian regimes breeds are not meant to grow and flourish in liberty. They are meant to be tame and useful domestic animals”.²⁰ Based on our distinction between judges and prosecutors, we argue that the combination of non-neutral prosecutors -that enjoy considerable scope- with neutral judges -with limited scope- is an efficient combination of judicial institutions to play a monitoring function that can help the autocrat to solve the problem of control. Specifically, judges of the ordinary justice system can help the autocrat monitoring the opposition, particularly if they are competent to deal with crimes of political nature; that is, if these crimes have not been subtracted from their jurisdiction.²¹ Besides, a Supreme Court with no real judicial review powers would tend to systematically reject all the appeals presented by citizens in politically delicate matters, denying the writs of habeas corpus, and/or ignoring the cases of tortures and disappearances presented to the Court.

As we have already anticipated, prosecutors are typically non-neutral vis-à-vis the head of the executive power in autocracies: This makes prosecutors particularly useful to play the monitoring function and deal with the problem of authoritarian control.²² Specifically, they can be a key element in the legal control of the opposition, serving as a “police patrol” mechanism of monitoring closely supervising and controlling the other actors activities (potential or real opposition, in our case) “with the aim of

¹⁸ No doubt, autocracies can –alternatively or complementarily- opt for illegal repression strategies and brutal force. Clandestine repression could be the consequence of courts being considered either inefficient or problematic (we thank Robert Barros for this suggestion). Svobik does not elaborate much on this crucial distinction between clandestine repression and “judicialized” repression” (Aguilar 2013; Pereira 2005).

¹⁹ Regular judicial institutions that help solve private and local conflicts of course exist, and they may be formal or informal (such as judges of the peace, a council of elders or similar). Here we mean judicial institutions that deal with politically salient cases.

²⁰ Questions such as control of the appointments (at least to the highest post of the judiciary), promotions, sanctions, removals, etc., have been abundantly quoted in the literature as instruments manipulated by dictators. However, it is also true that “as soon as political institutions are granted minimal margins of power and autonomy, they can turn against the dictator (...). Even if institutions make autocracy work, and augment the authoritarian ruler’s *probability* of surviving in office and governing effectively, they still contain the *possibility* of eroding authoritarian stability and governance” (Schedler 2009, 331; 337; author’s emphasis). In our framework, this would happen if and when judicial institutions become independent from the regime, most likely when the power of the autocrat is fading.

²¹ However, even if their jurisdiction has been heavily restricted, they can always play a role of social control for the autocrat, as will be seen in the Spanish case.

²² The police and the investigative services generally work in coordination with the prosecutors, sometimes under their direct supervision. A special police or investigative corps could play some of the functions that we assign to prosecutors.

detecting and remedying any violations of [the regime's] goals and, by its surveillance, discouraging such violations" (McCubbins & Schwartz, 1984, 166). Notice that because judges are passive but prosecutors are active, the more important actor in the justice system to play the "police-patrol" monitoring role under autocracies would be the prosecutor. Specifically, in these regimes non-neutral prosecutors are able to investigate opposition groups, get information about their activities, and build "legal leverage" to be used by the regime in negotiations with them. In other words, prosecutors can become the "legal arm" of the dictator. The greater the prosecutors' scope the more efficient they could be in performing this function. This information is fed to the autocrat who uses it to then make a choice between stick and carrot.

A complementary strategy of the autocrats to control and repress the opposition consists in creating special courts for dealing with particularly relevant problems for the regime. According to Toharia (1975) and Sievert (2013) the dictator is more likely to not encroach upon ordinary courts dealing with innocuous issues for the regime, when he has already created special courts to prosecute his enemies.²³ In other words, as we have already anticipated, the dictator does not care much for lower ordinary courts as long as the scope of these courts is severely limited, making them harmless for his survival and the stability of the dictatorship. Interestingly, in our framework the dictator's special courts would always be non-neutral (because they would be biased towards one actor within the governing coalition) but they can have either a limited scope (because they would be devoted to the prosecution and judging of particular crimes and/or actors within that specific jurisdiction, e.g. labor, or ecclesiastic courts) or an extended scope to ascribe to it repressive competences to serve the regime's interests (this would typically be the case of a military jurisdiction with competences to judge civilians for certain crimes).

If dictatorships rely very heavily on the military to rule is because, when facing the dilemma between repression and cooptation, they have opted out for the first strategy, typically because of the existence a "mass, organized, and potentially violent opposition" (Svolik, 2012: 125).²⁴ However efficient in the sort run, this choice entails a moral hazard in the long run: When the regime decides to expand the military's autonomy for fighting against the rebels, he might be sowing the seeds of its own destruction by empowering too much the actor more likely, and apt, to take power by force. The key is to give the military enough incentives to defend the regime (vested interests) without attributing it a pivotal role in politics (Svolik, 2012).

²³ Following Toharia, Moustafa and Ginsburg (2008, 17-8) argue that the more independent the ordinary judiciary under a dictatorship, the higher the number of special jurisdictions. Schedler (2009, 333) also includes "fragmentation" of the judiciary in the "menu of judicial manipulation" used by the autocrats.

²⁴ Differently, according to Gandhi and Przeworski (2007), the intensity of the threat posed by the opposition is a good predictor of autocracies' level of institutionalization (the latter is measured according to the political parties with representation in the legislature). And, at the same time, an adequate level of institutionalization contributes to lengthen the tenure of authoritarian regimes.

One of the possible ways to empower the military while keeping it loyal to the regime, which has been overlooked by the literature,²⁵ is through the creation –or, more frequently, the expansion- of the military jurisdiction. The purpose of this special jurisdiction is to militarize the repression of the civilian opposition, which typically entails faster judicial processes (summary trials), considerably less formal guarantees, and fairly harsher sentences (softer for military officials who commit crimes in defense of the regime), all of which is obviously related to the problem of authoritarian control.²⁶ Once the main threats coming from the masses have been suppressed, and once the regime enjoys enough stability and confidence, the more logical movement from the point of view of the autocrat would be to return to civilian judicial institutions the previously subtracted parts of their jurisdiction, while maintaining other military privileges –such as the right to prosecute their own people, or some economic advantages- in order to avoid military unrest.

Credible Commitments, Authoritarian Power Sharing, and Judicial Institutions

Most dictators do not directly control enough resources to govern alone and, therefore, seek the support of notables with whom they promise to share power. This creates, according to Boix and Svolik (2013, 300), “the central dilemma of any dictatorship, which is to establish a mechanism that allows the dictator and his allies to credibly commit to joint rule”. The main question that emerges is: Will the dictator continue to be loyal to the supporters who launched him into office after he consolidates his rule? Resolving this credibility problem is particularly important given that the most serious threat that dictators’ face emanates from within their support coalition (Geddes 2003; Haber 2006). Boix and Svolik argue that because in authoritarian regimes commitments cannot be enforced by an independent authority, “power-sharing is ultimately sustained by the ability of the dictator’s allies to credibly threaten a rebellion that would replace the dictator should he violate the power-sharing agreement” (Boix and Svolik 2013: 300. See also Svolik 2009).

Other scholars, however, argue that institutions can help the dictator to put and maintain together its ruling coalition (Albertus and Menaldo 2011; Magaloni 2008). For instance, Magaloni argues that one solution to this dictator’s dilemma is to allow for the existence of a parallel political organization that can guarantee to its members that their investment in the existing autocratic institutions will pay off over the long run (Magaloni 2008, 722). Specifically, Magaloni posits that autocratic political parties can

²⁵ Regarding military jurisdiction, Svolik has contemplated the following questions: “jurisdiction in the fight against (...) «subversives»”, “legal impunity for internal repression” and “legal framework that allows the military to participate in internal repression” (Svolik 2012, 124, 125, 127), but he has not elaborated on the functioning of the military jurisdiction nor on the consequences of using this institution as an alternative to civilian jurisdiction for dealing with crimes of political nature, irrespectively of the identity (civilian or military) of the defendant.

²⁶ The military jurisdiction, as we will argue below, can also be useful to solve the problem of authoritarian power sharing.

play this fundamental role: “if the dictator delegates control to the access-to-power positions and the state privileges to a parallel political organization, such as a political party, he can more credibly guarantee a share of power and the spoils of office to the groups that support him (Magaloni 2008, 716).²⁷ We argue that judicial institutions in authoritarian regimes can play a role analogous to that of political parties.

Remember that a court is neutral if it does not exclusively reflect the interests of the dictator or of one of the groups in the ruling coalition. On the other hand, a court has a limited scope if its decisions cannot harm the regime and its allies because they are restricted, for instance, to a certain topic, or to the parties in the case, or to a certain period in time.

We identify two possible mechanisms through which judicial institutions can help making the autocrat’s power-sharing commitment credible. First, a High or Supreme Court that is neutral with regard to the members of the ruling coalition and has a limited scope can make credible the autocrat’s commitment to the groups that form part of his ruling coalition. Such neutrality can be obtained, for instance, when the relevant groups in the ruling coalition have some kind of representative in the court, with no single group having a majority of judges. This would be a guarantee for each group that court decisions do not affect its interests when cases related to this group reach the court. As we will show, in Mexico the Supreme Court help guaranteeing the so called civil-military pact (basically an exchange of loyalty to the regime for military autonomy) since there was always at least one military judge or military lawyer serving as justice in the Supreme Court. In Spain, some special courts devoted to political repression had representatives from the ordinary justice, the military, and the fascist pseudo-party (*Falange*), which was a way of sharing power with these groups.²⁸

The second mechanism works through the creation of multiple special jurisdictions, each one with its own system of non-neutral courts but with limited scope. Specifically, the autocrat can create different special jurisdictions for the most relevant groups within his ruling coalition in order to reward (and maintain) their loyalty. Members of this group accept the exchange because having a special jurisdiction means that they themselves can deal with problems internal, and particularly relevant, to this group.²⁹ As we will show, in Spain the Franco regime

²⁷ The credibility of the power-sharing deal crucially depends on the party’s ability to effectively control access to political positions and on the fact that the party can be expected to last into the future. A dictator will possess an interest to uphold a system of credible power-sharing with his ruling clique to make his life less vulnerable to conspiracies, military coups, and violent rebellions (Magaloni 2008, 716).

²⁸ In contrast, other special courts such as the ecclesiastic were equally non-neutral and, precisely for having a scope limited to their particular realm, the government usually did not encroached upon them regarding these issues (i.e. ecclesiastical and religious matters).

²⁹ Notice that our proposed mechanism is different from Moustafa’s (2007) and Moustafa and Ginsburg (2008), where specialized courts that are relatively “independent” from the autocrat but with a very narrow “scope” (e.g. economic or commercial courts) are created to send a signal to investors. However, as Moustafa himself recognized, even such limited “independence” and scope can backfire and such courts may outstep the bounds; and then, they can be simply dismantled, as in Egypt when the court started meddling with politically sensible areas such as public security (Moustafa 2007). This reinforces Svobik’s point that under authoritarian regimes no independent institutions exist, or, to all effects, persist over time.

created multiple jurisdictions to cement the power sharing arrangements with important groups of the ruling coalition, including the military, the Catholic Church, or the *Falange*, trying to satisfy, at the same time, the business elite by keeping under control labor unrest. The existence of these special jurisdictions, each with its own system of non-neutral-limited-scope courts, tends to be a clear sign of the regime's intention to share power with relevant groups of the ruling coalition by allowing them to deal with their own issues.³⁰

One good example of this is the military jurisdiction: When the military is a critical component of the ruling elite and, particularly, when they have played a crucial role in bringing about the dictatorship, they are likely to be rewarded with a impermeable special jurisdiction.³¹ This is the dictator's institutional guarantee that only they will be authorized to judge their own people. Specifically, a military jurisdiction with non-neutral (e.g. biased in favor of the preferences of the military) and limited-scope ordinary courts can guarantee impunity to the military personnel as the civilian jurisdiction will be unable to prosecute and punish their actions. It does not matter however violent and illegal the military actions might be, only the military courts will be allowed to deal with these crimes, and, as it is typically the case, they will tend to be indulgent -to say the least- with their own people, particularly in cases of repression, but also in cases of corruption, or other kind of abuses within the military. The military jurisdiction, therefore, is useful not only for the problem of control but also for the problem of power sharing.

Judicial Institutions in Mexico under the PRI and in Spain under Franco

In the reminder of the paper, we illustrate with examples of our two cases the mechanisms through which judicial institutions can help solving the autocrat's dilemmas. We start with the problem of authoritarian control, and then we proceed with the problem of authoritarian power sharing.

³⁰ Special jurisdictions have a very long history. "Whereas the principle of unity of jurisdiction is associated, in general, with democratic regimes, the proliferation of special jurisdictions characterizes autocracies". The special jurisdictions of the *Ancien Régime* were already considered "royal prerogatives, or concessions ceded by the absolute monarchy who created, maintained, and distributed these among the dominant strata -nobility and clergy- with the aim of sealing with them loyalties in his favour". With the triumph of the liberal revolutions and the consecration of the principle of separation of powers, special jurisdictions were progressively abolished and the unity of jurisdictions began to prevail. Some of them, such as the military and the ecclesiastical, still exist in various democracies as an institutional legacy, even if their competences have been severely restricted. But it is also true that some dictatorships have either increased the scope of the still existing jurisdictions or even created new ones for different purposes (Del Águila 2001, 370).

³¹ Notice also that this strategy can be accompanied -though this is not always the case- by other empowering measures, such as providing the military with economic privileges (as in Egypt with Mubarak) and/or with increasing budgets (as in Cuba with Macedo). Sometimes (as in Franco's Spain) the dictatorship empowers certain aspects of the military while weakening others in order to obtain the benefits of a powerful repressive power without running the risks of creating a too independent and influential actor.

Monitoring, Authoritarian Control, and Judicial Institutions in Mexico and Spain

In Mexico the basic institutional incentives that subordinate the public prosecution to the executive branch were set in the Constitution of 1917. At the federal level, the Mexican president unilaterally appoints and removes the *Procurador General de la República* (the equivalent of the attorney general in the United States), who, in turn, freely appoints and removes all lower level *ministerios públicos*.³² There were always internal mechanisms of control, such as periodic visits and reviews, that allow officials at higher levels to monitor their subordinates, but ultimately all *ministerios públicos* report to the *Procurador General* and face little external accountability. At the same time, the office of the Mexican attorney general enjoys much discretion in the three steps that characterize the prosecutorial process: investigating, charging, and sentencing.

The combination of political subordination (i.e. non-neutrality) and huge legal power (i.e. broad-scope) of the prosecutors was the cornerstone of the coercive legal power of the authoritarian PRI-regime for most of the XX century. The Mexican executive regularly chose the political use of prosecutorial power to exert pressure on friends and enemies alike. The popular saying *para mis amigos todo, para mis enemigos la ley* (“everything for my friends, the law for my enemies”) is particularly true regarding the Mexican *Ministerio Público*. The capacity to unleash the force of a legal prosecution on a political enemy served as the proverbial stick that the Mexican executive wielded to coordinate behavior of the different actors in the political system. The successive presidents under the PRI-regime use this capacity selectively, even against prominent members of the political and entrepreneurial elite who “step out of the bounds” informally established by their administrations.

A non-neutral high-scope prosecutorial office interacted with relatively neutral but low-scope ordinary courts at all levels, including the supreme court. During the hegemonic party-regime led by the PRI, the Mexican Supreme Court was legally and politically subordinated to the executive power. Legally, the institutional design for the Mexican judiciary fitted the Montesquieuan characterization of *pouvoir null* (what we term low-scope): it was subordinated to the legislative organ, and judges’ work was considered to be the “application of the laws”. Politically, the supreme court and the judiciary in general, was just another piece in the dominant party system that characterized Mexico for seventy one years: the PRI was able to incorporate it into its institutional structure together with the other organs of government, worker unions, peasant movements, the army, and the entrepreneurs (see Weldon 1997).

Specifically, although the 1917 Mexican constitution established that members of the supreme court enjoyed life tenure and were appointed by congress, a series of reforms starting in 1928 altered these features (the PNR, the PRI’s predecessor, was

³² Since 1994 the executive’s choice of *Procurador General* has had to be approved by the Senate, but the president still freely removes her.

created in 1929). First, the 1928 reform involved replacing all justices. In 1934, a new reform replaced the original life tenure with one of six years coincident with the presidential term.³³ From then on, the Supreme Court and the rest of the judiciary was integrated into the Mexican hegemonic party regime: “although life tenure was restored in 1944, the tone of executive-judicial relations had been set, and was to remain essentially unchanged until 1994” (Domingo 2000, 713; Beatriz Magaloni 2003, 280-291).³⁴

The use of prosecutors and judges in the monitoring function by the PRI-regime was prevalent not only for salient political figures. The task of the *Ministerio Público* was not to conduct a professional investigation of a crime but instead to hide customary police arbitrariness to detain people, to obtain confessions, and to produce the legal file of the case to be reviewed by a judge. The judge then merely checked to see if the file contained the legal requisites, declared the defendant guilty, and proceeded to sentencing according to the prosecutor’s suggestions (Magaloni A. L. 2010, 15). Because the Supreme Court had been successfully incorporated into the dynamics of the hegemonic party, it very rarely served as a check on lower judges and prosecutors and actually validated their practices. For instance, in one infamous decision the Mexican Supreme Court decided that confessions extracted by prosecutors through the use of physical force (i.e. torture) were accepted as evidence in a trial as long as there were other pieces of evidence that corroborated the confession.³⁵

The Francoist regime was a long-lasting dictatorship (1939-1975) and its judicial configuration experimented important changes from the post-war period to Franco’s death.³⁶ However, certain crucial characteristics were maintained, with some nuances, all along the regime.³⁷ After the first months of the civil war (1936-1939), during which extralegal repression prevailed in both sides, a more “legal” repression began to be implemented. Once the war was over, and during the first years after Franco’s victory,

³³ Moreover, starting in 1933 and until 1994 an important unwritten political norm was in place: to be part of the Supreme Court Justices needed to be affiliated to the hegemonic party (Cabrera Acevedo 1998, 145).

³⁴ The Supreme Court was, so to speak, externally subordinated (i.e. vis-à-vis the president and the party) but internally dominant (i.e. vis-à-vis the judiciary as if the matters related to the judiciary was a special jurisdiction) and this was typical of the way the hegemonic party operated. While the heads of the major institutions were required to stand the “stick” of external subordination, they could enjoy the “carrot” of internal domination that gave them great political and economical gains. Internal dominance was a characteristic of the constitutional role of Justices in Mexico. Since 1917 the Supreme Court has had the control over the appointment and promotions of lower court judges, which promoted clientelistic practices (see Pozas-Loyo and Ríos-Figueroa 2011).

³⁵ Tesis de Jurisprudencia. Semanario Judicial de la Federación. Amparos Directos 151/90 y 251/90. Primera Sala, Octava Época, tomos VII-Enero y X-Septiembre, pp. 193 y 248.

³⁶ For a general account of the justice system under the first stage of Francoism (1936-1945) see Lanero (1996); for the participation of the military in the political repression along the same period see Gil (2010). For a recent account of the collaboration of the justice system with Francoist dictatorship, see Aguilar (2013).

³⁷ In 1967, an important legal transformation took place in Spain with the approval of the Organic Law of the State (Ley Orgánica del Estado). This general law, equivalent to a constitution, aimed at providing a higher level of institutionalization to the dictatorship and to modernize the functioning of certain institutions. However, in basic terms, the prosecutors remained non-neutral, the special jurisdictions were maintained, and no relevant advances in the autonomy of the ordinary justice system were achieved (De Esteban 1973: 312-341).

there was a massive number of prisoners and, according to the estimates, between 40,000 and 50,000 executions took place.

The repression was mainly, but not exclusively, undertaken by a grossly expanded military jurisdiction, being the military the most relevant group of the ruling coalition at that time given its crucial contribution to the war effort, and also due to the fact that Franco was a military man himself and he trusted the military institution more than any other. Additionally, several special courts were created to pursue and repress, getting around the formal guaranties of the ordinary courts, all people considered loyal to the Republican cause (the sentences included confiscations, fines, professional deputation, force-labor, exile and prison). In the first years of the dictatorship, these special courts were composed by military judges, ordinary judges, and leaders of *Falange*³⁸ (e.g. *Tribunal de Responsabilidades Políticas*, and *Tribunal de Represión de la Masonería y el Comunismo*). This composition, as will be seen in the next section, also served the purpose of power-sharing.

With the passage of time, a progressively limited military jurisdiction (even if it always retained the power to judge and sentence the most delicate political crimes, such as terrorism) coexisted with a different special court, the *Juzgado y Tribunales de Orden Público* (1963-1977). This court was formed exclusively by judges and prosecutors of the ordinary justice, whose purpose was to repress the increasing opposition movements with harsh prison sentences and whose decisions were severely criticized because of the scarce procedural safeguards and for being ideologically biased. In spite of the increasing competences of the ordinary justice system in the repression of the dictatorship, whenever a conflict of jurisdictions took place normally the military justice took precedence. In addition, the decisions of the *Consejo Supremo de Justicia Militar* could not be appealed before the supreme court.

Regarding judges in the ordinary justice system, whose limited scope has been already mentioned, Toharia (1975, 495) considered them to be, at the end of the dictatorship, “fairly independent of the Executive with respect to their selection, training, promotion, assignment, and tenure.” However, we consider them to be non-neutral because they were subjected to a highly biased training system that imbued in them the values of the regime. In issues unrelated to politics these judges served as a conflict-solving instance for private matters, but in politically related issues these judges often exercised a significant degree of social control over the population (*Justicia*

³⁸ *Falange Española Tradicionalista y de las Juntas de Ofensiva Nacional Sindicalista* (*FET y de las JONS*) was the only political organization that was allowed in Spain; all the others were banned. One of the main reasons adduced by Franco to rebel against the Republic was precisely his harsh criticism of the deleterious consequences that -according to him- party politics have had in Spain. However, given that both the *falangistas* (*Falange Española de las Juntas de Ofensiva Nacional Sindicalista*) and the *carlistas* (*Comunión Tradicionalista*) provided him with the most important contingents of volunteers during the civil war, he could not just dissolve these political organizations. What he did, to have both under control, was to force them to unify into a single organization (the already mentioned *FET y de las JONS*). Franco gave *Falange* some political preeminence while it was useful for him. In exchange for the submission, he provided with important benefits to its members and, as it will be seen, reserved them a relevant role in certain areas.

Democrática 1978; Ortiz 1996; Mir 2000; Jiménez Villarejo y Doñate 2012; Giménez 2014).

The other crucial monitoring and repressive judicial mechanisms in the hands of the Francoist regime was the *Ministerio Fiscal*.³⁹ This was a rigidly hierarchical institution presided by the Prosecutor of the Supreme Court, who was directly dependent on the Ministry of Justice and exerted a clear authority over local prosecutors through written instructions, and who worked in narrow collaboration with the police (particularly, in cases of political nature, with the notorious special police *Brigada de Investigación Social*).⁴⁰ The annual reports produced by the *Ministerio Fiscal* (partially based on the provincial reports sent by the local prosecutors) served an unquestionable monitoring role of the society in general, and of the opposition in particular. These prosecutors were of course non-neutral; in fact, a significant number of prosecutors ended up assuming high political positions under the dictatorship.⁴¹ In sum, similarly to Mexico, a non-neutral broad-scope prosecutorial office coexisted with relatively neutral but narrow-scope ordinary courts.

Credible Commitments, Authoritarian Power Sharing, and Judicial Institutions in Mexico and Spain

In Mexico, a neutral but narrow-scope Supreme Court help cementing the so called civil-military pact that was one of the pillars of the stability of the hegemonic party rule. During the administration of General Lázaro Cárdenas (1934-1940), the recently born party successfully integrated the army, the organized workers, and the organized peasants into its structure and changed its name to *Partido de la Revolución Mexicana* (PRM, 1936). The PRM gradually became the single most important political machine in the country within which most decisions regarding “who gets what, when, and why” were made.⁴² A decade later, the party became hegemonic and changed its name to

³⁹ An early example of the collaboration of the prosecutors with Francoist repression is the *Causa General*: “Ordered by a 1940 decree, this process was conducted by the Spanish Attorney General’s Office, subordinate to the Ministry of Justice. The information relating to alleged offences committed by sympathizers of the losing side was compiled by ordinary prosecutors up until the 1960s and led to the opening of tens of thousands of judicial proceedings” (Aguilar 2013, 251).

⁴⁰ The police was dependent on the *Ministerio de la Gobernación*, which, in most occasions, was occupied by a high ranking military. Other police corps involved in the repression of the opposition were the militarized police *Policía Armada* (particularly in the street demonstrations), and the also militarized *Guardia Civil* (more focused at the time in rural areas and notorious for its actions against the guerrilla fighters until the mid-50s).

⁴¹ According to Giménez (2014, 336), the politization of the *Ministerio Fiscal*, that is, its lack of neutrality, can be demonstrated by the fact that “5% of the 258 existing prosecutors in 1970 have been freely appointed by the government (by decree) to occupy posts in other institutions”. See also Jiménez Villarejo and Doñate (2012, 28).

⁴² Albertus and Menaldo’s argue that “Before voluntarily exiting power, Calles was able to fashion a corporatist arrangement that helped him make credible promises to the new economic elite created by his policies. The pillar of this corporatist arrangement was the founding of the PRI by Calles in 1929. Calles invited influential generals, regional elites, nascent industrialists, and labor bosses to join his new political party, each of whom brought a vast network of political supporters with him” (Albertus and Menaldo 2012, 999-1000).

Partido Revolucionario Institucional (PRI, 1946). That same year the first civilian president, Miguel Alemán, was elected.⁴³

Cárdenas' incorporation of the organized peasants, workers, and the armed forces within the PRM secured stability for the nascent regime simultaneously reducing the relative power of the army. Despite the resistance of the armed forces (Serrano 1995, 433), Cárdenas introduced further changes to discipline them such as dividing the Ministry of War and Navy into two different defense ministries, enacting legislation barring serving officers from participating in any political activity, and expanding earlier efforts aimed at the professionalization of the forces (Díez and Nicholls 2006, 9).⁴⁴ By the end of the Cárdenas administration, "the Mexican armed forces had been weakened and brought under the control of the national party" (Díez and Nicholls 2006, 9). In exchange for loyalty to the PRM, as well as to the "Revolutionary family", the armed forces got an important degree of autonomy with regard to the military's internal functioning, training, and promotions, along with a high level of discretion in making expenditures. This exchange of loyalty for autonomy is, in essence, what scholars refer to as the civil-military pact (e.g. Díez and Nichols 2006, 10; Serrano 1995, 433). While the basis of the pact was established under Cárdenas, it was further developed and sustained in successive administrations.

The Supreme Court helped cementing the civil-military pact in different ways. First, as a way of power-sharing, since 1940 and until 1994 "the presence of at least one military officer serving as a Supreme Court justice was a constant" (Caballero 2010, 157-8).⁴⁵ Second, through its jurisprudence, the Supreme Court defended a broad scope of the military jurisdiction that basically meant that military officers charged with crimes were tried (and most of the times absolved or leniently punished) in military courts. This is important because the armed forces were a key actor in securing internal political order during the "golden years" of the PRI regime. This was the case in 1958 when they were asked to suppress a railroad workers' strike, in 1968 when they intervened to suppress a student movement, and indeed throughout the 1960s when they were ordered to put down guerrilla uprisings, especially in the southern state of Guerrero (Díez and Nichols 2006, 10).

The Supreme Court's jurisprudence on military jurisdiction nicely reflects its participation in the holding the civil-military pact together. For instance, from 1940 onwards the Mexican Supreme Court basically uphold a criteria based on the identity of the person involved in a crime: if the person belongs to the armed forces then the case belongs to military jurisdiction and nothing else matters. The "personal-identity"

⁴³ The civil-military pact, however, did not imply that the armed forces lost political influence but rather that it was channeled through more subtle mechanisms, and often behind the scenes (Ronfeldt 1976, cited in Serrano 1995, 435). In fact, while the president of the republic is a civilian since 1946, the president of the PRI was a member of the armed forces until 1964.

⁴⁴ At the same time, Cárdenas passed the Law of National Military Service establishing compulsory basic military training for 18-year-old males, which strengthens the armed forces.

⁴⁵ "It is noteworthy the case of Agustín Mercado Alarcón who joined the SCJN in 1944 and was there until 1967. In 1969 another military officer joined the SCJN, Alberto Jiménez Castro". (Caballero 2010, 159) Military officers have also held several seats in Congress since 1940 (Díez 2008).

criterion was somewhat attenuated by sensibly keeping out of military courts some conducts and situations that simply cannot be considered part of the military service, such as when the officer is on vacation, or when a military officer killed the referee during a soccer game. But in some cases, the Mexican Supreme Court upheld the pure “personal-identity” criterion even in cases of rape of a woman, robbery, or murder of a civilian. In most of the cases where the jurisdiction was contested, the Supreme Court decided that the case should be sent to the military jurisdiction.⁴⁶

Franco’s victory was possible thanks to the contribution of different groups but especially of the military. The military jurisdiction not only served the purpose of repressing the opposition, but it was also designed to allow the armed forces to deal with their own issues with a relative lack of encroachment from the executive power. This power-sharing mechanism was both a reward for the war effort and a guarantee that certain agreements will be respected. Franco was obsessed with keeping the greatest amount of power in his own hands, so he always tried to achieve a balance between the different groups of his ruling coalition, preventing each of them from being powerful enough to become a real threat to his personal rule. Accordingly, Franco combined a high level of autonomy given to the military justice and important economic privileges, with a budget devoted to military expenses that decreased over time⁴⁷ and a diminishing presence of military members in his cabinets (Álvarez 1984). At the end of the dictatorship, the military personnel were very poorly paid and the military infrastructures were clearly obsolete (Cardona 2008).

The strategy of creating special jurisdictions for cementing the ruling coalition was not exclusive for the military. One of the obsessions of the Francoist regime was to avoid the very high level of labor conflicts of the Republican period and to guarantee a certain level of “social peace” to the business elite. With this purpose, the regime created a highly regulated and politically intervened labor system since 1938 (that is, in the midst of the civil war, through the approval of the *Fuero del Trabajo*, clearly inspired by the *Falange*). A special labor jurisdiction began to be created since then;⁴⁸ each province had one *Magistratura de Trabajo* and a *Tribunal Central de Trabajo* (both dependent, in administrative terms, of the *Ministerio de Trabajo*,⁴⁹ whose cabinets were occupied, in several occasions, by prominent *falangistas*). However, a special “Social Court” also existed within the Supreme Court to deal with labor issues, which, between 1949 and 1958, had preeminence over the *Tribunal Central de Trabajo* (Martínez Girón et al 2006: 76). This means that, in contrast with other power-sharing judicial institutions (e.g. the military and the ecclesiastic ones), the last

⁴⁶ Similar deferential jurisprudential patterns towards other members of the ruling coalition, such as organized labor, can be traced at the Mexican Supreme Court.

⁴⁷ Whereas in 1941 the budget devoted to military expenses was the 35,20% of the total public expenditure, in 1965 it was only 17,16% (Instituto de Estudios Fiscales 1976, 744-753).

⁴⁸ The 1940 *Ley Orgánica de la Magistratura de Trabajo* was one of the most important legal regulations of the first period.

⁴⁹ This Ministry discretionally elected the magistrates of this special jurisdiction from the ordinary jurisdiction, and they became professionally dependent, to an important degree, on that institution (Lanero 1996: 344).

appeal organ of the labor jurisdiction, at least for a decade, was the Supreme Court, unbiased, in principle, vis-à-vis the different groups of the ruling coalition. The labor jurisdiction was not in the hands of the *Falange* (but the *Sindicato Vertical*, the only labor union allowed under Franco, was), but this organization played a very important role in the organization of labor relations –and in the repression of workers' unrest– under Francoism. Besides, from 1944 the *Sindicato Vertical* counted with its own labor jurisdiction (the *Tribunales Sindicales de Amparo*), even if its functions were limited to judicial conciliation; that is, “before presenting a labor demand to the *Magistratura de Trabajo*, it was compulsory to try this judicial conciliation” (Lanero 1996: 345).

The Catholic Church not only gave legitimacy to the Francoist cause by consecrating the civil war as a “national crusade”, but it also accepted, in exchange for several privileges, to go on supporting the dictatorship. Not only the Church enjoyed a preeminent position in crucial areas for the regime –such as the education policy, often in competence with the *Falange*, and the censorship of cultural productions–, but also the ecclesiastic jurisdiction was strengthened and enlarged. Catholicism became the official religion of the Francoist state (all other public religious manifestations were proscribed) and was recognized as a source of inspiration for the entire domestic legal system.⁵⁰

This power-sharing agreement, present from the very beginning together with important economic privileges, was further institutionalized through some crucial pacts that were signed. The 1851 Concordat signed between Spain and the Holy See was reintroduced by Franco (this pact consecrated the identification between Spanish State with Catholicism) and a new Concordat was signed in 1953. In exchange for the express recognition of the Catholic Church to the Francoist regime, and for Franco's capacity to propose to the Vatican his own candidates for bishops, he recognized the Church a special jurisdiction, and he assumed as well the responsibility to fully finance the Church.⁵¹ Finally, all the Republican legislation aimed at the secularization of the country was abolished (e.g. divorce was forbidden and only religious marriages were allowed).

In sum, several special jurisdictions (non-neutral and with limited scope) were created as a way to assure partners of the ruling coalition that their interests would be respected and promoted in exchange of their support for the regime. In Spain, as in Mexico, the *Tribunal Supremo* was relatively neutral vis-à-vis other members of the ruling coalition in the sense that it was not captured by any of them, but it was certainly dependent on and aligned with the authoritarian regime, particularly in cases

⁵⁰ The Catholic doctrine as a source of legal inspiration has been abundantly found in the sentences of the Supreme Court (Bastida 1986).

⁵¹ Already since the end of the civil war (by a Law of November, 9th, 1939), the regime explicitly recognized the Catholic Church its “efficient cooperation in the victorious Crusade” and, in exchange for this, reestablished the budget that was cancelled by the Republic.

of ideological nature as has been demonstrated by Bastida (1986).⁵² This court also confirmed the majority of sentences emanated from the infamous *Juzgado y Tribunales de Orden Público* (Jiménez Villarejo and Doñate 2012, 21).

⁵² Other specialist in the subject has even claimed: “In the light of the doctrine elaborated by the Supreme Court, it is absolutely clear that no other institution of the state power kept and proclaimed an ideology more identified with the thinking of the head of state than this court” (Giménez 2014: 334).

Conclusions

Building bridges between the literature on authoritarian survival and the literature on authoritarian judicial politics, we claim that judicial institutions can contribute to solve the problem of authoritarian control by monitoring actual and potential political opponents (through public prosecutors and the police), as well as by using them in the repression of opponents (particularly, but not solely, through the military jurisdiction). Judicial institutions can contribute as well to solve the problem of authoritarian power-sharing by making credible the commitments made by the authoritarian leader to the members of his ruling coalition, either by awarding them with the privilege of special jurisdictions to deal with their own affairs, or by guarantying the relative neutrality of certain judicial institutions to solve intra-elite conflicts.

In both Mexico and Spain, judicial institutions were used by the authoritarian regime to deal with the problem of authoritarian control. The design of judicial institutions to play this role is nice and simple: the combination of biased (towards the dictator) but broad-scope prosecutors coupled with narrow-scope ordinary judges serve as monitors and censors of political opponents' behavior. In both countries judicial institutions contributed as well to deal with the problem of power-sharing. We showed that the Mexican Supreme Court was key to cement the civil-military pact that was a cornerstone of the hegemonic rule of the PRI. The Supreme Court was able to facilitate the power-sharing between the PRI and the military by being a forum where military interests were represented and by allowing an expanded military jurisdiction that in many occasions was used as a tool for the impunity and lack of accountability of the armed forces. In Spain, the Supreme Court had a neutral composition regarding the ruling elites, and several special jurisdictions were created to award the most important groups of the ruling elites. While the scope of the ordinary jurisdiction was severely limited, a biased and very powerful prosecution office contributed to monitoring and repressing the opposition.

The differences between the power-sharing institutions in both countries could be explained by the different composition of the ruling coalition in both cases, and by the strong determination of Franco to create equilibriums among the different factions supporting his regime so that none of them eventually became powerful enough to conspire against him. Mexico used the PRI for the purpose of power-sharing, not only with the military, but also with the rest of the ruling coalition. However, the deep aversion of Franco towards political parties did not allowed him to use the *Falange* (the only allowed party) as an integrative institution. This might explain why he created the *Movimiento Nacional* –a non-party organization controlled by him which integrated the different political sensibilities of the ruling coalition-, and, particularly, why he turned to special jurisdictions to meet his power-sharing needs.

The institutional combinations we have analyzed in this paper are just some among other possible options. In our two cases, the military played a crucial role in the establishment of the dictatorship, which explains the concomitant expansion of the military jurisdiction. In cases where the military has not played such a determinant role we expect other institutions (judicial and non-judicial) to deal with the problems of control and power-sharing. One of our principal aims is demonstrating that dictators can -and normally do- resort to judicial institutions to try to resolve these crucial problems in order to stabilize their rule and extend their tenure. But different combinations of neutrality and scope of judges and prosecutors are possible according to the nature of the regime and the role played by non-judicial institutions.

We believe that our theoretical framework contributes to explain why some authoritarian regimes empower certain judicial institutions and weaken others, and what role judicial institutions can play under authoritarian regimes. Case studies on the role played by judicial institutions in Venezuela (Sánchez Uribarri 2011), Chile (Barros 2002), Russia and Ukraine (Popova 2012), and Peru (Dargent 2009) seem to fit our theory. Further empirical analyses on a larger sample of countries are needed to corroborate if this is the case. Questions such as how the judicial institutions interact with other paralegal (e.g. investigatory agencies) and paramilitary (e.g. praetorian guards) institutions are beyond the scope of this paper but worth pursuing in the light of its framework.

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