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The Spanish Jury: 1888-1923

by Michael G. Burros*

I. INTRODUCTION

Article 125 of the new Spanish Constitution permits jury trials upon passage of enabling legislation by the Cortes, Spain’s legislature. The country’s most recent jury law was abrogated by the Franco government in 1936, 124 years after the first Spanish Constitution provided for jury trials based on the theory that a sovereign people should judge themselves. Between 1812 and 1936 eight different laws were enacted and abolished. The first five laws dealt specifically with libel and press restraint, whereas the last three covered a broad range of criminal law. The most enduring criminal jury law was passed in 1888, during the Restoration.

This Note will examine the relationship between the jury system and Spanish society, more specifically, the effect of imposing a new legal system upon an already existing legal system. Juridical statistics compiled by Spain’s Solicitors General will be used to demonstrate that the jury

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1 “Citizens can exert the popular will and participate in the administration of justice through the jury, in whatever form and with respect to those penal processes that the law shall determine, just as in the customary and traditional tribunals.” Const. Española art. 125 (Spain).

2 The government claimed that the jury’s defects were clear and that the Popular Front had placed partially above strict justice in the jury system. 1 Legislación del Gobierno Nacional 2° semestre (Sept. 8, 1936).

3 Const. Española art. 307 (Spain 1812).

4 See H. Nuñez de Cepeda, El Jurado 5-7 (1933).


6 I will use the term Solicitor General as a translation for the Fiscal del Tribunal Supremo. Aside from the Solicitor General there are three other Fiscal titles which will be referred to in this Note: Fiscal Regional - Regional Attorney General
system adapted to the characteristics of the then prevailing legal and political structure of Restoration Spain. Furthermore, this empirical data will show that previous hypotheses which linked illiteracy with a high rate of criminal acquittals are incorrect.

II. History of the Spanish Jury

The 1888 jury law\(^7\) can best be examined after discussing its forerunners and the foundations which they established for the later development of a full criminal jury. Initially, the jury system was discussed by the commission which drafted the 1812 Constitution.\(^8\) Commission members reasoned that the jury would be an expression of popular sovereignty which would enable the populace to participate in the judicial process.\(^9\) The 1812 Constitution adopted the notion of popular government and also permitted the jury, as an institution of popular sovereignty, to decide issues of fact.\(^10\) Eight years later, the Cortes passed enabling legislation mandating the use of the jury in election fraud cases, premised on the belief that these cases were best handled by the people.\(^11\)

The juror pool included all male citizens, 25 years and older, who were elected annually by the local ayuntamientos [town councils]. A two-tiered jury system was devised. The first tier consisted of nine men who acted as a grand jury. Their function was to determine whether or not there was a cause of action. The second tier was composed of twelve men who delivered the verdict after the trial. The French abolished this system in 1822 when they restored Ferdinand VII to his position as absolute ruler of Spain.\(^12\)

The 1837 Cortes produced a new constitution that liberalized the political process by widening the voting franchise and permitting municipal self-government.\(^13\) A new bill regulating freedom of the press was enacted which would use the jury as a fact finder. Under the system used in the

\(^{7}\) Law of Apr. 30, 1888, 140 Colección Legislativa 708.
\(^{8}\) Núñez, supra note 4, at 5-7.
\(^{9}\) Id. at 5-7.
\(^{10}\) Const. Española art. 307 (Spain 1812).
\(^{11}\) Núñez, supra note 4, at 8; 14 Nueva Enciclopedia Jurídica, Jurado at 33 (F. Seix ed. 1971).
\(^{12}\) Id. The French Invasion put an end to both the jury and the Spanish Constitution of 1812.
\(^{13}\) R. Herr, Modern Spain 85 (1974).
press cases, a fixed number of jurors were selected on the basis of the amount of taxes they paid.\(^{14}\) The more taxes that the citizen paid, the greater the likelihood that the citizen would become a juror. The names of those who were eligible were written on slips of paper and placed in an urn from which 72 names were drawn for each case. The jury was selected after both parties to the proceeding had exercised their individual right to challenge up to 30 jurors.\(^{15}\) If more than 12 jurors remained, then the jury would be chosen in numerical order of withdrawal from the urn.\(^{16}\)

The 1837 press law was annulled eight years later during the government of military strongman, Narvaez.\(^{17}\) By royal decree the press law was replaced by stricter censorship, and the jury system was eliminated.\(^{18}\) The government ministers, in their memorandum to the Queen Regent, stated their desire to dissolve the jury because it had not served the country well. The memorandum also revealed that the ministers were concerned about the dearth of guilty verdicts returned; it stated, "... fear is firmly planted that the evil doers will not be convicted and that the populace will be left defenseless..."\(^{19}\)

Narvaez left office in 1851, and by 1852 a new press law had been promulgated.\(^{20}\) This decree prohibited press coverage and public speech not formerly reached by statute. The government resorted to the jury system to avoid the appearance of direct intervention in the guilt determining process. A memorandum sent by the cabinet members to the Queen Regent indicated that they hoped that the jury would serve to moderate the harshness of the new press law by mitigating seemingly inflexible court rules.\(^{21}\) The law did not give the majority of the country an opportunity to participate in the fact-finding process; rather, the jury pool was limited to the wealthiest members of society. The jurors were drawn from 100 citizens paying the highest taxes in Madrid; the 60 top taxpayers in each of the regional capitals and the 30 top taxpayers in each of the provincial capitals.\(^{22}\) The jury pool contained some of the most powerful people in the country; a group which, because of its privileged status, probably was closely associated with the government. Less than one year later, in 1853, the government eliminated the jury system due to the difficulties of administering it. The government proffered only a vague explanation.

\(^{14}\) Law of Oct. 17, 1837, 23 Decretos de la Reina y de la Cortes 254-55.
\(^{15}\) Id.
\(^{16}\) Id.
\(^{17}\) Id.
\(^{18}\) Law of April 2, 1852, 55 Colección Legislativa pt. 1, at 578.
\(^{19}\) Id. at 581.
\(^{20}\) Law of April 2, 1852, 55 Colección Legislativa pt. 1, at 578.
for this action. It maintained that the jury and Spanish culture were not compatible.23

In December of 1855, one year after a successful liberal pronunciamiento,24 the jury was reinstated, but only for cases involving freedom of the press.25 In 1857, the jury was again abolished, simply because the philosophy of the government changed.26 Seven years later it was restored in a form substantially similar to that established by the 1852 statute. This law remained in effect until 1872.27 The abolition and restoration of the jury system became a regular occurrence; the liberals installed it and the conservatives abolished it.

When the First Republic was proclaimed in 1872, the Cortes established the first criminal jury system.28 The method of jury selection was changed from the scheme of previous years which was based on the payment of taxes to a new standard which designated literate males over 30 years old as the initial pool.29 The government was enthusiastic in its support of the jury system. By 1875, however, serious administrative problems had developed which led to dissolution of the jury.30

The Minister of Justice, speaking of the administrative problems, said, "The past two years have brought into sharp relief the inconveniences of the institution."31 He mentioned three specific problems: first, the three judge panels required for each jury trial resulted in less serious criminal cases being backlogged;32 second, there was little public support for the jury, since citizens preferred paying a fine to sitting on the jury;33 finally, the treasury was being drained of funds by the overtime and travel expenses which were paid to judges and prosecutors.34 Therefore, on January 3, 1875, the law was suspended,35 and it was not again revived until 1888. As Spain entered the Restoration era, the country had no criminal jury system.

Thus, until 1888, Spain had virtually no experience with the criminal jury. Only the short-lived 1872 law provided a jury trial for most criminal charges. Prior to 1872, the jury pool was drawn from the citizens paying

24 Pronunciamiento is a military uprising against the government; literally a pronouncement against the government.
26 See Gaceta de Madrid 1 (July 14, 1857).
29 Id. at art. 658.
31 Id. at 7.
32 Id.
33 Id.
34 Id.
35 Id. at 6.
the most taxes. The 1872 law brought major changes in juror selection and created many problems, most of which reappeared when the Cortes passed another comprehensive jury law in 1888.  

### III. JURY LAW OF 1888

The 1888 law can best be analyzed in light of the political structure of 19th and 20th century Spain. A brief explanation of the political order, established in 1874 with the restoration of the Bourbon Monarchy, provides a background for such an analysis.

#### A. The Restoration

During the Restoration period, the Spanish political system was based on the cooperation of the two major monarchist parties. New elections were held whenever the governing party blundered or became unpopular. After dishonest balloting, the party then out of power took over the government. This was known as the *turno pacifico* or peaceful change.

During the *turno pacifico*, the Minister of Gobernación, whose functions were similar to the present U.S. Secretary of the Interior, held extensive negotiations with all power groups in the country. These discussions produced lists of candidates approved for election. Known as the *encasillado*, each list was sent to the provincial governors, all of whom were appointees of the Minister of Gobernación. The governors then took whatever steps were necessary to ensure that the local party leaders elected the *encasillado* candidate.

This structure depended upon the local boss, or cacique, for its existence. The cacique served to bridge the gap between his locality and the central government, as a party or government functionary, he maintained powers chiefly because citizen apathy resulted in low voter turn-
out. In order to deliver votes the cacique gave favors to his followers. The type of favor which the cacique delivered was often illegal; running the gamut from embezzlement to bribery. At other times the cacique asked government officials in the capital, Madrid, to suspend decisions harmful to his partisans. This system required the central government to ignore local corruption, which in most provinces took the form of patronage. In short, caciquismo was similar to the political machines which operated in the United States.

The ascension of Alfonso XIII to the Spanish throne in 1902 is often cited as the beginning of the demise of the caciquial system. The breakdown of the system was due in part to King Alfonso's unwillingness to allow his friends to leave office, which resulted in a disruption of the turno pacifico, and in part to the deterioration of the monarchist parties' power bases in urban areas. Nevertheless, the system did remain strong throughout most of the country until the beginning of the dictatorship of Miguel Primo de Rivera in 1923. To illustrate, between 1890 and 1931 elections were held for over 1,000 seats from rural Andalucia to the Cortes, and the encasillado candidate lost only 13 times.

The judicial system played an integral role in the caciques' ability to maintain power. Since electoral fraud was a criminal offense, judges were shifted from region to region in order to guarantee immunity from prosecution for caciquial electoral machinations. In Old Castille, the cacique Gamazo wielded power from 1876 until the turn of the century due largely to his friendship with the magistrates. In the province of Burgos, Alonso Martinez used his position as an important jurist and Minister of Justice to maintain a political apparatus in the 1870's and 1880's. In the region of Galicia, unscrupulous lawyers and municipal secretaries

46 Id. See, e.g., R. Carr, Spain 1808-1934, at 366-379 (1966); see also J. Vicens Vives, Approaches to the History of Spain 137 (J. Ullman, trans. 1970) (discussing the caciques rise to power).
47 J. Varela, supra note 40, at 360.
48 "The political friends - that group of rewarded and fearful clients - who acceded in the perpetuation of the caciques' power in return for which they would help the government . . . [The government] would then suspend some administrative decisions which were harmful to them [the caciques]." Id. at 354.
49 Id. at 358.
50 But see, R. Carr, supra note 46, at 366.
51 R. Herr, supra note 13, at 115.
52 Tussel, supra note 40, at 8-9.
53 Cf. id. at 3-20.
54 Id. at 10.
56 J. Varela, supra note 40, at 405-06; R. Carr, supra note 46, at 373 (1966).
57 J. Varela, supra note 40, at 371-74.
58 Id. at 376.
took advantage of confused land titles to threaten recalcitrant citizens with the loss of property.\textsuperscript{59} Galicia was controlled by the \textit{cacique} Gasset through this legal scheme.\textsuperscript{60}

The \textit{caciques'} local power base in Spain may have motivated the central government to attempt to give the people some voice, through the jury device, in the government. This system, to some extent, supported the corruption that allowed the government to control the outcome of the electoral process. Whether the system was an elaborate charade or a legitimate attempt at reform is immaterial, since the actual operation of the jury in Spain became a futile exercise.

\textbf{B. The Jury List}

1. Eligibility and exemption

The jury law of April 25, 1888, established a jury panel of 12 men\textsuperscript{61} whose duty it was to declare the guilt or innocence of the accused,\textsuperscript{62} and to determine whether circumstantial facts supported modification of the penalty sought by the government.\textsuperscript{63} After the verdict was rendered, the three judges who presided over the court\textsuperscript{64} imposed the appropriate sentence.\textsuperscript{65} The jurisdiction of the court extended to all criminal acts, from theft to crimes against the state.\textsuperscript{66}

Jury duty was obligatory upon all who were called.\textsuperscript{67} The pool of jurors was drawn from all literate, secular citizens who were thirty years old or older, heads of households, district residents for four years, and fully possessed of their civil and political rights.\textsuperscript{68} Crimes allegedly committed in a given district were tried before jurors from that district.\textsuperscript{69}

The law also required a separate grouping according to ability for academics, professionals, and public officials who were not heads of households.\textsuperscript{70} Included in this category were provincial deputies, members

\textsuperscript{59} Id. at 388-89.
\textsuperscript{60} Id.
\textsuperscript{61} Law of April 30, 1888, 140 Colección Legislativa 708, art. 1 [hereinafter cited as Ley del Jurado].
\textsuperscript{62} Id. at art. 2.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at art. 1.
\textsuperscript{65} Id. at art. 3.
\textsuperscript{66} Id. at art. 4. The crimes which the jury could hear were separated into two categories. The first category was composed of traditional crimes and the second dealt with crimes of the press, libel and slander.
\textsuperscript{67} Id. at art. 8.
\textsuperscript{68} Id. at art. 9.
\textsuperscript{69} Id. at art. 44.
\textsuperscript{70} Id.
of the Cortes and retired members of the armed forces. This provision was intended to weigh jury selection so that the intelligentsia were guaranteed a greater percentage of jury seats than would result in a random selection process.

It appears that the drafters of the bill did not want a large jury pool, for at the time the jury law requiring jurors to be male and literate was passed less than 30 percent of the population could read and write. Males composed approximately 49 percent of the population and the total number of men 31 years old and older who could read and write accounted for only 9.6 percent of the population. Furthermore, there were four categories relating to exclusions and exemptions from jury duty. The first exclusion dealt with persons who had lost some portion of their right of self-control by virtue of being a debtor, a ward of a charity, or a prisoner. The second grouping excluded certain government workers considered indispensible and prevented public prosecutors or judges from sitting on the jury. The third exclusion kept all interested parties from becoming members of the jury. The fourth category was a voluntary exemption offered to the elderly, manual laborers, members of the Cortes and those who had been called in previous years.

These exemptions represent the drafters' fears that jurors would be subject to undue influence. The requirement that jurors be literate and in full possession of their civil and political rights was intended to assure their independence. The exclusion of public prosecutors, judges, and interested parties protected jurors from their prejudices. These qualifications drastically reduced the number of people eligible to sit on the jury.

2. Municipal list: first compilation

Lists of all those eligible for jury duty were compiled at the municipal level. The local judge and fiscal municipal formed a committee with the mayor or his lieutenant, the three citizens paying the highest property taxes, and the top commercial taxpayer in the municipality. This committee had the responsibility of preparing an initial eligibility list. A committee member's failure to attend the committee meetings resulted in a fine.

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71 Id.
72 Instituto Geográfico y Estadístico, 1887 Censo de la Población de España XXV (1891).
73 Id. at XIX.
74 Instituto Geográfico y Estadístico, 1912 Anuario Estadístico 124 (1913).
75 Ley del Jurado, supra note 61, at art. 10.
76 Id. at art. 11.
77 Id. at art. 12.
78 Id. at art. 13.
79 See supra note 6.
The secretary of the municipality also attended but could neither vote nor take part in the deliberations. The *fiscales* believed that proper formation of the lists was the secret to a successful jury system. The author of the jury bill, Manuel Alonso Martinez, stated in a letter to his friend, Víctor Covián y Junco:

> The jury which will begin to function in Spain will demand as an indispensable ingredient the formation of jury lists... all the safeguards built into the law are illusory... if the election of the jurors does not inspire one to aim for justice and result in the necessary combination of morality and intelligence in the trier of fact just as in the trier of law.

While the government recognized that honest list formation was essential to the success of the jury, the task was delegated to the same local officials who were expected to manipulate the elections in favor of the *encasillado* candidate. Since the jury was competent to hear cases involving electoral fraud, the local officials were in a position to control subsequent trials through their control of the list formation process. Corrupt local officials had both the motive and the opportunity to manipulate jury lists. Thus the government was faced with choosing between protecting the integrity of the jury or maintaining the *turno pacifico*. It was not surprising under these circumstances that many *fiscales* blamed the *caciqual* system for the increasing number of not guilty verdicts.

3. Municipal list: problems

Every year complaints were received by the Solicitor General from the provincial *fiscales* about impropriety in the jury selection process. What follows is a catalogue of some of the more blatant abuses, as depicted by a number of government officials. The President of the Council of Ministers recounted his own experience with the jury:

> Since the jury law has been promulgated no one in my family has had anything to do with the institution, although the mentally ill child of a nanny was chosen to serve once. About two years ago I was chosen to be on the jury list review committee for my judicial district... The government officials were surprised that I attended the meeting. No one else from the district appeared. I demanded that fines be imposed, and all concerned appeared at the next meeting. This took place in Madrid, not

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80 *Ley del Jurado*, *supra* note 61, at art. 14. The fine could be anywhere between 150 and 500 pesetas. The 1897 dollar equivalent would have been between $30 and $100. M. Muhleman, *Monetary Systems of the World* 196 (1897).

81 Letter from Manuel Alonso Martínez to Víctor Covián y Junco (May 20, 1888), *reprinted in*, Fiscalía del Tribunal Supremo, 1918 Memorias XLIII-XLIV.

82 See, e.g., Fiscalía del Tribunal Supremo, 1917 Memorias XII; Fiscalía del Tribunal Supremo, 1921 Memorias 40.
in some sleepy little village. We started our work and found that the Compañía del Mediodía had padded its list of workers entitled to exemptions. The jury list did not contain the names of anyone who lived outside of their stores (no one on the first, second, or third floors). The list of abilities contained the names of only five or six academics.\footnote{Fiscalía del Tribunal Supremo, 1921 Memorias at 41-42. All of this occurred in one of the most fashionable districts of Madrid.}

Further evidence of questionable practices respecting jury list preparation in Madrid appears in the Solicitor General's reports. The Fiscal of Madrid stated that in the 10 districts of Madrid only 17 people were on the lists of ability, and in four of the districts there were no lists of ability at all. Since Madrid was one of the most literate areas in Spain, this result hardly seems possible, absent fraud.\footnote{In 1910, Madrid was divided into 10 judicial districts. The entire city had a population of 556,958. Of this number there were 99,662 literate males over 30 years old or approximately 18\% of the population. Instituto Geográfico y Estadística, 1 Censo de la Población Española 184-87 (1910); 3 Censo de la Población Española 238 (1910).} In a district with 50,000 inhabitants, only 411 people were on the household list.\footnote{Id.} Upon further scrutiny, the Fiscal noted that the list was limited to lower-floor tenants of the city's buildings, and that the list failed to include almost all of the prominent persons. In addition, the Madrid, Zar, and Alicante Railroad, which officially listed 411 exempt district workers, sent a list containing 490 exempt workers to the list forming committee.\footnote{See, e.g., Fiscalía del Tribunal Supremo, 1921 Memorias 30-43.}

These examples from Madrid seem to be characteristic of the country as a whole. Due to the resistance of the middle and upper classes, the lists were not formed in accordance with the law. Eventually the exemption of wealthy persons from jury duty, as a result of bribery and pay-offs, became common practice for local officials. Thus, juries were composed of the poorer and less literate members of the community. Most fiscales claimed that these uneducated jurors were responsible for the difficulty in obtaining the guilty verdicts desired.\footnote{See Fiscalía del Tribunal Supremo, 1903 Memorias 33.} Some felt that apathy towards the political system made the jury easier to manipulate.\footnote{Id.} Despite the Solicitor's General's claim that their institution was the best friend that the jury ever had, the complaints about the system seem unfounded when examined in light of the fiscales complete failure to prosecute the people who evaded jury duty.

4. Municipal list: reform of the compilation process

In an attempt to improve the jury selection process, the Spanish
Crown, in 1897, ordered local prosecutors to be more conscientious in the list formation. The prosecutors were required to take a census in order to compile juror lists. The provincial and regional fiscales were ordered to review the results to ensure that the lists were composed of eligible citizens. In 1898, after one year in operation, the Solicitor General reported widespread resistance on the part of the local fiscales. For example, only six of the 206 municipalities in Toledo completed census forms as requested; in Zamora, 139 municipalities had not even distributed the forms. Many of the lists used by the other provinces to comply with the order were the old improperly drawn lists.

In 1899, the Solicitor General reported that the work of the municipal fiscales was grossly inadequate. He cited six reasons for the difficulty: 1) the transitory nature of the job; 2) the lack of stimulus to do a good job; 3) the corruption on the local level; 4) the communication problem between the provincial capitals and the municipalities; 5) the lack of strong ties between the provincial and municipal fiscales; and 6) the municipal fiscales’ dependence on politics.

Twenty-three years later, the Government was still unsuccessful in its attempt to implement the royal decree of 1897. The government, aware of the difficulties involved in enforcing the law, was unable or unwilling to improve the situation. Suggestions were made that census information be used to form the jury lists. There was no guarantee, however, that the census would have been any more impartial than the local committees, since the census was used to manipulate the vote even before universal manhood suffrage was introduced. The fact that the list compilation process created procedural changes which had no effect on the problems of jury fraud would indicate that the problems originated either in Spain’s socio-political system or in the extreme complexity of the law.

5. Municipal list: adjustment

Once the names were gathered, each municipality compiled two eligi-
bility lists, one for heads of households and the other for people of ability. Those heads of households who also qualified for the abilities list would be placed in the latter.\textsuperscript{97} One set of lists was compiled for each municipal judge.\textsuperscript{98} The lists were developed by January 15th\textsuperscript{99} and posted by February 1st for 15 days. During this 15 day period, any resident of the municipality could ask to be included on the list and those for whom inclusion was voluntary could request exclusion.\textsuperscript{100} Jury eligibility hearings were held before the municipal judge\textsuperscript{101} who subsequently decided whether to include the claimant in the jury pool.\textsuperscript{102}

Those whose claims were rejected could appeal the decision if they appeared before the provincial criminal court.\textsuperscript{103} There was no appeal from the criminal court's decision.\textsuperscript{104} After all appeals were completed, and no later than May 1st,\textsuperscript{105} the lists from each municipality were forwarded to the judges of instruction\textsuperscript{106} in the corresponding judicial district. Delays were subject to penalty.\textsuperscript{107}

Since the fiscales complained about the scarcity of qualified jurors, one might expect the number of appeals to be substantial. Notwithstanding, it was not. Indeed, the first recorded use of the appeals process came eleven years after the law was approved. In that case, a doctor was excluded from the list upon his improper request. Aware of the impropriety, a political enemy petitioned for his inclusion. The fiscal who reported the incident stated that the petition was motivated not by a desire to serve the public, but rather by a self-serving desire to discredit the doctor.\textsuperscript{108} In effect, the judiciary had become a valuable political tool.

Ironically, the ideological foundation for the jury system was eroded through the manipulation of its processes. The lack of appeals was probably a reflection of the fact that those who wished to avoid jury duty did so through unofficial methods. As a result the jury was composed of people who were either: 1) not aware of methods by which they could avoid service, 2) aware of such methods, but unable to effect them, 3) motivated by the hope of financial gain, or 4) genuinely interested in serving the

\textsuperscript{97} Id. at art. 16. \\
\textsuperscript{98} Id. at art. 15. \\
\textsuperscript{99} Id. at art. 16. \\
\textsuperscript{100} Id. at art. 18. \\
\textsuperscript{101} Id. at art. 19. \\
\textsuperscript{102} Id. at art. 21. \\
\textsuperscript{103} Id. at art. 22-24. \\
\textsuperscript{104} Id. at art. 25. \\
\textsuperscript{105} Ley del Jurado, supra note 61, at art. 25. \\
\textsuperscript{106} Juez de Instrucción is a judge who serves the same purpose as the prosecutor and jury at a grand jury hearing. \\
\textsuperscript{107} Ley del Jurado, supra note 61, at art. 30. \\
\textsuperscript{108} Fiscalía del Tribunal Supremo, 1899 Memorias 74.
public; the latter explanation being quite remote. Interestingly, the central government had tremendous power over many local governments to obtain desired electoral results,109 but this power was not exercised to correct jury formation.

6. Judicial district list: compilation

During the month of May, the judges of instruction designated a new committee of eight members. The committee was composed of the parish priest, the primary school master longest resident in the judicial district, four taxpayers selected randomly from amongst the top twelve real estate taxpayers, and two of the top six business taxpayers in the judicial district. No one on a municipal committee was eligible to serve on the district committee.110

When the judges of instruction received the municipal lists they convened the committee. The members then chose ten percent of the names on the head of household list whom they thought best able to fulfill the job of juror. If there were more than 500 names on the head of household list, the corresponding minimum number of jurors was 200. If, however, there were less than 500 names on the list, the minimum number of jurors was 150. If the lists of ability contained more than 150 names, the committee reduced the list to 150. When there were less than 150 names on the ability list, reduction was prohibited.

7. Regional list: finalization

The judges of instruction sent the revised lists to the regional criminal court. The governing board of each regional criminal court convened to form the official lists for each judicial district.

If the revised head of household list contained 200 names and the revised list of ability contained 100 names the lists were reduced to 150 and 75 names respectively. When the head of the household list contained between 150 and 200 names it was reduced to 150 names and when the list contained less than 150 names it was reduced to 50 names.111 If there were not enough names to form a 75-name list of ability, the top taxing households were taken from that list and added to the abilities list.112 The municipal officials made sure that the final lists contained no incompetent persons.113 The final lists, completed before August 1st, were pub-

109 J. Varela, supra note 40, at 408.
110 Ley del Jurado, supra note 61, at art. 31.
111 Id.
112 Id. at art. 33, § 1.
113 Id. at art. 33, § 5.
lished in the Official Bulletin.\textsuperscript{114}

C. Jury Selection

Trials were scheduled every four months. Jury lists were used for one year extending from August to August. Most of the trials were conducted in the courts of the provincial capitals unless the case loads became so heavy that courts in smaller towns had to be used.\textsuperscript{115} Trial dockets were set on December, April, and August 16th at the provincial criminal court.\textsuperscript{116} Once a controversy was found to warrant a jury trial, 42 potential jurors were selected:\textsuperscript{117} 20 names from the household list, 16 names from the abilities list, and six substitutes were chosen by lottery from the judicial district in which the case arose.\textsuperscript{118} Any prospective juror could be challenged for cause and dismissed.\textsuperscript{119} Challenges not agreeable to all parties were heard and decided by the provincial court within 24 hours of the hearing.\textsuperscript{120} The lists were then submitted to the district judges who turned them over to the municipal judges so that prospective jurors could be notified.\textsuperscript{121} If at least 28 jurors and substitutes appeared, final jury selection began. If less appeared, the court attempted to locate suitable replacements, otherwise the trial would be postponed.\textsuperscript{122}

At the appointed date and time, the jurors appeared before the judges for final jury selection.\textsuperscript{123} Voir dire began by drawing the names of jurors and submitting each to challenge. Both the prosecution and the defense could use an unlimited number of peremptory challenges until only 12 jurors and two alternates remained.\textsuperscript{124}

The fiscales complained bitterly about this system of voir dire, charging it gave the defense counsel a better chance to select a jury sympathetic to his client's case. Theorizing that the local counsel, knowing the populace better than the prosecutor, would be more familiar with the disposition of or better able to bribe the jurors, some fiscales felt that the process bred more corruption. In retaliation, the prosecutors challenged everyone passed by the defense so that the jury would ultimately be composed of the last fourteen jurors drawn.\textsuperscript{125}

\textsuperscript{114} Id. at art. 33, § 6.
\textsuperscript{115} Id. at art. 42.
\textsuperscript{116} Id. at art. 43.
\textsuperscript{117} Id. at art. 44.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at arts. 44-45.
\textsuperscript{121} Id. at art. 46.
\textsuperscript{122} Id. at art. 52.
\textsuperscript{123} Id. at art. 53.
\textsuperscript{124} Id. at art. 56.
\textsuperscript{125} See, e.g., FISCALÍA DEL TRIBUNAL SUPREMO, 1915 MEMORIAS XLVII.
D. The Trial

Following voir dire, the jurors were sworn and the trial began.\textsuperscript{126} Jurors could question either side at the court’s discretion.\textsuperscript{127} If, during the trial, both sides reached agreement concerning facts which would take the trial outside the jury’s competence, the defense had the option to continue before the jury or to try the case to the judge.\textsuperscript{128} Conversely, if the trial was originally tried to a judge and subsequently discovered to be within the competence of a jury, the defense could choose the fact finder.\textsuperscript{129}

At the end of each argument, the court orally reviewed the evidence for the benefit of the jury. The judges explained the charges, enunciated the legal tests necessary to prove the crime, and presented the appropriate attenuating, exculpatory, and aggravating circumstances involved.\textsuperscript{130} The standard against which guilt was to be determined was left to the consciences of the jurors.\textsuperscript{131} The Court was charged with maintaining the strictest impartiality throughout the trial.\textsuperscript{132}

The next step in the trial was the formulation of interrogatories for the jury. These were drawn from the definitive conclusions of the prosecution and the defense.\textsuperscript{133} Anything not included by the parties was added by the court.\textsuperscript{134} The first part of the question was, “Is John Doe guilty of . . .” followed by specific questions relating to key facts. The subsequent series of questions related to any extenuating, attenuating, or aggravating circumstances.\textsuperscript{135}

The jurors received the questions and retired to the jury room. During their deliberations,\textsuperscript{136} they could request clarification of the interrogatories.\textsuperscript{137} After deliberating they took an oral vote on the questions responding “yes” or “no” to each question.\textsuperscript{138} A majority vote decided the fate of the accused.\textsuperscript{139} Jurors were not permitted to abstain.\textsuperscript{140}

\textsuperscript{126} Ley del Jurado, supra note 61, at arts. 57-58.
\textsuperscript{127} Id. at art. 63.
\textsuperscript{128} Id. at art. 65.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at art. 72.
\textsuperscript{131} Id. at art. 84.
\textsuperscript{132} Id. at art. 68.
\textsuperscript{133} The definitive conclusions were composed by counsel after they completed their arguments. Basically the conclusions served to restate each side’s case including whatever modifications were necessitated by the particular facts of the trial. Id. at art. 70.
\textsuperscript{134} Id. at art. 75.
\textsuperscript{135} Id. at art. 76.
\textsuperscript{136} Id. at art. 80.
\textsuperscript{137} Id. at art. 82.
\textsuperscript{138} Id. at art. 84.
\textsuperscript{139} Id. at art. 85.
\textsuperscript{140} Id. at art. 86.
standing, abstentions were considered not guilty votes.\textsuperscript{141} Three abstentions resulted in a warning to the juror, after which the juror was fined.\textsuperscript{142} When the jurors completed the interrogatories they signed them and returned them to the court where the foreman read the conclusions.\textsuperscript{143} The court proceeded to sentence the the defendant based upon the verdict.\textsuperscript{144}

A verdict could be returned to the jury for reform if: 1) a question was omitted, 2) the answers to the interrogatories were contradictory or not congruent, 3) the jury acted \textit{ultra vires}, or 4) there had been an irregularity in the deliberation process.\textsuperscript{145} The court explained the problem and instructed the jury to arrive at a proper verdict.\textsuperscript{146} If the court sent the jury back three times without a proper verdict, a special poll was taken to determine if a verdict could be reached.\textsuperscript{147} If the judges found that a verdict could not be reached, a new jury was impaneled and the case retried.\textsuperscript{148} If one party's request for reform of the verdict was refused, the party could appeal by protesting the ruling.\textsuperscript{149} Appeals were also allowed on the basis of mistake of procedure or law.\textsuperscript{150} If there were no appeals, sentence was entered.

In summary, the jury system was characterized by two major components: the jury selection process and the trial. The jury selection process unfolded in three stages: 1) the creation of the lists; 2) the verification of the lists; and 3) voir dire. The trial was divided into six distinct elements 1) the arguments, 2) the judge’s explanation of the charges, 3) the submission of the interrogatories to the jury, 4) the jury deliberation, 5) the verdict, and 6) sentencing.

IV. The Jury and the Judicial System

The impact of the jury system on the Spanish judiciary remains unclear. Prosecutors claimed that the jury was causing the system to deteriorate. Citing juror apathy and illiteracy, they criticised the increasing number of acquittals.\textsuperscript{151} Therefore it is important to examine the jury as an institution of popular sovereignty.

\begin{footnotesize}
\begin{enumerate}
\item Id. at art. 86.
\item Id. at art. 88.
\item Id. at art. 90.
\item Id. at art. 96.
\item Id. at art. 107.
\item Id. at art. 108.
\item Id. at art. 110.
\item Id.
\item Id. at art. 111.
\item Id. at art. 116.
\item Id. at art. 117.
\item Id. at art. 118.
\item Id. at art. 119.
\item Id. at art. 120.

\textsuperscript{151} FISCALIA DEL TRIBUNAL SUPREMO, 1922 MEMORIAS 29-30.
\end{enumerate}
\end{footnotesize}
A. The Jury as Sovereign

As early as 1812 the argument for the jury centered on its function as an institution of popular sovereignty:

I have no doubt that some day we will establish among ourselves the healthy and liberal institution the jury so that all Spaniards will be able to terminate their differences through elected jurors and among equals, so no one will have to fear for their future because of the Courts or government influence. . . .

The 1888 jury was seen in the same light. The institution was once compared to the king because both could absolve and condemn without giving reasons.

In 1896, Solicitor General Luciano Puga said that the jury was the natural and logical consequence of the political system. It affirmed dignity and equality before the law in addition to harmonizing justice and popular sovereignty. The jury was intended to make the law and popular perceptions correspond: "It is not important to society whether jurors judge by official tests or by other private means, what is important to society is that the judgment is honest and just."

As originally planned the pool from which jurors were selected constituted roughly 9.6 percent of the population. With the passage of time, literacy rates rose and the pool expanded. It totaled 10 percent in 1900, 10.9 percent in 1910, and 12 percent in 1920. Considering
that universal manhood suffrage was introduced in 1890, these figures demonstrate that few had a voice when it came to popular sovereignty on the jury. The intended pool, the middle class and the elite, abdicated responsibility by leaving the jury system in the hands of local politicians. In most provinces this resulted in the transfer of responsibility to the more "modest classes" the members of which were believed to be less qualified.

The fiscales saw these "less qualified" jurors as the crux of the high rate of acquittal. They believed that the jury's inability to deliver guilty verdicts was due to the jurors' lack of education. This criticism was not justified from the purely theoretical standpoint. As Salvador Viada y Villaseca pointed out, the jury represented the sovereign. If the rate of convictions dropped, it demonstrated the will of the people. That result was, by definition, the desired result and should have been respected despite its failure to conform to the expectations of the fiscales.

B. Empirical Evidence

Statistics paint a picture of the jury which contradicts the fiscales' complaint. Admittedly, after 1888, the rate of not guilty verdicts increased steadily. Of all jury trials conducted in 1888, 26 percent resulted in acquittals. The level had reached 53 percent by 1922. The increase was fairly steady as illustrated by graphing the percentage of not guilty verdicts chronologically into a straight line regression formula. While the individual provinces experienced more erratic increases, the national

(1900).

158 Instituto Geográfico y Estadístico, 3 Censo de la Población Española 403 (1910).

159 Instituto Geográfico y Estadístico 3 Censo de la Población Española 276-77 (1920).

160 Fiscalía del Tribunal Supremo, 1921 Memorias 41-42.

161 Fiscalía del Tribunal Supremo, 1896 Memorias 93.

162 Fiscalía del Tribunal Supremo, 1921 Memorias 40.

163 Fiscalía del Tribunal Supremo, 1899 Memorias 86.

164 Felipe Sanchez Roman, the Solicitor General, talks of the jury functioning with regularity. He says the fiscales difficulties stemmed from having expected too much from the jury system and having those expectations dashed. Fiscalía del Tribunal Supremo, 1898 Memoria 76-77.

165 See Appendix A, graph 1.

166 Id.

167 The formula is:
trend was distinct.  

Interestingly, for the country as a whole, the increase in the acquittal rate corresponds to the increase in the literacy rate. Approximately 29 percent of the population was literate in 1877, 34 percent in 1900, 38 percent in 1910, and 44 percent in 1920. Assuming that literates appeared on juries in similarly increasing proportions, and accepting the views of the fiscales, one would expect to find that the provinces with the highest literacy rates would have had the lowest acquittal rates. This was simply not the case.

The data indicates a positive correlation between increased literacy and increased acquittal rates nationwide. There was a similar though less striking correlation between increased acquittal rates and increased literacy rates on the provincial level. Contrast Cadiz, with a 40 to 50 percent literacy rate in 1920, and registering a decline in the percentage of acquittals, with Cuenca, with the same literacy rate registering sharp

\[
b = \frac{\sum x_i y_i - \frac{\sum x_i \sum y_i}{n} \sum x_i^2 - \frac{\left(\sum x_i\right)^2}{n}}{\sum x_i^2 - \frac{\left(\sum x_i\right)^2}{n}}
\]

\[
a = \frac{\sum y_i}{n} - b \frac{\sum x_i}{n}
\]

\[
r^2 = \frac{\left[\sum x_i y_i - \frac{\sum x_i \sum y_i}{n}\right]^2}{\left[\sum x_i^2 - \frac{\left(\sum x_i\right)^2}{n}\right] \left[\sum y_i^2 - \frac{\left(\sum y_i\right)^2}{n}\right]}
\]

and it was used in canned computer program developed by Hewlitt-Packard.

168 See generally, Appendix A. Of the 47 Peninsular provinces surveyed, only three, Castellon, Zaragoza, and Huesca registered a decline in the percentage of acquittals between 1888 and 1923. See Appendix A, graphs 12, 21, & 48.

169 Instituto Geográfico y Estadístico, 1 Censo de la Población Española XXV (1887).

170 Instituto Geográfico y Estadístico, 2 Censo de la Población Española 297 (1900).

171 Instituto Geográfico y Estadístico, 3 Censo de la Población Española 402 (1910).

172 Instituto Geográfico y Estadístico, 3 Censo de la Población Española LXII-LXIII (1920).

173 Appendix B, Distribucion Geográfica del Analfabetismo de la Población de Mas de 5 Años de Edad, Instituto Geográfico y Estadístico, 2 Censo de la Población Española XXXVI (1920).

174 Appendix A, graph 11.
increases in the number of acquittals between 1888 and 1920. Over the same period Bilbao, with a literacy rate of over 70 percent, registered a sharp increase in acquittals.

The available data tend to disprove the theory that increased literacy correlates to increased convictions. On the contrary, they tend to prove just the opposite. Nevertheless, it should be kept in mind that the data do not take other factors which may affect a verdict into consideration. The most important of these include: 1) the type of cases heard in each province (crimes of property or violence); 2) the experience of counsel; and 3) the relationships between counsel, the parties, the judges, and the jurors.

V. Conclusion

One conclusion which emerges from this examination is that apathy and local patronage combined to create in the jury system what already existed in the rest of the political and judicial structure. The same local officials who controlled the political system also controlled the basic machinery for jury selection. Through their manipulation of the jury, local officials were able to control the results of trials concerning political crimes. While there was local manipulation of both the elections and the jury, the central government only dictated the results of the former. Apparently there was very little it could do to control trials. The government did attempt to reform the jury selection process, but all for nought. The Solicitors General expressed their frustration at not being able to make the jury fit their images of how a jury system should operate.

Therefore, in Spain between 1888 and 1923, the people were the sovereigns in theory only, the cacique and the encasillado exerting their influence to ensure that it stayed that way. Given the fact that Spain's rulers considered only a maximum of 12 percent of the population eligible to sit on juries, it is doubtful that the juries were ever intended to function as an extension of the popular will in any but the most limited sense. The resulting acquittal rates indicate that contrary to the Government's intentions, the jury, outside of the area of political crimes, served as an expression of popular notions of justice and sovereignty.

175 Appendix B.
176 Appendix A, graph 16.
177 Appendix B.
178 Appendix A graph 8.
179 See, e.g., Fiscalía del Tribunal Supremo, 1896 Memorias 102-10, and Fiscalía del Tribunal Supremo, 1899 Memorias 82-83.
180 161 Colección Legislativa 369 (March 8, 1897).
181 Fiscalía del Tribunal Supremo, 1898 Memorias 76-77.
Appendix A

All materials for this Appendix come from Fiscalía del Tribunal Supremo, Memorias 1889-1923 and the Jefatura Superior de Estadística, 1923-24 Anuario Estadístico 375 (1925). The author extends his gratitude to Alfredo Bello and John Vogel whose assistance was instrumental in the preparation and verification of the graphs.
% of not guilty
% of not guilty
% of not guilty
Appendix B

PERCENT OF POPULATION ILLITERATE IN 1920

|-----------|-------|--------|----------|-----------|--------|---------|---------|-----------|---------|------|------------|------|-----------|---------|--------|---------|-------|--------|-------|--------|--------|-------|--------|-------------|--------|-----------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|