

The Process of Punishment

What, after all, is a political trial? It is a trial in which the prosecuting party, usually the regime in power aided by a cooperative judiciary, tries to eliminate its political enemies.

—Judith Shklar, *Legalism: Law, Morals, and Political Trials*

One of the most striking trends of modern authoritarianism is the extent to which power has been consolidated through law. Across the globe, autocrats have routinely invoked legal procedures to justify arbitrary rule – measures ranging from elections, to parliamentary procedures, to constitutional referendums.¹

In this seemingly legalistic world order, courts have unsurprisingly emerged as a prominent forum to adjudicate conflict and contest power. But when courts become sites of autocratic contestation, the proceedings that ensue often bear little resemblance to how courts operate in functioning democracies. This is especially true wherever autocrats invoke the institutions of criminal justice for repressive ends, a practice sometimes referred to as “persecution through prosecution.”² In such cases, the overriding objective is not to adjudicate innocence or guilt of the accused, but rather, in the words of Judith Shklar, to “pursue a very specific policy—the destruction, or at least the disgrace and disrepute, of a political opponent.”³

¹ Albertus and Menaldo (2012); Huq and Ginsburg (2018); Scheppele (2018); Waldner and Lust (2018).

² Amnesty International (2017). ³ Shklar (1964), p. 149.

Such tactics are often used against high-profile political operatives, as was the case in 2013 when Bo Xilai, a once rising star within the Chinese Communist Party, had his political fortunes quickly reversed after he was accused of crimes against the Chinese state. By the end of the trial, Bo's conviction and life sentence cemented what many observers had already suspected since his initial indictment: that his political future was over. Harsh measures were similarly undertaken in Iran when a controversial prosecutor and ally of former president Mahmoud Ahmadinejad was found guilty of abuse of public office and sentenced to 135 lashes.⁴ The timing and targets of these cases are often significant, as when former prime minister of Pakistan Nawaz Sharif and his daughter were both found guilty of corruption and sentenced to 10 years in prison in 2018 – less than three weeks before the national elections.⁵ As for Bo Xi Lai, his conviction came mere months before a historic transition of power within the standing committee of the Chinese Politburo.

The often predictable outcomes of these cases have fueled suspicions among human rights observers that by bringing their rivals to court, autocrats are simply masking political purges as judicial ones. In so doing, contemporary autocrats are invoking routines reminiscent of more extreme historical episodes of judicial persecution and punishment. Consider the infamous Moscow trials of the Soviet Union, wherein opponents of the regime were ritualistically humiliated for their alleged crimes against the state. These show trials were the judicial centerpiece of Joseph Stalin's Great Purge in which "factional power struggles and political differences were 'solved' not only with the physical liquidation of the loser, but also with his political murder" or the "assassination of his character."⁶ Meanwhile in Nazi Germany, the people's court was specifically erected to mete out harsh, punitive justice against so-called enemies of the state; virtually all trials ended in the death penalty for the accused. To facilitate this repressive agenda, the court operated outside of the confines of normal constitutional law and exercised considerable jurisdiction over a range of petty and political offenses.⁷

⁴ *Iran Ex-Prosecutor Sentenced to 135 Lashes for Corruption*. (2016, November 2). BBC. <https://www.bbc.com/news/world-middle-east-37851724>

⁵ Constable, P. (2018, July 6). *Pakistan opposition leader arrested in corruption case*. The Washington Post. <https://www.washingtonpost.com/news/worldviews/wp/2018/07/06/pakistan-court-convicts-former-prime-minister-sharif-in-corruption-case/>

⁶ Hodos (1987), p. 5. ⁷ Geerling et al. (2017).

Both then and now, the use of courts for repressive ends suggests that the institutions of law and justice need not keep autocratic impulses in check but can instead facilitate its worst excesses. And yet, while the legal and judicial underpinnings of autocracy have deep, expansive roots, there remain gaps in understanding of how such systems came to be. Particularly puzzling is why autocrats opt to “judicialize” the process of punishment when there are far more expeditious ways of dealing with political rivals. That is, if a judicial purge is merely a political one in disguise, then it begs the question of why conceal such practices in the first place – especially when the outcomes are virtually the same.

The questions animating this book focus directly on the role that courts play in strategies of autocratic survival: Why do autocrats bother holding a political trial when the outcomes are assumed to be known from the start? Why do autocrats use judicial procedures to repress in some cases but extrajudicial strategies in others? What are the goals of going to court and by what mechanisms are these goals achieved? Do autocrats face risks by going to court, and if so, how do they ensure that trials go as planned?

This book approaches these questions from a variety of analytical perspectives and intellectual traditions, using a combination of political, socio-legal, and historical lenses to produce a more panoramic view of repressive justice and political control. In the remainder of this chapter, I examine the puzzle of political trials and consider existing explanations for judicial strategies of punishment in autocratic regimes. I then introduce a theoretical framework to explain why autocrats use courts to repress, who they are more likely to bring to trial, and how they ensure that the desired outcomes of court come to pass. After laying out the main argument, I highlight the book’s core contributions, describe the empirical strategy, and finally conclude by laying the road map for the remaining chapters.

1.1 THE PUZZLE OF POLITICAL TRIALS

The notion that autocrats would use courts for undemocratic ends is, on the surface, unsurprising. Indeed, it is to be expected that autocrats will attempt to manipulate the judicial process whenever the stakes of adjudication are high. Due process in autocratic courts should thus not be taken at face value; to be even accused of crimes against the state usually means that one’s days are numbered.

However, the real puzzle is not how such trials will end, but why autocrats conduct them in the first place. Consider the treatment of the

notorious chief of secret police Lavrenti Beria following Stalin's death in March of 1953. With Stalin gone, a vicious struggle for control of the Soviet Union ensued, the two leading contenders being Beria and Nikita Khrushchev, the latter of whom was a prominent member of the Politburo with a sizable faction behind him. When the balance of power shifted against Beria and in favor of Khrushchev, Beria was promptly arrested. He remained in detention until his trial for treason in December 1953, whereupon he was tried, convicted, and executed in a single day.

The decision to prosecute Beria was a curious one considering that there were far more expeditious ways of eliminating enemies of the state – many of which had been engineered by Beria himself. In fact, in his capacity as Stalin's head of security services, Beria had been responsible for an unprecedented extrajudicial campaign of terror across Soviet society, involving the arbitrary detention, torture, deportation, and killing of countless citizens. Though Beria's punishment ensured that he met the same violent end as his former victims, given this tradition of violence that Beria himself had helped build, it is not immediately obvious why the state opted to take the extra step of conducting a trial before carrying out his execution.

The phenomenon of political trials is even more puzzling when we consider the risks of going to court. Particularly concerning for autocrats are cases that draw negative publicity to the regime and may help the target of prosecution garner sympathy for their cause. So describes the case of Alexi Navalny, a vociferous critic of Russian president Vladimir Putin whose controversial treatment at the hand of the Russian state has generated widespread attention to intra-elite politics and government corruption. Since the late 2000s, Navalny's efforts to expose public malfeasance have made him the repeated target of criminal prosecution, including convictions for fraud and embezzlement that were seen by many as politically motivated.⁸ While these judicial efforts prevented Navalny from running for local office, they did little to silence his campaign against Putin. In fact, these proceedings arguably boosted his profile: As he was being prosecuted again in January 2021 following a failed assassination attempt that has been pinned on the Federal Security Service,⁹ Navalny's team released

⁸ *Alexei Navalny: Russia's vociferous Putin critic.* (2021, April 21). BBC. <https://www.bbc.com/news/world-europe-16057045>

⁹ Toler, A. (2020, December 14). *Hunting the Hunters: How We Identified Navalny's FSB Stalkers.* Bellingcat. <https://www.bellingcat.com/resources/2020/12/14/navalny-fsb-methodology/>

a Youtube video about state corruption that was viewed over 117 million times.¹⁰ In February 2021, Navalny was sentenced to prison by a Russian court, a decision that mobilized tens of thousands of his supporters to protest across Russia and led to violent crackdowns by the state.¹¹ The European Union and the United States responded by imposing sanctions on the Russian government for poisoning and imprisoning Navalny.¹²

The Navalny case illustrates the dangers of judicializing repression: By bringing political conflict out into the open, a judicial process may help turn political opponents into political martyrs. This suggests that political trials do not always deliver punishment as intended and may even be counterproductive for the regime. The question is why, given these risks, would autocrats bother with the fanfare of a trial when there are less conspicuous ways of dealing with elite threats? What value do judicial proceedings provide that arbitrary detentions or extrajudicial killings do not?

1.2 EXISTING EXPLANATIONS

Among scholars of authoritarian politics, theories of why autocrats judicialize the process of punishment have been dominated by two competing explanations: concealment and coordination. In essence, concealment theories suppose that courts merely cloak the true nature of repression, whereas coordination theories posit that courts impose real constraints on arbitrary rule. Each logic has fundamentally different implications for how judicial proceedings should be interpreted. If the intent of a trial is to conceal, we cannot take its proceedings at face value; whatever happens in court is a farce because real decision-making happens behind closed doors. However, if the intent of a trial is to show the willingness of autocrats to tie their own hands or to impose constraints on their decision-making, then judicial proceedings should be taken seriously. In this section, I briefly summarize each logic and outline what remains missing from these explanations.

¹⁰ *Putin's palace. History of world's largest bribe.* YouTube. <https://www.youtube.com/watch?v=ipAnwilMncl>, accessed June 22, 2021.

¹¹ *Women Form Human Chains in Russia in Support of Navalny's Wife.* The Guardian (2021, February 14). <https://www.theguardian.com/world/2021/feb/14/navalny-supporters-to-defy-kremlin-and-hold-candelit-protests-russia>

¹² Blinken, A. (2021, March 2). *Imposing Sanctions on Russia for the Poisoning and Imprisonment of Aleksey Navalny.* <https://www.state.gov/imposing-sanctions-on-russia-for-the-poisoning-and-imprisonment-of-aleksey-navalny/>

1.2.1 Concealment Theories

The central premise of concealment theories is that courts and other legal instruments serve as “window dressing” to cloak repressive behaviors.¹³ By this logic, rather than openly terrorize the population and risk opprobrium on the global stage, autocrats prefer to portray themselves as competent and public-spirited leaders, mimicking rational-legal ideals without sincerely embracing them.¹⁴ But openly espousing these ideals can backfire for autocrats, too. For example, if autocrats promote rule of law rhetoric but continue to commit extrajudicial violence, they risk undermining the civic-minded image that they were attempting to cultivate in the first place.

Concealment strategies speak to the phenomenon of “democratic backsliding,” a catch-all term describing a wide range of processes by which would-be autocrats debilitate or repurpose democratic institutions for autocratic goals.¹⁵ These practices have become increasingly de rigeur in the age of electoral autocracies such that leaders are often compelled to legitimize their rule under the pretense of free elections, popular referendums, and the right to a fair trial.¹⁶ Bermeo (2016) and Waldner and Lust (2018) observe that contemporary forms of backsliding are especially insidious because they operate entirely in accordance with the law, which limits the ability of dissenters to fight back through those same legal channels. Indeed, by combining the institutional attributes of democracy with the logic of authoritarianism, leaders can effectively chip away at human rights and political freedoms in plain sight.

The logic of concealment offers a reasonable intuition for why autocrats bring conflict to court, but it is important to recognize the limits of this kind of explanation. In particular, the notion that political violence is costly and therefore must be concealed is a relatively recent one; it partly reflects shifting norms about human rights that only began to carry weight in the latter half of the twentieth century.¹⁷ As Guriev and Treisman

¹³ Ginsburg and Moustafa (2008); Ginsburg and Simpser (2013).

¹⁴ Rajah (2011) refers to this phenomenon as “urbane authoritarianism,” wherein autocrats shy away from over coercion. Law here offers a form of cover by “[encoding] and [concealing] ideology and relations of power.” See also Guriev and Treisman (2019).

¹⁵ Bermeo (2016). ¹⁶ Magaloni (2008).

¹⁷ Though the human rights movement gained traction in the 1960s, Cold War considerations ultimately limited the impact of such efforts, meaning that systematic campaigns to sanction repressive regimes did not materialize until the turn of the century.

(2019) argue, the need to camouflage violence has grown more important with the proliferation of information technologies and the spread of the global human rights movement, factors that should raise the political costs of violence for autocrats.

But judicial strategies of repression predate these developments; autocrats have long relied on courts as sites of political persecution and attempted to turn the machinery of criminal justice against threats to their survival, patterns that emerged well before the information revolution and the age of electoral autocracies. The show trials of Stalinist Russia, for example, cannot be explained by the desire to cloak or legitimize persecution as due process; the oppressive outcomes of these proceedings were always meant to be seen.¹⁸

Furthermore, if the goal is to hide the true nature of political violence, then it is not immediately obvious why autocrats would opt for a judicial process when there are more discreet forms of punishment at their disposal. Many forms of extrajudicial repression, including arbitrary arrests and summary detentions, can be executed in ways that draw far less scrutiny than political trials. This is not to say that information about extrajudicial violence can be entirely suppressed or ignored, but rather that attention to such practices can wane quickly when they are more hidden from the public eye.

This highlights a key conundrum of concealment theories: It is unclear whether political trials actually conceal anything.¹⁹ Pro-democracy groups have frequently condemned such cases as flagrant abuses of the criminal justice system for partisan ends and harbor no illusions that due process will be granted to the accused. After all, “persecution as prosecution” was a phrase coined by the human rights community and has become a popular rallying cry whenever such cases come to court, which suggests that political trials have done little to quell criticism among outside observers. Opposition supporters likewise seem utterly unconvinced by the legitimacy of these proceedings, especially when the target of prosecution is a high-profile opponent to the regime. Such cases have been widely interpreted as witch hunts based on trumped up charges, not the rational-legal models of adjudication that concealment theories would suggest.

¹⁸ Hodos (1987).

¹⁹ The rather flimsy attempts to hide undemocratic behaviors also apply to autocratic elections, particularly when vote share for the incumbent nears 100 percent (Magaloni, 2008).

The reality is that whenever individuals are brought to trial, their treatment by the state is brought to the fore in ways that are not necessarily advantageous for autocrats. There is thus little evidence to support the claim that bringing conflict to court helps mask or legitimate repressive behaviors; it may in fact do the opposite. And if audiences do not believe that judicial institutions are being used properly, judicializing punishment can garner more negative attention to repressive practices. The longer such proceedings take to unfold, the more opportunities for both domestic and foreign critics to scrutinize (and potentially find fault with) the conduct of courts.

1.2.2 Coordination Theories

In contrast to concealment theories, coordination theories contend that courts do not disguise the true nature of punishment but instead deliberately bring it out into the open, albeit in a tightly controlled fashion. Many of these theories begin with a simple premise. As Chwe (2013) writes, “submitting to a social or political authority is a coordination problem: each person is more willing to support an authority the more other support it.”²⁰ Myerson (2008) builds upon this logic to explain how courts can be used to coordinate support for the ruler. The court in his model is a literal meeting place for members of the ruling elite to observe how the ruler treats one of their own. Once assembled in court, the ruler can show his supporters that he is willing to abide by predetermined rules and procedures when deciding standards of appropriate (or inappropriate) behavior. Exercising such restraint signals to other elites that the ruler’s commitments are credible, which is the basis of effective power sharing in autocratic regimes.

A court thus operates similarly to other institutions of elite cohesion, that are designed to establish credible commitments or “contracts” between autocrats and their supporters.²¹ A robust body of scholarship on these themes has primarily focused on autocratic parties, cabinets, legislatures, bureaucracies, and constitutions; that is, nonjudicial institutions.²² These works have shown that the credibility of these

²⁰ Chwe (2013), p. 19.

²¹ Myerson refers to courts as a “minimal constitutional structure” between rulers and their supporters.

²² Albertus and Menaldo (2012); Gandhi (2008); Ginsburg and Simpser (2013); Slater (2010); Wright (2008).

commitments often hinge upon the autocrat's willingness to make meaningful concessions to their supporters or impose real constraints on their authority. This logic readily extends to the judicial sphere, wherein a court provides an ideal venue for autocrats to put their claims into practice by showing other elites how they will all be treated "equally" under the law – as long as they stay loyal to the autocrat.

A common theme linking coordination theories is the idea of autocratic restraint, mainly that autocrats can reinforce support for their authority by cooperating with or making concessions to other elites. But maintaining elite cohesion often demands more than just buying goodwill; it also involves punishing malfeasance. For example, when autocrats purge cadres from the ruling circle (stripping them of party membership or lucrative government portfolios), they not only reveal their capacity to inflict violence on one of their own; they also reveal the bounds of permissible behavior, which serves as a reminder to others of what can happen if they too fall out of line. Thought of in these terms, a public purge affects both the individual being punished as well as the audience of other elites who might be punished in future. This logic helps explain why such attacks are often performed out in the open, such as the infamous Iraqi Ba'ath Party purge of 1979 that was conducted before a live assembly of politicians and was even televised for a broader audience.²³ Dramatic roundups of political elites have occurred elsewhere in places like Turkey and Saudi Arabia where the visibility of these procedures ensures that even those who are not directly implicated are still able to witness the purging of others.^{24,25}

Purges are particularly conspicuous acts of elite retribution that are often invoked capriciously. But autocrats can also institutionalize the process of punishment by turning the sanction of elite agents into a criminal justice procedure. Codifying punishment shifts the venue of violence from the public assembly to the courtroom, transforming "public violence of

²³ In this infamous episode, newly installed President Saddam Hussein shocked an assembly of Ba'ath Party leaders by announcing that more than sixty individuals who were sitting before him in the assembly had conspired to overthrow him. As each alleged coconspirator was named, they were escorted out by armed guards.

²⁴ Editorial Board. (2016, July 16). *The Counter-Coup in Turkey*. The New York Times. <https://www.nytimes.com/2016/07/16/opinion/the-counter-coup-in-turkey.html>

²⁵ Leber, A. and Carothers, C. (2017, November 15). *Is the Saudi Purge Really About Corruption? Lessons From China*. Foreign Affairs. <https://www.foreignaffairs.com/articles/china/2017-11-15/saudi-purge-really-about-corruption>

the King” into “a juridical process of the law.”²⁶ Routinizing this process can also be a powerful tool of elite discipline, whereby discipline entails the creation of “docile bodies” through conditioning or coercion.²⁷ And cultivating docility can be fundamental for maintaining regime cohesion, since a disciplined agent is one who can be relied upon to comply.

Yet, the disciplinary dimensions of autocracy remain undertheorized. Scholars of punishment have largely focused on the disciplinary dimensions of democracy, where the evolution of crime and punishment in the Western world has been primarily analyzed through a socio-legal lens.²⁸ Meanwhile, scholars of autocratic institutions have tended to conceptualize punishment as an act of arbitrary repression – a measure of last resort to be used when institutions of power sharing break down.²⁹ But just as autocratic institutions can be used to share the spoils of power, so too can they be used to punish and purge. And the power of codified punishment is often its repetition, which over time generates expectations for how disobedience will be treated.³⁰

This discussion suggests that institutionalizing punishment can help maintain elite cohesion by ensuring that all acts of insubordination receive the same penalty. However, autocratic rule is by definition arbitrary. Why should we expect autocrats to apply the same set of rules for all? Even as autocrats signal their intention to uphold law and order, punishments can still be more institutionalized for one group than another. To what extent are such differences strategic? And does differential treatment have implications for broader strategies of repression both in and out of court?

1.3 A THEORY OF JUDICIAL REPRESSION

In this section, I outline a theoretical framework that explains why autocrats judicialize the process of punishment and when they are more likely to do so. In particular, a theory of judicial repression needs to consider the function of a political trial, who is more likely to be subjected to this process, and how autocrats actually ensure that such proceedings go according to plan.

²⁶ As Foucault (1979) explains, rather than bloody the body, the state condemns the soul of the criminal.

²⁷ Foucault (1979).

²⁸ Seminal scholarship in this field have uncovered the disciplinary power of the law to the sociology of Western penitentiaries (Garland, 2012).

²⁹ Svobik (2012).

³⁰ As Foucault (1979) observed, punishment’s “effectiveness is seen as resulting from its inevitability, not from its visible intensity.”

1.3.1 The Function of Trials

Why do autocrats conduct political trials? In essence, taking political rivals to court enables autocrats to institutionalize the process of punishment. But in contrast to existing theories of coordination, I argue that judicializing punishment is more about enforcing consequences than offering concessions. That is, rather than impose meaningful constraints on authority, my claim is that a trial serves as an explicit demonstration of the consequences of violating the autocrat's rules.

To understand how this process works, it is useful to consider a political trial as a kind of formal performance or ceremony of justice. The ceremony typically begins with an indictment against a political rival that spells out the nature of their alleged offense. The state then brings the accused to court whereupon it lays out its allegations before a judge. At the end of these proceedings, the judge delivers their verdict regarding the guilt or innocence of the accused. This sequence of indictment, adjudication, and judgment constitutes a judicial ritual, one which is familiar, repeated, and routine. However, in a political prosecution, the underlying goal is not necessarily to elucidate the facts of the case nor to ensure due process for the accused; it is to use the language of the law and the procedures of court to establish in no uncertain terms the consequences of violating the rules of political order – that is, of defying the autocrat's authority. To the extent that this process of trial and punishment is oft repeated, we can say it has become institutionalized.

The fact that this ritual is conducted in court is significant. A court is a space for individuals to observe not just the trial and punishment of the autocrat's rivals, but perhaps more crucially, to observe that these proceedings are witnessed by others. Assembling an audience in court thus ensures that each member of the crowd sees other members observing the same story at the same time. Regardless of whether anyone truly believes this story to be true, to see others act *as if* these proceedings are credible can compel individuals to act *as if* they agree.³¹ In short, obedience to authority can be reinforced by the mere supposition of others' obedience.

Performing this ritual before a wider audience helps generate common knowledge that conflict has a clean and tidy resolution (the defendant's conviction), which implies that rivalries within the regime have been

³¹ Wedeen (1999) explores the politics of “as if” in Syria where individuals routinely participate in elaborate, often preposterous ceremonies of devotion to Assad, not because they truly believe in the message of these rituals, but rather because they are compelled to by the fact that others are complicit.

effectively defused. The explicit, methodical, and largely predictable nature of these proceedings are an important driver of shared expectations. With this understanding in mind, was the guilty verdict against Beria after the death of Stalin really a foregone conclusion? Or was this expectation engendered by the careful delivery of a judicial ritual, such that by the end of the trial, conviction appeared inevitable?

By this logic, political trials neither conceal acts of violence nor coordinate others around the idea that they will be treated equally; instead, they convey the unwavering message (and presumably widely shared belief) that rebellion against the autocrat is not only doomed to fail, but entails harsh penalties for those foolish enough to try. The question is: When are autocrats more likely to invoke such measures?

1.3.2 Who Goes to Trial

The ultimate objective of a political trial is to restore obedience to authority by way of eliminating a political rival. But not all rivals should be subjected to a judicial process. Rather, I argue that a political trial is more useful when regime cohesion is under strain, as is more often the case when rivals to power come from within the ruling circle. The ruling circle consists of agents whose cooperation is necessary for regime survival, including party leaders, cabinet ministers, and commanders of the security forces. However, because they are such a vital pillar of autocratic support, insider elites are also well positioned to undermine regimes from within. Indeed, such threats are deemed especially vexing because their proximity to power makes it easier to plot in secret, which makes autocrats more vulnerable to their insurrection.

When members of the insider elite turn against the autocrat, the autocrat's goal is to both eliminate the source of the threat as well as maintain the obedience of other members of the ruling circle. Herein lies the value of a political trial: by singling out an insider for prosecution and punishment, autocrats can attempt to restore regime cohesion by demonstrating to other insiders the consequences of defying authority. Bringing this demonstration to court is important toward this end, for it is in the literal courtroom that insiders are able to observe other insiders watch the same proceedings. The act of communal observation can serve to reinforce the main message of the trial because beliefs are stronger when they are assumed to be shared. Invoking a judicial strategy against insider rivals thus helps autocrats overcome threats to regime cohesion by reaffirming the rules of political order (and creating the impression that other insiders subscribe to these rules).

By contrast, when regime cohesion is not under immediate strain, autocrats may be better served by resorting to extrajudicial strategies of repression. Such is the case when confronting threats to power from beyond the ruling circle, or from outsider elites. Outsider elites comprise a diverse category of politically active individuals or groups who seek greater power in the political sphere, including opposition leaders, trade union heads, and members of the business community. However, because these actors are not members of the autocrat's inner sanctum, autocrats do not require their support for the regime to survive. Threats from outsider elites thus do not impose the same type of strain on regime cohesion, and in fact, may produce the opposite by providing a common, externally mobilized enemy for insiders to unite against. Furthermore, strategies of outsider mobilization tend to make such groups more convenient targets for state violence. Unlike insider elites who can afford to plot in secret, outsider elites more often wear opposition on their sleeves because doing so can help build broader support for their cause. But visibility has costs: The more open and explicit outsider mobilization becomes, the more obvious targets they pose for extrajudicial repression.

What this discussion suggests is that while a trial can help restore obedience to authority in autocratic contexts, whether autocrats opt for this approach can depend on the type of threat they confront, especially whether regime cohesion is under strain.

1.3.3 A Cooperative Judiciary

A judicial strategy of repression presumes that there exists a permanent or semipermanent body that can be called upon to execute the duties of court in a reliable, predictable fashion. In most cases, this responsibility falls upon the judiciary: the official judicial corps of the state and in many respects the most suitable conductor of political trials. Because judicial professionals are often the foremost experts in law and judicial procedure, they should be particularly well equipped to conduct courts in a systematic, routine manner. It thus reasons that a more professionalized judiciary goes hand in hand with a more institutionalized process of punishment.

While a professionalized judiciary lends stability to judicial process, on what basis can we assume that courts will cooperate with the autocrat's agenda? The most obvious way to secure a cooperative court is by packing the bench with regime loyalists. A patronage-based logic – wherein government positions are based on loyalty rather than merit – helps explain recruitment patterns across a variety of government agencies in autocratic

regimes.³² However, the judiciary is a unique type of agency in that the judicial corps is essentially a guild, or an elite professional association with relatively high barriers to entry. In short, not everyone can be a judge. The ability of autocrats to pack the courts is thus constrained by the guild-like properties of the judiciary, which have higher-eligibility criteria the more professionalized the judiciary becomes. Of course, professional jurists can also be regime loyalists; but in practice, this is not always the case.³³ The ability of autocrats to sidestep qualified jurists for their preferred candidates can be furthermore limited if their intention is to keep the judiciary professionalized.

If autocrats cannot arbitrarily pack the courts in their favor, there are other ways of securing judicial cooperation. *Ex ante* controls, such as rules to limit tenure and circumscribe discretion, can attempt to forestall judicial disobedience in relatively discreet ways. This is in contrast to *ex post* controls, such as dismissals, demotions, detention, and even the murder of defiant judges, which brings violence against the judiciary out into the open. Both *ex ante* and *ex post* methods should be seen as measures of last resort to be invoked when judges cannot be trusted to voluntarily comply; that is, they are disciplinary measures designed to compel judicial obedience. Without such obedience, the conduct of political trials cannot be taken for granted and the obedience of others may not be restored.

1.4 CONTRIBUTIONS

This book makes several contributions, the first of which is conceptual. One of my central claims is that punishment can be institutionalized even if its application is deemed repressive. Phrased another way, though political trials can bring order to the process of punishment, whether such proceedings are even invoked in the first place can depend more on the identity of the defendant than the nature of their purported crime. Who goes to trial is thus a partisan calculation, not a legal one. As I show in Chapter 4, there are conditions under which insider elites are indeed more likely to go to trial than outsider elites, which provides evidence that judicial procedures are selectively applied for repressive ends; mainly, the elimination of political threats that are close to the center of power.

³² Arriola (2009); van de Walle (2006).

³³ Autocrats may face significant constraints in their ability to pack government agencies with regime loyalists (Hassan, 2020; Woldense, 2018).

Thinking about repression in these terms represents a departure from conventional theories, which more often treat political violence as an extrajudicial process rather than a judicial one. Strategies of autocratic survival are typically framed as a trade-off between the carrot and the stick, or between institutions of co-optation and violent acts of the state.³⁴ But a central premise of this book is that courts are one weapon among many in the autocratic arsenal – when and why autocrats choose to invoke this judicial weapon is still poorly understood. As the book’s findings suggest, reconsidering repression as a judicial phenomenon can help develop a more complete and nuanced picture of these patterns and furthermore may be useful for understanding democratic backsliding trends because courts are precisely the kinds of contested spaces that are more vulnerable to being “hijacked” for autocratic ends.³⁵

By focusing on judicial strategies of autocratic survival, this book also broadens appreciation for the myriad ways in which autocratic power can be institutionalized. A large body of research on these themes has focused on the cooperative dimensions of elite cohesion, mainly how ruling parties, legislatures, cabinets, and constitutions can help regulate regime relations and thus stabilize the distribution of power.³⁶ Though courts remain comparatively understudied in this tradition, a growing body of work has shown how courts serve similar coordinating functions in autocratic regimes, providing forums to monitor agents, enforce administrative control, enact policies, implement controversial reforms, and legitimize undemocratic practices.³⁷

Building on these works, I focus my attention on the disciplinary devices of autocracy, placing courts center stage to highlight how the judicial routines and rituals that are typically associated with due process can instead be weaponized for its opposite. In so doing, I consider how judicial performances correspond to (and sometimes enhance) performances of power beyond the courtroom. Kilson (1963) and Wedeen (1999) have illustrated the ways in which autocrats deliberately project their authority in the public sphere, through constitutional referendums,

³⁴ Gandhi and Przeworski (2007). ³⁵ Hodal (2019).

³⁶ Arriola (2009); Gandhi (2008); Ginsburg and Simpser (2013); Hassan (2020); Meng (2020); Slater (2010); Truex (2016); Wright (2008).

³⁷ Ding and Javed (2021); Ginsburg and Moustafa (2008); Helmke (2004); Massoud (2013); Moustafa (2007); Pereira (2005); Wang (2014).

rallies and parades, and votes of confidence in parliament.³⁸ Many such activities rely on some form of ceremony or public participation, whether by voting, oath-taking, or otherwise pledging support to the autocrat. Like their judicial counterparts, these *extrajudicial* rituals force their participants to be complicit in performances of power. And as is the case with political trials, whether audiences truly believe in these performances is moot. As Wedeen (1999) explains, witnessing the voluntary submission of others can itself be an act of domination.³⁹ Autocratic rituals – whether in or out of court – can thus generate self-fulfilling prophecies whereby perceptions of power lead to genuine support.

Approaching courts from this angle serves additional advantages from a theory-building perspective. Conventional wisdom holds that judicial institutions should play a relatively limited role in autocratic regimes. What power do judicial institutions actually exercise when rulers live above the law? But, as the argument goes, courts *can* become sites of meaningful contestation and *do* exercise real constraints on arbitrary authority in a functioning democracy; wherever courts fail to live up to these standards (as is often the case in autocratic regimes), it is tempting to dismiss judicial institutions as weak or inconsequential.⁴⁰

However, the notion that autocratic courts are broken, dysfunctional, or otherwise not fulfilling their true purpose can be deeply misguided, reflecting democratic ideals rather than the world as it truly exists. This book aims to change such thinking by examining how judicial institutions can and often are used to entrench autocratic power, in both deliberate and methodical ways. Reflecting on the state of the judicial politics field, Moustafa (2014) writes that the distinctions that are often drawn between autocratic and democratic courts are arbitrary and oversimplified, which has led to an unfortunate theoretical divide in scholarship on comparative courts. But judicial repression is not a strictly autocratic phenomena: Democrats have also used political trials to achieve partisan agendas, such as during the infamous espionage case against Julius and Ethel Rosenberg

³⁸ Some even introduce constitutional amendments declaring themselves “President for Life” (Magaloni, 2008).

³⁹ Stern and Hassid (2012) observe similar phenomena in China where uncertainty regarding the limits of state tolerance led many lawyers and journalists to frequently self-censor and control themselves.

⁴⁰ Such thinking follows the intellectual tradition of a broad body of scholarship in political economy and historical institutionalism, including seminal works by North and Weingast (1989), Weingast (1997), and Olson (1993) on the institutional origins of rule of law and democracy.

or the Smith Act trials of communist party leaders conducted during the McCarthy-era Red Scare. The presumption that democratic courts are not meant to be used in tyrannical fashion is thus more of a normative claim than an empirical reality.

In this vein, it is useful to conceptualize courts as political institutions that can be designed and adapted to serve the needs of their particular environment, as opposed to bodies that are intrinsically democratic or authoritarian. Such thinking has long occupied the minds of scholars of punishment, especially scholars of Western democratic institutions. In his seminal study of the American criminal justice system, for example, Feeley (1979) observed that the proceedings of court ultimately reflect the “state of mind of its leadership and on the amount of concerted hostility in the body politic.” In a similar vein, Kirchheimer (1961) described the courts as an “exclusive staging area for clashes between conflicting political claims,” specifically, the “clash between the authorities of the day and their foes.”⁴¹ That is to say, courts may be used as safeguards of democratic values or weapons of autocratic power depending on the needs of the polity which they serve.

In addition to rethinking the function of judiciaries, this book also refocuses theories of autocracy in postcolonial Africa. Before the “third wave” of democratization, this region was home to a substantial portion of the world’s authoritarian regimes. But too often these experiences are not taken into consideration when scholars theorize about autocracy. Recent research by scholars such as Hassan (2020), Woldense (2018), Meng (2020), Riedl (2014), Opalo (2019), and others have helped address this gap by building theories of autocracy and democracy rooted in the continent’s diverse histories, especially in regards to the legacies of postcolonial rule on contemporary governance. Building from these works, my theoretical framework speaks directly to the experiences of postcolonial autocracies attempting to consolidate control. And as I show throughout this book, analyzing the types of conflicts that plagued autocrats during the early years of independence provides insight into the broader challenges of autocratic survival, the implications of which may travel to other contexts where elite loyalties are uncertain or regime cohesion is under strain.

Finally, while postcolonial Africa is often characterized as a place where informal institutions reign, this book shows that even in very

⁴¹ Kirchheimer (1960).

informal environments, formal institutions matter – but perhaps not for the reasons that we expect. In postcolonial regimes, the formal machinery of criminal justice has long been weaponized in service of the state, even in contexts where political authority became increasingly arbitrary and personalized in the decades after decolonization. In such settings, the selective, strategic enforcement of laws and regulations serves as a potent reminder of who has power (and who does not).

1.5 CASE SELECTION

This book adopts a historical approach in order to elucidate and evaluate the main claims of the theory. As I aim to demonstrate throughout, taking history seriously not only deepens appreciation for how political violence evolves over time, it also complicates our understanding of how power is institutionalized. Theories of authoritarianism often adopt a functionalist view wherein it is assumed that whatever institutions are under the autocrat's employ were created for the purpose they currently serve.⁴² While such work provides insight into how autocracy can be configured, the presumption that autocrats are actually able to effectuate their desired outcomes is often taken for granted. In particular, it is not immediately obvious why insecure autocrats who draw on uncertain support would be able to withstand challenges to their power, let alone establish institutions that effectively stabilize their rule. Defusing threats to autocratic survival can be especially difficult in such scenarios, and efforts may ultimately be unsuccessful. However, tracing the evolution of autocratic institutions in historical context can provide insight into how rulers learned to navigate unfamiliar terrain, as well as the potential missteps they made along the way.⁴³

Set against this backdrop, the empirical focus of this book is postcolonial Africa, a context that offers ideal testing ground for theories of judicial repression and autocratic survival but where research on such themes remain scant. To date, scholars of African autocracy largely overlook the courts, turning attention instead to legislatures, parties, and bureaucracies.⁴⁴ Scholars of African courts meanwhile have tended to highlight

⁴² This orientation appears most prominently in game theoretic approaches to autocracy. See Gandhi (2008); Meng (2020); Svobik (2012).

⁴³ This historical approach to understanding autocratic institutionalization and regime building builds upon the analytical insights of Collier (1982); Hassan (2020); Massoud (2013); Slater (2010); Solomon (1996).

⁴⁴ Bleck and van de Walle (2018); Bratton and Van de Walle (1994); Hassan (2020); Kilson (1963); Riedl (2014); van de Walle (2002).

their democratic dimensions, dealing primarily with themes of due process, rule of law, and judicial independence.⁴⁵ Part of the reason for this disconnect is the fact that these research agendas often focus on distinct windows in time: Whereas work on autocracy tends to examine the one-party dictatorships and military juntas of the Cold War era, work on the judiciary tends to be rooted in trends that arose during the “third wave” of democratization in the late 1980s and early 1990s. These contrasting periods of geopolitical history have understandably resulted in different analytical approaches to the study of autocratic institutions and courts across the region, but they have also limited understanding of how judicial institutions factored into the designs of autocratic regimes.

This book takes a different approach by examining periods of African political development when threats to regime survival were great and pathways to power were uncertain; when leaders had greater opportunities to create, destroy, or adapt the institutions of law and justice to confront these challenges and attempt to consolidate control. My inquiry focuses on the postcolonial period, a time of profound transformation across the African continent marked by the decline of European empire, the rise of new nation states, and the consolidation of military and civilian dictatorships – all within the span of a few decades.⁴⁶

While this history is well trodden ground, the judicial dimensions of postcolonial politics remain largely overlooked.⁴⁷ The few works on these themes from scholars such as Widner (2001) and Massoud (2013) have shown the value of recasting this era through a juridical lens, but there is still ample ground to be explored.⁴⁸ Particularly intriguing is the degree to which postcolonial autocrats chose to work within, rather than around, their colonial inheritances in the legal sector. Originally designed to subjugate indigenous peoples, colonial law and courts provided weaponry

⁴⁵ Much of this latter body of work examines judicial politics since the 1990s when global liberalizing trends led to the breakdown of autocratic rule around the world. See Gløppen (2003); Gløppen and Kanyongolo (2007); Ellett (2013); and VonDoepp and Ellett (2011).

⁴⁶ Young (2012) defines the postcolonial period as the first few decades after independence from colonial rule, ending in the early 1990s with the third wave of democratization.

⁴⁷ This history is typically explained through the lens of patrimonialism, whereby strongmen executives used their command of state resources to further their particularistic objectives. See Young (2004); Collier (1982); Bratton and Van de Walle (1994); Zolberg (1966).

⁴⁸ These contributions provide contrasting approaches to the study of judicial politics in historical context. Widner’s (2001) study of rule of law in postcolonial Tanzania pivots around the life and career of Chief Justice Francis Nyalali. Massoud (2013) meanwhile examines three phases of legal politics (colonial, authoritarian, and humanitarian) over 114 years of Sudanese history.

to wield against anyone who resisted government authority.⁴⁹ For example, public-order and state-of-emergency laws served as broad legal cover for an array of draconian practices, ranging from arbitrary arrests and indefinite detentions, to mass displacements and executions. These laws worked in tandem with a punitive criminal justice system that severely limited the rights of colonial subjects to a fair trial and helped establish the legal foundations of imperial rule.

In these ways, colonial institutions provided a ready, repressive infrastructure for the incoming leaders of the postcolonial state. And rather than dismantle these systems of oppression after independence, postcolonial leaders more often maintained them – turning the rational-legal instruments of colonial rule into weapons of postcolonial power. The question is: Were these outcomes historically determined? That is, were postcolonial leaders bound by their colonial legacies, or did they have the discretion to select which institutions to uphold or destroy? I revisit such themes throughout the book in order to better understand how strategies of repression evolved and whether they ultimately helped fortify autocratic regimes.

I further narrow my focus to Anglophone Africa, specifically former British colonies that began to decolonize in the mid-twentieth century. Anchoring my inquiry in this context serves two purposes. First, it provides a more even baseline for understanding threats to autocratic survival across otherwise diverse regions and peoples. Toward the end of the Second World War, indigenous subjects across the British Empire began mobilizing against colonial rule; in several cases these efforts resulted in relatively peaceful, negotiated transitions to independence by the late 1950s and early 1960s, setting the stage for the presidential republics, one-party states, and military juntas that would come to dominate the postcolonial scene.⁵⁰ The shared struggles for nationhood in these territories set them apart from places where the battle for independence was considerably more violent and protracted, in some cases lasting well until

⁴⁹ Some of the most repressive legislative tools of the British Empire – including the notorious preventive detention laws used to detain political opponents without trial – originated in British India and were transplanted around the world without regard to local circumstance (Coldham, 2000).

⁵⁰ Botswana, a former British colony that became one of the most stable multiparty democracies on the African continent, is a notable outlier.

the 1980s and 1990s.⁵¹ By focusing on nations that experienced similar geopolitical circumstances both before and after independence, I am better able to compare strategies of repression in comparative context and identify similar patterns of punishment across time and place.

Second, focusing on Anglophone African cases enables me to refine my inference to a single type of legal regime. The common law systems that were installed across the British Empire were fundamentally distinct from the civil law systems used in Francophone and Portuguese territories, the latter of which were predicated on a different logic of adjudication, judicial authority, and evidentiary procedure. These distinctions may have differing implications for the delivery of political justice: Whereas the common law tradition tends to afford greater autonomy to judges to make judgments based on prior rulings, the civil law tradition tends to treat judges as civil servants whose role is to accept the laws of the government as given, even when they are patently antidemocratic.⁵² Focusing on Anglophone cases thus provides a way to explore the complex dynamics that may be driving judicial outcomes while ruling out alternative explanations that might be rooted in the different modalities of common and civil law adjudication. Furthermore, given the relative independence of judges in common law regimes, examining such jurisdictions provides a way to test theories of judicial compliance, since judges in these contexts technically have greater discretion to defy political authority.⁵³

Using the aforementioned criteria my analysis features Ghana, Sierra Leone, Kenya, Malawi, Tanzania, Uganda, and Zambia, over a period dating from independence in the mid-twentieth century until the early 1990s. My scope of coverage is thus both geographically wide – including countries in East, West, and Southern Africa – and temporally deep – ranging between three to four decades for each country. The result is an empirical analysis firmly grounded in history, one which reflects the diverse experiences and common challenges confronting autocratic regimes of the postcolonial period.

⁵¹ Following long and bloody conflicts, Zimbabwe finally achieved independence in 1980 and Namibia in 1990. South Africa, meanwhile, was dominated by a white minority apartheid regime until 1994.

⁵² Joireman (2001).

⁵³ In the common law case, it is often argued that the discretion afforded to judges through rules of precedent can help engender judicial independence, since judges have greater autonomy to interpret the law (Joireman 2001).

1.5.1 Data on Postcolonial Regimes

Archival research is generally difficult in autocratic contexts where data are often incomplete, missing, or destroyed.⁵⁴ But postcolonial Africa presents an additional set of challenges. Despite its relative recency, the postcolonial period is in many ways less well documented than the colonial period in African government archives.⁵⁵ As many historians have noted, record keeping was not a priority for most postcolonial regimes, meaning government agencies were not compelled to systematically document or keep internal records.⁵⁶ Even where archives were actually maintained, the lack of infrastructure to properly house and preserve them has in some instances led to literal states of decay. In more devastating cases, records were destroyed by orders from above; ironically, the only records that remain are those that fell beyond the reach of the state.⁵⁷ Official documents dating from this era can thus be hard to come by, particularly with respect to sensitive matters such as state-sanctioned repression.

Yet, a great deal of information on postcolonial politics can be derived from alternative sources. In fact, scholars have increasingly recognized the virtues of so-called *shadow archives*: historical deposits located outside of the countries under study, usually by the government of the ex-colonizer.⁵⁸ With respect to former British colonies, many such records were produced by British High Commissioner Offices stationed in African territories, who for decades after independence, served as conduits from their local postings to the London Home Office, as well as to other High Commissioners based in neighboring countries. The documents that travelled between and within these agencies provide valuable intelligence on local African affairs, including a wealth of information derived from indigenous African sources.

Of course, no archive is without bias, especially one maintained by a former colonizer.⁵⁹ The fact that British officials may have painted an

⁵⁴ Balcells and Sullivan (2018); Hassan (2020).

⁵⁵ Colonial administration records actually tend to be more extensive than postcolonial ones in African national archives.

⁵⁶ Allman (2013); Skinner (2019).

⁵⁷ Allman (2013) cites known examples of archival destruction in Togo, Nigeria, and Guinea.

⁵⁸ Allman (2013); Skinner (2019).

⁵⁹ Even in formal reports, British officials made no effort to hide their racism and white supremacy, frequently delivering snide commentary or derisive quips about the inferiority of their African contemporaries.

askew picture of African affairs (due to lack of interest or intel, or both) cannot be fully dismissed. But, flaws and all, such records still offer considerable value. Considering the geographic and temporal scope of my study, British archives provide a rare vantage point from which to compare and contrast several postcolonial African regimes contemporaneously. Furthermore, these records present a unique perspective of political conflicts in Africa as they unfolded in real time. Due to Britain's preoccupation with the political and economic stability of its ex-colonies, members of the British High Commission were highly attuned to threats to political order and regime survival across the region, especially potential rebellions and coups. It was thus common for British officers to meticulously track and document any whisper of conspiracy or intrigue and relay this information to their counterparts in neighboring African countries. A single episode could generate hundreds of back-and-forth reports between British agencies that were attempting to confirm the scope of a conspiracy as it was still unfolding – a diligence to detail that I leverage for my own data collection strategy.

I drew on variety of archival material over the course of completing this project. My primary source was the British National Archives where I found a treasure trove of country-specific data, including intelligence briefings, memorandums, and reports published by African governments, African gazettes, African newspapers, private correspondences between British agents, letters from African heads of state and other political elites, and other political ephemera. This information was collated by country, year, and compiling agency, including the British Foreign Commonwealth Office and the Overseas Development Agency. Wherever possible, I corroborated these reports with African perspectives, including rare records from the continent that have been preserved by the Endangered Archives Programme, the Senate House Library, and the Honourable Society of the Inner Temple.

Data derived from the archives provides the basis for the quantitative and qualitative inference presented throughout this book. My empirical centerpiece is a dataset of political prisoners that I introduce in Chapter 4. The data include a wealth of fine-grained information on individuals who were deemed threatening to autocratic regimes and subsequently repressed by judicial or extrajudicial means. The geographic and temporal scope of these records enable me to systematically test the link between threat-type and repression strategy, as well as explore other questions of judicial behavior and autocratic survival in comparative context.

While data on political prisoners provide a bird's-eye view of repression strategies, case studies present a more nuanced picture of these

dynamics by fleshing out the mechanisms of a judicial ritual and the different pathways of punishment used by autocratic regimes. I examine these themes in Chapters 3 and 5, wherein I draw on a variety of records from archival and secondary sources to examine cases from Kenya, Sierra Leone, and Tanzania.

To understand how autocrats ensured courts would fulfill these objectives, in Chapter 6, I turn again to British sources, including once secret communications between African heads of state and British officials that reveal the challenges of ensuring courts complied in postcolonial regimes. A variety of correspondences, policy reports, and memoranda from this period provide a lens onto the court-packing strategies of African autocrats, especially the remarkable influence of expatriate justices on postcolonial courts. I also consulted the memoirs of justices who actually served on these forums, which provided a unique perspective of political trials from the very agents responsible for overseeing them.

1.6 OVERVIEW OF THE BOOK

Chapter 2 develops a theory of judicial repression. I explain why autocrats would opt to institutionalize the process of punishment in court, when they are more likely to do so, and how they ensure that the judiciary actually cooperates with their repressive agenda. The remainder of the book is devoted to evaluating these claims in the context of postcolonial Africa. In Chapter 3, I explore the mechanics of a judicial process in Kenya, focusing on a sensational sedition trial that occurred soon after independence. My analysis highlights the ways in which the trial served as a judicial ritual, focusing on how the ceremonial dimensions of the prosecution were used to restore confidence in the autocrat when regime cohesion was under strain. I further show that a judicial strategy of repression was particularly useful when used against insiders from the ruling party. In Chapter 4, I generalize these findings to evaluate patterns of punishment in a variety of autocratic regimes across postcolonial Africa. Using original data on coup plotters, statistical analysis reveals that insider elites were more likely to go to trial; outsider elites, by contrast, were more likely to face extrajudicial repression. I build upon these findings in Chapter 5 through case studies of Tanzania and Sierra Leone to illustrate the mechanisms by which autocrats developed different strategies to cope with threats from insider and outsider elites during pivotal periods of autocratic consolidation.

In Chapter 6, I focus on the question of judicial cooperation. I specifically examine the risks of judicial rebellion in postcolonial regimes and how this affected judicial strategies of repression. I provide evidence that postcolonial autocrats were deeply suspicious of judges from the insider elite but faced considerable challenges in finding local alternatives. To confront these constraints, autocrats often preferred to appoint expatriate judges from around the British Commonwealth, which not only helped increase the judicial supply but also cultivated more compliant courts.

In the concluding chapter, I reflect on the book's broader implications and draw parallels between past and present. One important takeaway from this discussion is that while weaponizing courts for undemocratic ends is by no means a new trend, the rhetoric used to justify such measures has in many ways evolved. As such, there is still considerable debate regarding the power of courts to constrain the worst impulses of arbitrary rule, or even the ability of democratic interests to harness these institutions for their own ends. Whether these outcomes shall come to pass, however, may depend on the role courts have long played in autocratic spaces and the political interests they were originally designed to serve.