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Autocratic Courts in Africa

By

Fiona Feiang Shen-Bayh

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University of California, Berkeley

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Abstract

Autocratic Courts in Africa

by

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Doctor of Philosophy in Political Science

University of California, Berkeley

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This dissertation examines how judicial institutions in sub-Saharan Africa were used to both legitimize repression and maintain autocratic survival during the postcolonial period, as well as the enduring legacies of these tactics on post-autocratic rule of law. When autocrats turn to courts, these moves are often heralded as signs of democratic opening. However, courts can also become forums of repression, where political rivals are criminally prosecuted for anti-regime behavior. Despite these trends, courts remain relatively understudied in repression research. In fact, conventional definitions of repression are almost exclusively extrajudicial, defined as the arbitrary use of coercive violence to threaten or intimidate its target. While a separate scholarship on authoritarian judiciaries draws attention to the autocratic functions of law and order, these findings tend to be disconnected from research on repression. This has limited theory-building on how and why courts are used to contain democratic dissent.

To analyze the politicization of courts in comparative and historical perspective, I develop a theoretical framework that extends beyond conventional notions of judicial independence, re-conceptualizing judicial power along the following three dimensions: jurisdiction, function, and compliance. Jurisdiction refers to the scope of judicial decision-making, or whether judges are allowed to decide cases of political import. Once jurisdiction is granted, function refers to the actual tasks judges are required to perform in service of the regime. For example, one critical function of courts under autocratic rule is to provide a forum for the government to formally prosecute political rivals. Finally, compliance describes whether judges ultimately obey regime objectives, in this case, by convicting rivals for crimes against the state. Evaluated jointly, these three dimensions of judicial power help explain why judges become major political players in some autocratic contexts, but not others.

Using this framework, I argue that courts help autocrats both punish challengers and deter future coordination against the regime. These outcomes are achieved through a trial, defined as a formal, ritualized routine which generates common knowledge regarding the rules of political order. Establishing such rules or laws is vital towards regulating insider conflict within the regime, which is important towards maintaining autocratic survival. I refer to this process, wherein laws and courts are used to repress political rivals, as a judicial strategy of repression.

My findings utilize archival research, fieldwork interviews, and natural language processing of both web-scraped media and historical documents. My research contributes to broader debates on autocratic governance, judicial politics, postcolonial legacies, and varieties of state repression.

This dissertation is dedicated to Dagmar.

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CHAPTER ONE

Introduction

“The judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

– James Madison, Federalist No. 78

“In establishing the rule of law, the first five centuries are always the hardest.”

– Gordon Brown, former prime minister of the United Kingdom

Introduction

Courts are often portrayed as potential safeguards against autocratic rule. In fact, rule of law proponents contend that every case brought before a judge opens new avenues to hold power accountable (Moustafa, 2007; Elkins et al., 2009; Keith et al., 2009; Powell and Staton, 2009; Ellett, 2013). This optimism is rooted in a long held view that the judiciary is a potential check against dictatorship, a double-edged sword that can both serve the interests of power and also advance the rights of the powerless (North and Weingast, 1989; Poe and Tate, 1994; La Porta et al., 2004; Hill and Jones, 2014; Ritter and Conrad, 2016).

However, optimism must be tempered when courts become sites of political repression. Consider the highly politicized prosecutions that have been brought against government rivals in many weakly institutionalized democracies around the world. In Zambia, for example, opposition leader Hakainde Hichilema was in the process of filing a petition against the polling results of the 2016 presidential election when he was charged with treason. The state alleged that Hichilema had endangered the life of President Edgar Lungu and attempted to overthrow the government.¹ While the charges were ultimately dropped, Hichilema was imprisoned without right to bail for nearly five months, a decision that was upheld by the courts when contested by Hichilema’s lawyers. Many commentators observed that, rather than entertain Hichilema’s election petition, the Lungu regime was strategically invoking judicial procedures to keep Hichilema away from the political scene (*BBC*, 2017).

Similar tactics have been invoked in Cambodia, where Prime Minister Hun Sen, in power since 1985, has been accused of using judicial procedures to sideline political rivals during important election periods. For example, in 2010, opposition leader Sam Rainsy was found guilty of defamation in absentia and sentenced to ten years in prison (Thul and Tostevin, 2017). In 2016, Rainsy’s successor Kem Sokha was sentenced to five months in jail after failing to appear in

¹ The treason allegation stemmed from an incident in April 2017 when Hichilema’s convoy did not yield for the president’s motorcade.

court in connection with a case against two of his opposition party colleagues. Exactly a year later in 2017, Sokha was again charged with treason for “colluding with foreigners” under Article 443 of the Cambodian penal code, based on statements he made during a rally in which he indicated receiving “support” from foreign allies. In these examples, judicial procedures have helped sideline opposition players, even without concrete evidence of criminal wrongdoing.

Courts can also be used in response to more overt instances of violent conflict. After the failed overthrow of President Recep Tayyip Erdogan in Fall 2016, more than 220 suspected military and civilian plotters were brought to court under a 4,000-page criminal indictment, including charges of “violating the constitution,” “using coercion and violence in an attempt to overthrow” parliament, “martyring 250 citizens” and “attempting to kill 2,735 citizens” (*Al Jazeera*, 2017). The trial itself was an elaborate, publicized process, where the accused were required to present their own defense before a panel of three judges in a public courtroom the size of a gymnasium, where they read prepared statements and answered questions over several hours of testimony. As the trial was still unfolding, Erdogan used the political crisis as pretext to entrench his authority under an executive presidential system, a constitutional move which many critics argue has set the stage for one-man authoritarian rule (Shaheen, 2017).

Judicial measures were also invoked in the wake of the failed military coup d'état in Venezuela in 2002, which saw President Hugo Chávez ousted from office for a brief 47 hours. Although Chávez was only detained for the duration of a short weekend, the aftermath of the crisis took years to fully resolve in court. The fact that the attempted coup had been a military operation, possibly with the external assistance of the U.S. government, led to a lengthy debate over whether the military officers involved should even stand trial, or instead be punished summarily. After Chávez took over the Supreme Tribunal of Justice and filled it with his supporters, he ordered the courts to use the full weight of the law to condemn the actors implicated in the plot. Seven years later – after the conclusion of a trial that produced 265 expert testimonies, 5,700 photos, 20 videos and 198 witnesses – ten officers were finally convicted (Pearson, 2009).

These diverse examples illustrate the extent to which courts have been strategically used to punish political rivals and curtail democratic dissent in procedurally legitimate ways. Such cases have not enhanced the rule of law, but have instead facilitated democratic backsliding and under the guise of due process.² In treason cases, a trial in court can be costly for the accused, even when the charges are ultimately dropped. When these processes are made public, potential challengers may be deterred from mobilizing against the regime in future. Indeed, rather than hold power accountable, a judicial process can instead reinforce autocratic control.

Repression Research

Despite the fact that courts can play an instrumental role in punishing political rivals, judicial institutions remain relatively understudied in broader repression research. The focus instead is on explaining which political, economic, and social conditions are associated with government violations of human rights (Cingranelli and Richards, 1999; Poe and Tate, 1994; Hill and Jones, 2014). Repression is here defined as the actual or threatened use of physical sanctions against an

² Bermeo (2016) defines democratic backsliding as the state-led debilitation or elimination of political institutions sustaining an existing democracy.

individual or group of individuals by the state, where the purpose of such sanctions is deterring specific activities or beliefs (Goldstein, 1978). Repression is sometimes characterized as a reactive measure by the state, done in response to real or perceived threats to power (Moore, 1998; Carey, 2009; Gerschewski, 2013). Most studies focus on extreme tactics of state abuse, including the restriction, arrest, detention, torture, and even murder of political challengers, tactics which are considered routine under autocratic rule (Gurr, 1988; Moore, 2000; Hill and Jones, 2014). In general, such tactics involve violations of First Amendment-type rights³ and denial of due process of the law (Davenport, 2007).

Conventional definitions of repression thus are almost exclusively extrajudicial, focusing on instances of coercive state power (Goldstein, 1978; Gurr, 1988; Moore, 2000; Conrad and Moore, 2010; Davenport, 2007). In fact, when courts are incorporated into the analysis, these institutions are typically seen as mitigating the worst excesses of state violence (Carey, 2000; Elkins et al., 2009; North and Weingast, 1989). This is because of a long-standing view of courts as institutions designed to uphold the rule of law and protect due process (Helmke and Rosenbluth, 2009), and a judicial process is seen as antithetical to the arbitrary repression of political dissent (Conrad and Ritter, 2013). Along these lines, some scholars of repression have found negative relationships between repression and certain types of constitutional provisions or legal systems. For example, cross-national research shows that common law heritage is associated with lower human rights abuses, and constitutional guarantees protecting the right to due process can under certain scenarios limit arbitrary arrests and prosecutions (Powell and Staton, 2009; Hill and Jones, 2014).

In other words, the underlying current of repression research is that judicial bodies and legal instruments serve as institutional checks on autocratic authority. Courts are seen as especially critical institutions in curbing violence by the state, where it is often assumed that judicial procedures are designed to limit government encroachment of basic human rights (North and Weingast, 1989). In line with this thinking, some scholars have found that certain types of trials and legal principles – e.g. adversarial, oral argumentation, and *stare decisis* – may constrain incentives by the state to repress (Mitchell et al., 2013).

However, by conceptualizing repression in extrajudicial terms, existing scholarship overlooks the role of courts in both democratic and autocratic regimes alike (Moustafa, 2014). Such studies underspecify variation in repression tactics between extrajudicial and judicial extremes. This is especially the case in developing countries that are still emerging from decades of autocratic rule, where government oppression of democratic dissent has a deeply entrenched history. In such places, courts represent only one repressive tool in the broader autocratic arsenal. In Cambodia, for example, many more opposition actors have been summarily detained rather than brought to trial for alleged crimes against national security (*Radio Free Asia*, 2016). The same is true of the opposition in Zambia and Venezuela, where conspiratorial narratives are used as pretext to imprison opponents of the regime (Lansberg-Rodriguez, 2016). As for Turkey, the actors who have been brought to trial for their alleged role in the failed 2016 coup represent only a small fraction of all who have been implicated in the plot; as of 2016, approximately 35,000 individuals have been detained or disappeared without ever appearing in court (Said-Moorhouse, 2016).

³ First Amendment-type rights include freedom of speech, assembly, travel, and association (Goldstein, 1978).

Considering the range of repressive tools at an autocrat's disposal, it remains an open question of when, why, and how autocrats turn to courts to establish their authority. This dissertation examines these questions by focusing on the ways in which autocrats use courts to maintain their survival and institutionalize their rule, focusing on the role that judicial procedures play in regulating political conflict and deterring future dissent. In looking at the repressive functions of courts under autocratic rule, I also consider the long-term consequences of politicizing judicial institutions over time, especially in post-autocratic periods.

Repression Reconsidered

Conceptualizing courts as instruments of repression requires rethinking the function of judicial institutions under autocratic rule. To date, the literature on comparative courts has been strongly influenced by democratic notions of judicial power and rule of law (Carothers, 1998 and 2002; Ginsburg and Moustafa, 2008; Helmke and Rosenbluth, 2009). The concept of judicial independence has emerged at the forefront of this scholarship, where the central idea is that judges should be primarily evaluated by whether they are autonomous decision-makers or partisan cronies of the government (Linzer and Staton, 2015). Defined in these terms, judicial independence is a fundamental component of the rule of law (Carothers, 2002). More generally, judicial independence is meant to protect political, economic, and social rights, ensure that electoral and horizontal accountability functions effectively, and limit the ability of powerful state actors to obstruct or intimidate political foes (O'Donnell, 2004). An independent judiciary is thus considered essential towards establishing a scheme of checks and balances in a democratic polity (Mutua, 2001).

However, what if autocratic law and order, not democratic rule of law, is the end goal? A related, but separate, scholarship on autocratic courts challenges the assumption that courts are designed to hold power accountable. This literature uses a variety of cases in mostly non-Western regions of the world to demonstrate that empowering courts is not the same as protecting legal rights, courts can enable rather than constrain political leaders, and courts also serve vital coordinating, signaling, or information-gathering functions that stabilize autocratic power over time (Helmke, 2002; Moustafa, 2007; Solomon, 2007; Massoud, 2013). Indeed, if we set aside the notion that courts should function as independent arbiters of the law, we can be more open to the possibility that courts are often intended to operate according to an entirely different set of governing principles and political objectives (Moustafa, 2007 and 2014; Rajah, 2011).

These studies are principally concerned with the “judicialization of authoritarian politics,” wherein law and courts emerge as vital instruments of autocratic governance (Moustafa, 2003, p. 926). Within this broader agenda, scholars often focus on often unpacking the complex relationship between dictators and judges and how this structures the function of law and order in undemocratic societies (Helmke and Rosenbluth, 2009; Moustafa, 2007). Some of the most notable findings center upon sources of executive-judicial conflict, accommodation, and cooperation (Pereira, 2005; Ginsburg and Moustafa, 2008; Ellett and VonDoepp, 2015). Akin to the research on comparative courts, a key facet of this relationship is the degree of autonomy granted to courts: are judges independent actors whose decisions are free of undue political influence, or partisan cronies who obediently follow the directives of their political masters?

Empowering courts is considered especially puzzling in autocracies, where we typically expect rulers to be more concerned with consolidating arbitrary authority rather than holding themselves accountable to the law (Rios-Figueroa and Staton, 2008; Linzer and Staton, 2015).

While this research has revealed important insights into the dynamic relationship between autocrats and judges, these findings remain largely disconnected from work on state repression. Furthermore, by focusing on issues of judicial independence, even scholars of autocratic courts assume that the key question of judicial empowerment is understanding variation in the level of autonomy granted to courts under dictatorship. What remains under-theorized is the role that courts play in both facilitating and executing repression outcomes, especially when extrajudicial alternatives are readily available (Cross, 1999; Escribà-Folch, 2013; Hill and Jones, 2014). This lacuna has not only limited our understanding of the role that courts play in facilitating repression outcomes, but has also led to a rather narrow view of possible repression strategies that are available to autocrats. Considering the full range of repressive tools at the ruler's disposal, under what circumstances do autocrats prefer to use courts as instruments of repression? How do autocrats use judicial procedures to punish rivals, contain political conflict, and deter democratic dissent? Does using courts for autocratic objectives affect how these institutions work in post-autocratic periods?

The Argument

To address these questions, my theoretical point of departure is that different repression strategies arise in response to different threats to autocratic survival. These threats may emerge from either outside or inside the regime. Whereas regime outsiders include a variety of opposition actors who are excluded from the inner echelons of government, regime insiders consist of members of the ruling elite. The latter group comprise actors who are essential to autocratic governance, and may thus include civilian members of government, military personnel, and other members of the security forces.

I argue that courts become instrumental when an autocratic ruler (hereafter ruler) confront threats from the ruling elite.⁴ Unlike regime outsiders, who pose a common, external threat for insiders to mobilize against and repress, internal rivals present a more complex target for conventional repression tactics. To deal with such a challenger, a ruler first needs to unite members of the ruling organization against their fellow insider. A judicial strategy achieves this task by ritualizing the process of punishment in court, where the ritual of a trial generates a framework to interpret and disseminate a shared narrative about a particular conflict. This narrative can help rally members of the regime against an internal enemy. In other words, a trial is an intermediate stage in the process of repression, one that both targets current threats and deters future rivals.

The key mechanism of a judicial strategy is the trial. From the initial accusation to the final verdict, a trial constitutes a ritual, defined as a formal, routinized, and public ceremony which establishes a shared set of beliefs and rules (Chwe, 2001). When autocratic authority has been undermined by an internal rival, this ritual can help rally members of the regime around the idea that a ruler is still in charge. However, these judicial processes have important implications for

⁴ I adopt Tullock's (1987) definition of autocracy as any form of government wherein leaders are not selected by democratic elections.

our understanding of the role courts play in autocratic survival. As Malcolm Feeley (1979, p. 11) observes, when “the courtroom encounter [is] a ritual,” courts are no longer deliberative bodies, nor are judges assessors of facts or law. Indeed, truth is largely irrelevant here; what matters instead is that a trial legitimizes the incumbent’s claims to power and delegitimizes those of his challengers.

The fact that judicial processes bring insider conflict out into the open is significant. While a court broadcasts the existence of rivals within the regime, a trial carefully controls how threats to power are interpreted. In other words, political dissent is reframed as a criminal act, and a political challenger is recast as a threat to national security. By structuring conflict in these stark, categorical terms, a judicial strategy redefines dissent against the regime in a way that makes it more easily contained.

Theoretical Contributions

In this dissertation, the key question is not whether judges are independent actors under autocratic rule, but rather, why autocrats turn to courts in the presence of functional alternatives. To analyze these issues in comparative perspective, this dissertation develops a theoretical framework that extends beyond conventional notions of democratic judicial independence, re-conceptualizing judicial power along the following three dimensions: function, compliance, and jurisdiction. Whereas function refers to the tasks judges are required to perform in service of the regime, compliance describes whether judges ultimately obey these political objectives. Jurisdiction, in turn, refers to the scope of judicial decision-making, or whether judges are able to decide cases of political import. Evaluated jointly, these three dimensions help explain why courts become major decision-makers in some autocratic contexts and not others.

Using this theoretical framework, the causal logic of a judicial strategy is developed in three parts, where each part focuses on one of three dimensions outlined above. First, I argue that courts exercise an important repressive function by providing a forum to punish elite rivals in autocratic regimes. In particular, a judicial strategy of repression invokes the formal process of a trial in court to ritualize the punishment of regime insiders. This process is designed to defuse conflicts within the ruling organization and thereby maintain autocratic survival. In drawing focus to the repressive functions of courts, I synthesize important findings from the literatures on state repression, autocratic courts, and political trials. I also contribute new insights into how patterns of punishment become institutionalized under autocratic rule.

Second, I argue that in order for a judicial strategy to be effective, courts must be compliant to the repression objectives of their political masters. This means that in treason cases, judges are expected to convict rivals of the regime for whatever crimes they stand accused of. However, compliant courts are often taken for granted, especially during the early years of autocratic tenure when political authority tends to be less established. Under such circumstances, I examine how the selection of judges affects the compliance of courts. In particular, I argue that judges are more likely to be subservient to the repression objectives of autocratic regimes when the types of judges selected for the bench are more risk-averse. I thus link key features of judicial identity to court performance.

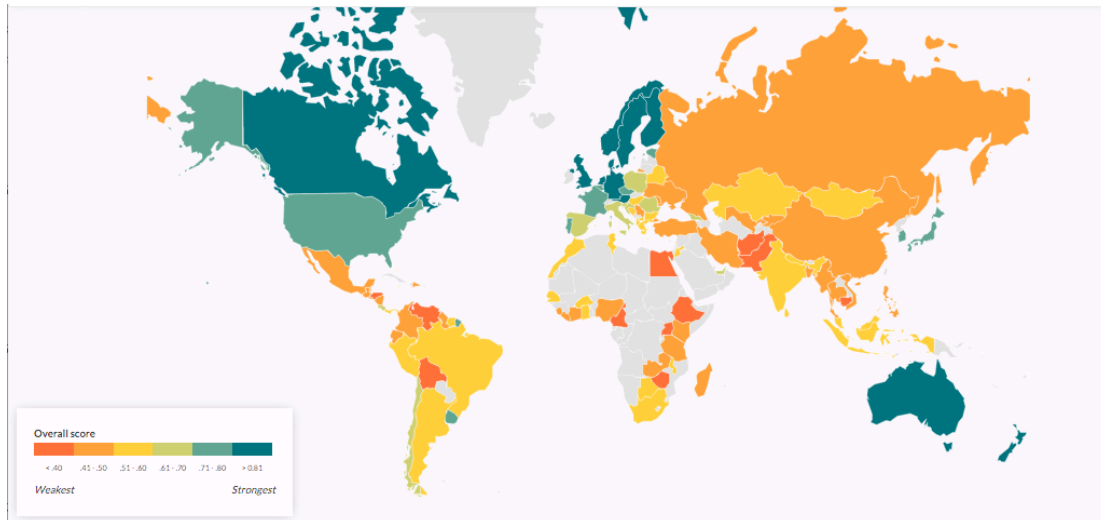
Third, I examine how the creation of repressive, compliant courts affects their jurisdiction over time. Jurisdiction is defined as the formal scope of judicial authority, or the legal domain over which a court is allowed to make official decisions. If judicial independence describes *how* judicial authority is exercised, jurisdiction describes *where* that authority lies. Although scope is a fundamental component of judicial power, this dimension has not been rigorously examined in comparative context. Judicial independence has received far more attention by both rule of law scholars and practitioners, despite the fact that independence means little if courts do not even have the actual authority to decide cases of consequence. To gain analytical traction on these issues, I examine how the political jurisdiction of courts evolves in comparative perspective, in both autocratic and post-autocratic periods. I do so by tracking how courts allocate their time and resources to different types of cases, ranging from the constitutional to the criminal. By looking at the types of cases that courts actually adjudicate, I am able to show how judicial authority is exercised across countries and over time. These findings illustrate broad trends in the evolution of judicial power since autocratic rule, and furthermore reveal how early decisions in the function and composition of courts affects long-run outcomes of jurisdiction.

Research Design

I evaluate my theoretical framework by turning to sub-Saharan Africa in the postcolonial period, a region which is highly relevant to the study of repression, autocratic rule, and judicial politics. Human rights abuses are replete in sub-Saharan Africa, where governments have consistently chosen to uphold the rights of the powerful rather than protect those of the powerless. Democratic dissent against arbitrary governance is thus typically met with greater restrictions on free speech and assembly, as well as violent crackdowns on popular mobilization (Human Rights Watch, 2016). Recent surveys conducted by the World Justice Project confirm these trends, revealing that across a variety of democratic indicators, sub-Saharan African countries consistently rank among the lowest in the world.

Figure 1.1: World Justice Project Rule of Law Index scores, 2017-2018⁵

⁵ Image created by World Justice Project Rule of Law Index, 2017-2018, retrieved April 13, 2018 from <http://data.worldjusticeproject.org/>.



The repressive record of sub-Saharan African regimes is unsurprising considering that most of these countries in this region experienced decades of civilian and military dictatorship following decolonization, legacies which have arguably contributed to contemporary patterns of arbitrary rule (Branch and Cheesman, 2009; Young, 2012). To date, the bulk of existing research on the autocratic institutions in Africa has focused on the postcolonial development of parties, legislatures, bureaucracies, and militaries (Bratton and Van de Walle, 1997; Van de Walle, 2002; Young, 2004 and 2012; McGowan, 2005; Riedl, 2015). Significantly less attention has been devoted to how judicial institutions have evolved over the same period.

This oversight is especially glaring because most African judicial institutions have deeply autocratic origins. In both the colonial and immediate postcolonial period, African courts were designed to facilitate arbitrary power, not to hold it accountable (Mamdani, 1996). These pathologies have persisted since the return to multiparty politics in the 1990s. For example, judges in many African countries are considered subservient to political interests (Mutua, 2001), a reputation that has undermined public confidence in the judiciary across a variety of contexts. A recent poll conducted by Afrobarometer across 36 African countries reveals that while 72% of respondents believe that courts have the authority to make legally enforceable decisions, 54% state that obtaining assistance from courts is difficult, 43% do not actually trust courts, and 33% believe that most or all members of the judiciary are corrupt (Afrobarometer, 2017). Local perceptions of injustice provide insight into why so many Africans eschew the formal court system in favor of more informal, customary alternatives (Sandefur and Siddiqui, 2013).

Endemic failures of the African justice system have motivated a large body of scholarship that examines why judicial institutions have remained weak and resistant to reform (Bräutigam and Knack, 2004). Much of this work looks at contemporaneous factors driving the underperformance of courts, covering a variety of economic and political challenges that have arisen since democratization in the early to mid-1990s (VonDoepp, 2005; Ellett and VonDoepp, 2011; Ellett, 2013; Gloppen, 2003).

This research is complemented by scholarship examining broader historical trends, especially colonial-era institutions and their enduring legacies over time (Chanock, 1985; Mamdani, 1996;

Lange, 2004). Focusing on colonial institutions is a convenient starting point for analysis because European colonizers installed similar infrastructure across their governed territories, regardless of local circumstance. This meant that countries with shared colonizers inherited similar institutions at independence. For example, the British devised a highly repressive version of English common law in colonial India and used this template without much modification across the British empire, including many parts of Africa and Southeast Asia (Killingray, 1986; Chanock, 1985). In the African case, these autocratic institutions were either preserved or enhanced by leaders of the independence movement, providing the structural foundations for postcolonial development (Ellett, 2013). Many scholars thus note that autocratic trends of postcolonial Africa are a direct continuation of colonial-era practices (Mamdani, 1996; Chanock, 1998; Joireman, 2001).

Given the incredible endurance of colonial institutions over time, existing research on these trends has focused on the effects of different European colonizers on long-run outcomes, typically contrasting the legacies of British and French rule (Lange, 2004). With respect to the judicial system, English common law and French civil law are considered fundamentally distinct in the ways that decision-making authority is conferred to judges, which has wide-ranging ramifications on a variety of political and economic developments (La Porta et al., 1998; Mahoney, 2001).

However, these studies tend to pay more attention to decisions made by the colonists rather than those made by postcolonial regimes. In these theories, the durability of colonial institutions is often taken for granted (Joireman, 2001), leaving little agency for postcolonial African leaders to determine their own strategies for autocratic survival. While there are a few notable exceptions to this trend, including Widner's (2001) work on Tanzania and Massoud's (2013) study of Sudan,⁶ these findings are limited to in-depth studies of specific countries and courts. We still lack generalizable theories to explain the ways in which postcolonial African autocrats strategically operated their courts, ensured that judges were compliant to their authority, and limited their scope of judicial decision-making over time. Indeed, it remains an open question of why African autocrats chose to use the courts as instruments of repression in some cases but not others, and the legacies these early decisions have had on post-autocratic rule of law.

Anglophone African Cases

Within postcolonial Africa, my focus is former British colonies.⁷ I specifically examine countries that inherited English common law rather than Roman-Dutch law.⁸ I also exclude non-secular

⁶ Widner (2001) examines how the indigenous leaders of the independence period made specific decisions in the design and operation of courts to serve a one-party state, decisions which ultimately backfired after the appointment of Chief Justice Frances Nyalali. Widner's within-country case study thus conceptualizes judicial politics in a conventional rule of law framework, emphasizing the potential for an independent judiciary to facilitate autocratic breakdown rather than autocratic consolidation. Massoud (2013) also uses a single country case – Sudan – to show how law and courts are adapted to suit the needs of colonial, postcolonial, and post-conflict regimes. In Massoud's framework, colonial legacies are continually evolving over time, only representing a single phase of institution-building.

⁷ Former British colonies include any state that was controlled by the British at the time of independence, irrespective of whether another European colonizer had previously held the territory. For example, even though Tanganyika was once a German colony, it is included in the sample because it became a British protectorate after World War II.

regimes that formalized sharia law in the constitution after independence.⁹ By making these restrictions, I am able to control for legal language and judicial procedures while examining cross-national variation in strategies of autocratic survival.

Another benefit to focusing on cases from Anglophone Africa is that while independence regimes inherited common legal and judicial infrastructure, the process and rate of autocratic consolidation varied across countries. In Kenya, Malawi, Tanzania, and Zambia, for example, the contest for national supremacy was manifested by party politics, where ruling party dominance was established through a variety of legislative and electoral tactics. Legislatively, ruling parties often enacted laws designed to limit opposition mobilization, or else criminalize free speech and democratic dissent. Many postcolonial regimes also chose to take the extra step of formalizing one-party dominance in the national constitution, thereby banning the right of opposition parties to exist. Electorally, politicians used rallies and campaigns to generate patriotic, nationalist sentiment that helped mobilize voters behind the party banner. Victories at the polls were then used to legitimize the ruling party mandate and further centralize power.

However, not all postcolonial regimes followed a similar trajectory. In Sierra Leone, Ghana, and Uganda, the process of autocratic consolidation was more explicitly violent, involving both successful and failed coup d'états. The effects of these political ruptures varied across cases. While the civilian dictatorship of Siaka Stevens in Sierra Leone was quickly restored after a series of military interventions, the one-party regime of Kwame Nkrumah in Ghana remained in exile long after the military came to power. Over the next few decades, military overthrow became the norm of political succession in Ghana. Similarly in Uganda, civilian rule was ultimately superseded by multiple military juntas that came to power through violent coups, most notably the dictatorial regimes of Milton Obote and the notoriously brutal Idi Amin.

While one-party and military dictatorships experienced uneven transitions of power after independence, arbitrary forms of extrajudicial repression were common across both regime-types. For example, the Kenya African National Union and Malawi Congress Party used their penetration across various branches of governments – including the police, military, and other parastatal forces – to monitor and punish partisan rivals, most often through summary detentions and disappearances. Meanwhile, governing military councils in Ghana and Uganda exercised even greater control over the coercive institutions of the state, regularly deploying violence against both military and civilian rivals to power.

With respect to judicial tactics, however, one-party and military dictatorships had important divergences. Civilian dictators were more willing to resolve political conflicts through the common law courts, so long as the presiding judges ruled in favor of the incumbent. Military dictators, by contrast, preferred to work within the military justice system, favoring courts martial over common law courts. However, even civilian dictators resorted to trial by court martial when a political challenger came from within the military organization. In other words, in both civilian and military regimes alike, the forum of judicial repression varied according to whether the challenger himself was a civilian or military agent. Thus while different regime-

⁸ Roman-Dutch law countries include South Africa, Lesotho, Swaziland, Namibia, Botswana, and Zimbabwe.

⁹ Sharia law regimes include The Gambia, Sudan, and Somalia.

types invoked different judicial procedures, the underlying logic of these approaches was the same.

In sum, sub-Saharan, postcolonial, and Anglophone African countries have shared geopolitical history and common institutional origins, which has crucially shaped the past half-century of autocratic and post-autocratic development. These cases also exhibit variation along a critical variable of analysis: threats to autocratic survival. Whereas some regimes confronted greater threats from ruling party and military actors, others were more concerned with civilian party rivals. Regimes thus varied in the degree to which they confronted different types of political threat. Using the criteria outlined above, my analysis covers civilian and military regimes in seven country cases – Ghana, Sierra Leone, Kenya, Malawi, Tanzania, Uganda, and Zambia – between decolonization and democratization.¹⁰ Examining these countries over this critical period of autocratic development provides a way to test the relationship between different threats to power and strategies of repression. Cases from this region thus offer ideal testing ground for the function, compliance, and jurisdiction of courts in autocratic regimes.

Methodology

I employ a combination of methodological tools to test each component of my theoretical framework, including archival research, statistical analysis, case studies, fieldwork interviews, and computational analysis of web-derived data. For the seven country cases, I generated fine-grained measures of political threats and state repression drawing on four months of archival research conducted at five different locations: the British National Archives, the British Library's Endangered Archives Programme, the Senate House Library's Special Collections, the Honourable Society of the Inner Temple in London, United Kingdom, and the Mandala House Library and Archive in Blantyre, Malawi. At these different sites, I digitized thousands of original records describing internal developments of former British African colonies, including intelligence reports, white papers, classified correspondences, indigenous media, and other political ephemera. For example, at the National Archives, I utilized reports compiled by the British Foreign Commonwealth Office (FCO), which kept meticulous, systematic records on the internal politics of their former colonies, including intelligence reports, security briefings, private correspondences with African officials, local African newspapers, and other political ephemera of the period. Many of these documents remained classified for up to 50 years after their creation and only in the last decade been made available to the general public.¹¹ This information was further corroborated by contemporaneous newspaper reports collected from the ProQuest Historical Newspapers Database.

From these different locations, I compiled more than 2,000 British documents and 5,000 newspaper reports to build a database of insider-outsider threats and how they were repressed in post-colonial African regimes.¹² I coded specific coup conspiracies, the individuals implicated in these conspiracies, and the method of repression deployed against them. In total, I identified 2,563 ruling party, military, and opposition challengers who were implicated in coup plots

¹⁰ Nigeria is omitted due to the particular nature of insider-outsider conflict that defined the post-independence period, where issues of federalism and national representation led to civil war shortly after independence.

¹¹ Certain records for this project were obtained through Freedom of Information Access requests.

¹² To be included in the analysis, each accused individual had to be documented by at least two sources.

against the regime from 1957-1994. Recall that a core component of the argument advanced in this dissertation is that different types of threat produce different strategies of repression. Collecting this data thus enabled me to use statistical methods to examine how African autocrats have reacted to both insider and outsider threats both across countries and over time. Where possible, I also triangulated information on long-term outcomes for political prisoners repressed through judicial or extrajudicial means. Such information provides insight into the long-term effectiveness or ineffectiveness of judicial and extrajudicial strategies.

The major caveat of relying on British or foreign archives is that focus may differ across African countries, often according to the level of foreign investment or expatriate presence that was maintained after decolonization. Additionally, foreign interest in extrajudicial repression notably shifted over time. This was because in the immediate postcolonial period, arbitrary detentions without trial were not considered extraordinary events. After all, it had been the British who pioneered these tactics against their African colonial subjects. However, in later decades, nongovernmental organizations and humanitarian watchdogs such as Amnesty International began to champion the cause of African political prisoners and raise their international profile, which also increased the attention paid to these subjects in the British government archives. To account for these trends, my analysis controls for both country and year indicators to correct for potential imbalances in coverage across space and time.

I pair cross-national statistical analysis of repression strategies with country case studies. I specifically draw on the experiences of Kenya, Malawi, and Ghana, three countries which relied on a judicial strategy of repression in the postcolonial period, but through different forums of punishment: whereas President Jomo Kenyatta of Kenya prosecuted important political challengers in the common law courts, President Hastings Banda of Malawi chose to work around these institutions, empowering traditional courts to try and punish democratic dissent. By contrast, each of the successive military juntas in Ghana resorted to prosecuting civilian and political rivals in military tribunals. By comparing these country cases, I illustrate how the underlying logic of a judicial strategy of repression is the same. However, I also show that the critical variable determining what type of forum a regime relied on what the compliance of the judiciary.

To examine how African courts have evolved since the end of autocratic rule, I conducted fieldwork in Blantyre and Zomba, Malawi. I chose Malawi for the following reasons. First, from 1969 until 1994, the common law courts were significantly marginalized under the personalist dictatorship of Dr. Hastings Banda. As described above, Banda chose instead to work within a so-called traditional court system, empowering tribal chieftains rather than common law justices to hear cases of political import. Second, while Malawi is one of the poorest countries in the world, with a notoriously under resourced civil and criminal justice system, the Malawian courts have developed a remarkable reputation for judicial independence since the return to multi-party governance in 1994. Third, many currently serving members of the Malawian justice system first forged their legal careers during the one-party era. In other words, these actors have unique insight into the form and function of political justice in both autocratic and post-autocratic periods. The Malawi case thus provides a valuable opportunity to understand the function, compliance, and jurisdiction of African courts over time.

To generalize these findings across the other African cases, I created a novel cross-national measure of judicial power based on political discourse on courts as reported in African media. Using a custom web-scaper, I collected 18,944 news articles published by various African news organizations between 1996 and 2017, the period following the end of one-party rule in the country cases. The media corpus was specifically analyzed using static and dynamic topic models, both of which are computational methods that infer latent topics from unstructured texts. The results suggest that when relationships between judges and leaders become institutionalized, they are difficult to transform, even after democratic transition.

Plan of Dissertation

The remainder of the dissertation is arranged as follows. In Chapter 2, I present the central theory explaining why courts are used by autocrats to repress political rivals. I outline the central features of a judicial strategy of repression, focusing on the function of trials in the aftermath of intra-regime conflicts. I also examine differences between outsider and insider threats and how political identities factor into the repression strategies of autocratic regimes. The theoretical framework advanced in this chapter is corroborated using statistical analysis on the political prisoners data. My findings reveal a striking pattern that is robust to the inclusion of several controls: conventional repression tactics were more likely to be used against regime outsiders, whereas a judicial strategy was more likely to be used against regime insiders. I also find that actors who went to trial had different long-run outcomes than actors who never went to trial. I discuss the implications of these trends in relation to broader findings on threat rankings and repression strategies.

Chapter 2 fleshes out the logic behind these findings with a case study of extrajudicial and judicial strategies of repression in postcolonial Kenya. After independence, President Jomo Kenyatta effectively mobilized members of the ruling party and military into waging an extrajudicial campaign against opposition outsiders, who represented a common external enemy. Using their monopoly over the state, insiders united to repress outsiders. However, such tactics were less effective when threats to power came from within the ruling organization. Over time, the ruling party became an uneasy coalition of disparate factions, and Kenyatta was unable to prevent the defection of party leaders, including his own vice president. Kenyatta's failure to manage intra-regime tensions led to a different approach in subsequent conflicts. Rather than rely on extrajudicial methods of repression, which had been effectively used against outsiders, Kenyatta chose to prosecute his challengers in court for crimes against the state. The routinized process of trial and punishment provided stability amidst an ongoing crisis of leadership, enabling Kenyatta to reunite members of the regime behind his rule and against his internal rivals. Using courts thus enabled Kenyatta to consolidate control when the regime was threatened from within.

After outlining the process of a judicial strategy and providing evidence of its impact on the survival of autocratic regimes, in Chapter 3, I turn attention to the inner-workings of courts themselves. I specifically examine the factors which determine whether judges are compliant to the repression objectives of autocratic rulers. In this chapter, I advance a theory that judicial identity plays a key role in the compliance of courts. Specifically, judges who are less embedded in local politics are more reliable agents of repression, delivering more consistent rulings in favor

of the autocratic regime. This finding goes against conventional notions of court packing, which argues that both democrats and autocrats are better off appointing judges who share their partisan views (Goldman, 1997; Hilbink, 2007). My findings suggest the contrary, that appointing such agents to the bench is a riskier strategy when autocratic power remains unconsolidated and political allegiances are more fluid. I provide evidence of this argument through statistical analysis of the political prisoners database, specifically data on convictions and acquittals for challengers who actually went to trial.

Chapter 4 generalizes a judicial strategy of repression by examining why autocrats will sometimes establish special courts outside of the normal judicial system. I argue that judicial forum-shopping can be explained by looking at the source of the threat to autocratic survival: while rivalries within the ruling elite are best addressed using regular courts, threats to power that emerge from the masses are best addressed using special courts. This is because different forums are tailored to different audiences; regular courts have elite audiences, but special courts – especially those that invoke popular justice – have mass audiences. Note that regardless of the forum, the central objective of a judicial strategy of repression is not to establish truth or ensure due process, but to develop a simple, digestible narrative that supports a broader regime objective. Different audiences require different narratives. This means that the fundamental criterion for what type of forum an autocrat turns to is whether the threat to power comes from masses or the selectorate. Ultimately, a trial by traditional court or military tribunal is still a trial; the underlying logic of a judicial strategy remains the same. A judicial strategy of repression is thus not limited by forum-type or legal system, but rather extends to a variety of institutional settings.

I evaluate these claims through case studies of postcolonial Kenya, Malawi, Ghana. Whereas the regime in Kenya routinely used regular courts to prosecute elite rivals, regimes in Malawi and Ghana eschewed common law institutions in favor of extraordinary justice. In Malawi, President Hastings Banda chose to establish a traditional courts system in 1969. Traditional courts were administered by tribal chieftains who were authorized to make decisions according to so-called customary law, often in the name of political justice. Importantly, the decision-making authority of chieftains fell beyond the jurisdiction of the common law judiciary. Because chieftains were considered agents of the president, not officers of the law, they answered directly to Banda. While important political cases were being directed to the traditional courts, the common law courts were largely neglected; they did not resume their jurisdiction over cases of political import until 1994.

In Ghana, the decision to erect institutions of popular justice arose under different circumstances. After usurping power via coup in 1966, Lt. General Joseph Ankrah of the military-led National Liberation Council chose to purge the entire common law judiciary as part of a broader anti-corruption campaign. By demonstrating malfeasance in the common law courts, the judicial purge reflected an attempt to legitimize the unconstitutional overthrow of civilian President Kwame Nkrumah, since many of these targeted judges had been appointed by the previous regime. The National Liberation Council also established a subversion tribunal to prosecute both military and civilian actors accused of crimes against the state. The tribunal was to be an entirely military affair, supervised and operated by army officers. As in Malawi, the tribunal fell beyond the jurisdiction of the common law courts and answered instead to the political leadership.

In both cases, special courts served as a link between rulers and the masses during times of political crisis. This was important for Malawian and Ghanaian autocrats who sought to legitimize their authority before the general public, rather than the ruling elite. Because special courts were designed to speak to non-elite (and often illiterate) audiences, they served as an ideal forum to execute a judicial strategy of repression.

In Chapter 5, I examine autocratic legacies on post-autocratic rule of law outcomes. To provide broader context for this discussion, this chapter begins by revisiting existing debates on judicial power, especially democratic notions of judicial independence. The chapter then advances an alternative concept of judicial power – jurisdiction – that is arguably better suited to the study of courts under autocratic and post-autocratic rule. I then evaluate this concept in the context of African judicial development since democratization in the mid-1990s using web-based data collection and natural language processing techniques. My findings reveal that political topics – e.g. constitutional or administrative cases – feature more prominently in countries that did not openly politicize the courts during the one-party era. Furthermore, corruption topics are more heavily represented in countries that more frequently invoked a judicial strategy of repression. The results suggest that contemporary African courts exercise a diverse array of jurisdictions, ranging from election petitions to the protection of human rights. However, when taken in broader historical context, contemporary trends reflect important autocratic legacies: political topics – constitutional and administrative – feature more prominently in countries that did not heavily politicize courts during the one-party era. Furthermore, these outcomes suggest that the scope of jurisdiction can reflect the underlying relationship between judges and leaders, which may be adversarial, supportive, or mixed. I pair these findings with country case studies to analyze potential mechanisms linking postcolonial jurisprudence and contemporary judicial practices.

Chapter 6 concludes the dissertation with a review of the key findings and a discussion of the implications of the argument, including new questions stemming from this research.

CHAPTER TWO

Theory: A Judicial Strategy

“As long as the usurper is in power, his word is law.”

– Rt. Hon. Sir Hugh Beadle, Chief Justice of Southern Rhodesia

Introduction

Repression is an inherent feature of autocratic rule. However, strategies of repression can vary widely between extrajudicial and judicial extremes, ranging from arbitrary violence to formal prosecutions in court. Considering the range of repressive tools at the ruler’s disposal, under what circumstances do autocrats choose to bring their challengers to court? In this chapter, I argue that courts become instrumental when dictators confront challengers from within the regime. Unlike regime outsiders, who pose a common, external threat for insiders to mobilize against and repress, an internal rival presents a more complex target. To deal with such a threat, the ruler first needs to unite members of the ruling organization against the challenger. A judicial strategy achieves this task by ritualizing the process of punishment in court, where the ritual of a trial generates a framework to interpret and disseminate a shared narrative about a particular conflict. This narrative can help rally members of the regime against an internal enemy. A trial is thus an intermediate stage in the process of repression, one that both targets current threats and deters future rivals.

The key mechanism of a judicial strategy is the trial. From the initial accusation to the final verdict, a trial constitutes a ritual, where ritual is defined as a formal, routinized, and public ceremony which establishes a shared set of beliefs and rules (Chwe, 2001). When autocratic authority has been undermined by an internal rival, this ritual can help rally members of the regime around the idea that the ruler is still in charge. However, these judicial processes have important implications for our understanding of the role courts play in autocratic survival. As Malcolm Feeley (1979, p. 11) observes, when “the courtroom encounter [is] a ritual,” courts are no longer deliberative bodies, nor are judges assessors of facts or law. Indeed, truth is largely irrelevant here; what matters instead is that a trial legitimizes the incumbent’s claims to power and delegitimizes those of his challengers.

The fact that judicial processes bring political conflict out into the open is also significant. In particular, while a court broadcasts the existence of rivals within the regime, a trial carefully controls how threats to power are interpreted. Political dissent is reframed as a criminal act, or a political challenger is recast as a threat to national security. By structuring conflict in these stark, categorical terms, a judicial strategy redefines dissent in a way that makes it more easily contained.

In what follows, I provide an overview of the causal logic connecting different types of threat to autocratic survival and subsequent strategies of repression. The setup introduces relevant actors – insiders and outsiders – and summarizes their interactions with autocratic rulers. I then develop a

theory that explains the logic of a judicial strategy, from which testable implications can be derived. In the final section, I provide evidence for the theory, through cross-national analysis and a within-country case study.

Outsider and Insider Threats

In order to understand these broader patterns of autocratic repression, it is useful to consider the different types of political challengers autocratic rulers face, from both outside and inside the regime. Different challengers pose different threats to autocratic survival, which have implications for how rulers choose to repress.

Outsider threats have been broadly defined to include not only everyday civilians but also the organized opposition (Gandhi and Przeworski, 2006; Svobik, 2009; Askoy et al., 2015). Although civilians are more peripheral to power than opposition leaders, both have been characterized as “distant threats” to the political elite (Roessler, 2011). However, even distant threats can pose a significant challenge to autocratic survival. This is especially true of opposition parties, groups which are actively mobilized against the incumbent regime.

Such threats were a prime concern in post-colonial Africa, where many opposition parties posed a credible threat to autocratic consolidation during the early years of independence. In Sierra Leone, for example, the opposition All People’s Congress steadily gained electoral ground against the ruling Sierra Leone People’s during the first decade of self-rule, eventually defeating the latter in the 1967 general election. Similarly in Ghana, the opposition posed a more sizable threat to the ruling Conventional People’s Party when several smaller groups mobilized under a United Party banner in 1957. Over the ensuing years, United Party leaders undermined national support for the ruling party, even stoking talk of secessionism in various outlying regions. Secessionist fears were also prominent in Uganda, where demands for regional autonomy in the sub-national kingdom of Buganda led to the creation of two rival partisan groups, the Kabaka Yekka, organized around the traditional monarchy, and the Democratic Party, which espoused national unity. In each of these cases, the opposition drew a clear distinction between members of the existing order and those who were organized against it. Opposition outsiders thus posed a direct threat to the autocratic regime, and in some instances, actually defeated the incumbent at the polls.

Even when the opposition is formally restricted or banned from participating in elections, outsider groups still present a potential threat to incumbents. In fact, opposition leaders who are denied the legal right to mobilize will often resort to more extreme measures of rebellion, as was the case in Malawi in 1965, when an opposition leader based in exile staged an armed insurrection against the one-party dictatorship of the Malawi Congress Party. Insurgent violence also threatened neighboring Zambia during the late 1960s and early 1970s, when the ruling party repeatedly accused the opposition African National Congress of recruiting military assistance from rebel fighters based in Angola. In Zanzibar, conflict between the opposition and the ruling party escalated into an actual revolution in 1964 when the opposition Afro-Shirazi and Umma parties successfully overthrew the Zanzibar Nationalist party. Both opposition groups had become increasingly frustrated by their under-representation in parliament in the years leading up to the violent coup, and only a week prior to the revolution, Umma had been declared illegal

by the state. Even outsider groups are thus a serious concern to autocratic survival, threatening not just the individual ruler, but also the broader ruling elite.

Whereas outsider threats are externally mobilized against the regime, insider threats emerge from within the regime itself. Insider threats specifically come from members of the ruling elite or the agents who operate on their behalf, including government ministers, military officers, and other political authorities (Bueno de Mesquita et al., 2003; Askoy et al., 2015; Greitens, 2016). Because these actors are normally responsible for coordinating and executing central commands, they can use their knowledge of the inner workings of power to effectively undermine the regime from within (Roessler, 2011). Such an undertaking is known as an allies' rebellion or palace coup, wherein the incumbent is deposed by members of his own ruling circle (Svolik, 2012).

However, by virtue of their elite status, insiders can pose a more divisive threat than their outsider counterparts. This is because a palace coup often preserves or enhances the position of insiders, depending on their allegiances to the ousted incumbent: if insiders are loyal to the ruler, their fate is linked with his; but if they are internally mobilized against him, they are also invested in his downfall. The emergence of insider threats can thus reveal important divisions or factions within the regime.

For example, consider the insider revolts of Swaziland in the early 1980s, wherein both the prime minister and the queen were deposed in quick succession while the Swazi monarchy never lost its central command (Matsebula, 1976). Likewise in Ghana, when General Ignatius Acheampong was ousted as leader of the Supreme Military Council in 1978, he was replaced by his second-in-command, Deputy-General Fred Akuffo, while several other members of the military junta were either maintained or promoted. When Akuffo himself was ousted by another military coup only a year later, the new leadership chose to re-appoint many of the prominent officials from the previous regime, including several civilian politicians in charge of important government portfolios (McGowan, 2003). As these cases show, an internal threat to the ruler does not necessarily represent a threat to all, and certain insiders may in fact benefit from deposing the sitting ruler.

Repressing Outsider and Insider Threats

To illustrate the differences between outsider and insider threats more concretely, consider how rulers respond when their authority is explicitly challenged by members of either group. One possible response is violent repression. Conventional tactics are largely characterized in extrajudicial terms, ranging from indefinite detentions without trial to summary executions, either committed in secret or before a public crowd (Poe and Tate, 1994; Cingranelli and Richards, 2008). Such acts of unrestrained violence are designed to not only punish political opponents, but also frighten and coerce others from dissenting in future (Gurr, 1988; Moore, 2000; Cingranelli and Richards, 2008; Davenport, 2007; Pierskalla, 2009; Svolik, 2009; Albertus and Menaldo, 2012; Hill and Jones, 2014; Ritter, 2014; Sullivan, 2016). However, autocrats may also resort to more subtle forms of persecution, such as harassment, extortion, or blackmail. Although rulers often claim credit for these acts of intimidation, no ruler executes these actions on his own; he requires the cooperation of agents who coordinate repression on his behalf (Bueno de Mesquita et al., 2003; Bellin, 2005; Myerson, 2008; Slater, 2010; Greitens, 2016).

The ruler's subordinates are the ones responsible for jailing political opponents, intimidating their families and associates, slandering them in the media, enacting legislation which limits their right to organize, taxing or confiscating their property, and generally undermining their ability to challenge the regime (Levitsky and Way, 2002; Schatz, 2009; Schedler, 2010; Slater and Fenner, 2011; Stern and Hassid, 2012). Indeed, effective repression is often a massive operation conducted across a variety of government agencies, where the key task for the ruler is ensuring that the members of these agencies are actually united against the target of persecution. Otherwise, the agents of coercion might turn their weapons against the ruler himself (Bueno de Mesquita et al., 2003; Svobik, 2009; Hassan, 2017).

While much attention has been devoted to understanding how rulers secure the compliance of coercive agents, considerably less emphasis has been placed on the fact that external enemies are often easier to repress than internal rivals. Outsiders are a convenient focal point for insider coordination, a common enemy to both rally against and repress (Slater, 2010). Examples of anti-outsider mobilization are replete in post-colonial Africa, where many opposition parties were officially designated as terrorist groups that threatened the safety and security of the nation-state. Such logic was used to detain opposition "subversives" in Ghana, both under the civilian dictatorship of Nkrumah as well as the military juntas which followed. Fears of mass rebellion were also used to unite insiders against outsiders in Malawi, where thousands of opponents to the Banda regime were labeled political criminals and subsequently tortured, exiled, or detained indefinitely without trial. Even in less overtly oppressive regimes, such as the one-party government of Kaunda in Zambia or the socialist government of Nyerere in Tanzania, thousands of opposition actors were disappeared under the guise of national security.

However, this kind of violent repression can be considerably more difficult to coordinate against insider threats. This is because members of the ruling elite may be internally divided over the actual threat posed by the challenger, where some believe they will suffer the fate of the incumbent, while others potentially benefit from the incumbent's ouster. From the ruler's perspective, however, such divisions are not always obvious. Insiders are likely to conceal their true loyalties, especially when they feel under direct threat or the ruler's grip on power seems precarious (Svobik, 2009; Roessler, 2011). In situations of heightened uncertainty, arbitrarily attacking insiders can exacerbate existing divisions within the leadership, further undermining support for the incumbent. In fact, by allowing indiscriminate violence to be used against members of his own regime, the ruler himself poses a threat to insider survival, perhaps more so than the challenger. This can prompt insider backlash or even a potential coup, the very outcome the ruler is attempting to avoid.

The fate of President Idi Amin of Uganda illustrates the potential consequences of using unrestrained violence against insiders. Amin was a military strongman, notorious for the brutal and violent persecution of political dissent. Although the figures remain widely disputed, upwards of hundreds of thousands of civilians, intellectuals, politicians, and military officials were tortured, disappeared, and publicly murdered after he usurped power in 1971 (International Commission of Jurists, 1977; Amnesty International, 1985). By the late 1970s, however, Amin's violent strategy began to show signs of wear. In 1977, Amin alienated what little remained of his ruling coalition when two prominent ministers and an archbishop were killed in a suspicious car crash, prompting several other government officials to defect or flee into exile. A year later in

1978, Vice President General Mustafa Adrisi was injured in another suspicious car crash, prompting a military mutiny among troops loyal to Adrisi (Roberts, 2014). This led to military in-fighting between Amin and Adrisi's factions, which spilled over into neighboring Tanzania and set the stage for the ensuing Uganda-Tanzania war and Amin's violent ouster. Indeed, by viciously attacking those closest to him, Amin arguably paved the way for his own downfall.

Repression reconsidered

Unlike outsider repression, which is relatively straightforward to mobilize, insider repression can be considerably more complicated and may even destabilize the regime from within. Indeed, when a regime is already composed of factions of varying loyalty to the center, arbitrary violence risks exacerbating divisions among the leadership and provoking further internal dissent against the ruler. This suggests that if the ruler wants to punish internal challengers to power, he requires a method which allows him to re-establish his authority while also preventing other insiders from mobilizing against him.

Courts provide a unique forum to achieve these punitive tasks. Repression research has largely overlooked the repressive potential of courts, characterizing them instead as the institutional antithesis of arbitrary authority (Hill and Jones, 2014). Judicial processes are widely believed to safeguard the rights of the accused and counteract acts of unrestrained violence by the state (Cross, 1999; Elkins et al., 2009; Keith et al., 2009; Powell and Staton, 2009; Carey, 2010). However, these conceptions of judicial power are deeply rooted in the democratic experience, where judges are considered relatively independent and thus able to make decisions without excessive political interference (North and Weingast, 1989; Carothers, 1998; La Porta et al., 2004; O'Donnell, 2004).

By contrast, separate research on autocratic institutions contends that courts can also be used to sideline democratic dissent (Solomon, 1996; Pereira, 2005), legitimize unconstitutional rule (Cheesman, 2011), and stabilize autocratic control (Moustafa, 2007). Much of this work centers upon the puzzle of judicial empowerment in authoritarian regimes – why would an autocrat voluntarily delegate political authority to courts (Solomon, 2007)? Many scholars have offered answers rooted in the various pathologies of authoritarian governance. For example, Stern and O'Brien (2011, p. 178) document how in China, courts are used to overcome the lack of transparency in authoritarian systems, and the cases selected for adjudication demonstrate which political behaviors are tolerated and which are suppressed. Judicial processes thus signal the “limits of the permissible,” which encourages self-policing or censorship of political dissent before it occurs. Courts can also be used to legitimize punishment by the state, as Rajah (2011) observes in Singapore and Pereira (2005) in Brazil, where judicial processes provide an “urbane” alternative to more heavy-handed acts of repression. Overall, these works show that law and courts are not a panacea for political conflict and authoritarianism, but are instead instrumental parts of state violence (Massoud, 2013).

While studies of authoritarian courts provide useful insight into the logic of judicial processes in undemocratic contexts, these findings remain largely disconnected from work on state repression. Even in work that explicitly focuses on judicial empowerment in authoritarian regimes, courts are often presented as a double-edged sword, both serving the interests of power

but also capable of holding it accountable (Ellett, 2013; Moustafa, 2014). The impact of this line of thinking is that we still more often see judicial processes presented as a potential alternative to extrajudicial repression, rather than as part of a broader strategy to quash democratic dissent. Ultimately, what is missing is a general theory of repression in the courts that addresses who is subjected to these procedures and why.

A Judicial Strategy

I argue that courts provide a valuable forum to both punish individual challengers and deter future coordination against the ruler. These mutually reinforcing outcomes are achieved through a trial, here defined as a formal, ritualized routine designed to generate common knowledge regarding the rules of political order. Establishing such rules or “laws” is vital towards regulating insider conflict within the regime, which is important towards maintaining autocratic survival. I refer to this process – wherein laws and courts are used to repress political rivals – as a judicial strategy of repression.

When we think of a trial, we tend to think of a formal process of adjudication that decides guilt or innocence in a particular cause. However, a trial can also be used to resolve internal conflicts over power. Such is a political trial, famously defined by Kirchheimer (1961, p. 46) as an attempt to maintain the status quo while “evicting” a rival from the political scene. This definition presents courts as only one of many battlefields for political domination, including parliament and the bureaucracy, the media, the church, workplaces, and school (Kirchheimer, 1961, p. 4). Falk (2008, p. 4) similarly defines political trials as “wars carried out by legal means,” drawing parallels between the ideological trials of the Cold War era and those from the post-9/11 War on Terror. Posner (2005, p. 107) adopts a more issue-specific definition to include both the partisan trials of political opponents as well as the more “public-spirited trials of public threats.”

Some scholars draw a distinction between political trials and show trials, the former of which may fall within the rule of law, while the latter are “so over determined by politics that they can hardly be considered trials at all” (Falk 2008, p. 3). For example, the show trials of Nazi Germany, the Soviet Union, and many Soviet satellites were well rehearsed before entering the court room and centered upon the public confession of defendants (Hayward, 1966; Posner, 2005). A show trial is thus a demonstration of a prearranged outcome. However, by dismissing these proceedings as state propaganda, we potentially overlook the mechanisms by which an autocratic artificially constructs his authority. The fact that these trials are conducted in the first place suggests that the ruler or regime has a message that they wish to convey about a particular political conflict. These signaling effects, which have been well documented in existing research on authoritarian courts, are ways of establishing or re-affirming political power.

Furthermore, many trials which are categorized as partisan propaganda have only been labeled as such with the perspective of time. During the “Red Scare” hysteria of the Cold War, many Western democracies conducted a series of “anti-Semitic, anti-foreign, and anti-Communist” trials that were considered both just and proper by highly respected leaders and legal experts at the moment of conviction (Christenson, 1983, p. 550). Even during the infamous Moscow show trials of the 1930s, “prominent diplomats and seasoned journalists (as well as the ‘true believers’ in the various communist parties and sympathetic movements in the West) believed that the

[trials] were legitimate, or at a minimum, felt that there was so much smoke that there had to be at least some fire” (Falk, 2008, p. 65). The line between political and show trials is thus fuzzy at best, and in either case, courts are still used as forums to repress political rivals. Indeed, if a court is a battlefield, then a trial is the specific plan of attack.

Under the broader rubric of political prosecutions, the most serious form is the treason trial. Treason entails overt acts of disloyalty to the ruler (Christenson, 1983), where “the essence of the offence lies in the preparation of the endeavor to overthrow the government or alter the law or the policies of the government” (Twumasi, 1985, p. 410). An allegation of treason thus “tears down the wall” between general acts of political dissent and actual crimes against the state (Kirchheimer, 1961, p. 62).

When an insider is tried for treason, a trial aims to unite other insiders against the challenger, which enables the ruler to punish the challenger without risking internal backlash. A treason trial achieves these tasks by adhering to a predictable, routinized sequence, which lends stability to the process of insider repression. This sequence unfolds as follows. First, the state brings formal charges against the challenger, usually followed by their arrest. Second, the challenger is presented in court, where the prosecution delivers their case against them before a judge. Third, the judge delivers a formal verdict and sentence, thus concluding the trial.

Treason trials are performed by challengers, prosecutors, and judges in court, where each actor plays a symbolic role: the challenger is the manifestation of real or imagined threats within the regime; the prosecutor represents the interests of the incumbent and outlines the alleged conspiracy committed against him; and the judge upholds the rules of political order as established by the incumbent, which most often entails ruling against the interests of the challenger. In other words, whereas the challenger represents a threat to the existing order, the prosecutor and judge are defenders of the status quo.

In many cases, these proceedings are not designed to elucidate truth or demonstrate proof of wrongdoing, but to rally insiders against an internal rival. This is why regardless of the actual facts of the case, a trial builds a simple narrative with a clearly defined beginning, middle, and end – the challenger rebelled, the challenger failed, the challenger is punished. A judicial strategy of repression thus brings insider conflict out into the open, but in a tightly controlled fashion. In fact, by structuring this narrative as a predictable plot with a tidy resolution, a trial can make the defeat of the challenger seem like a predetermined outcome, where the incumbent is always expected to emerge victorious over his foes. Judicial procedures can thus superimpose the semblance of order onto the messy reality of political conflict.

The language of the law helps cement this narrative in clear, categorical terms. While challengers have been implicated in specific crimes against the state, the actual charges levied against them in court are relatively generic. Treason is a catch-all term for acts of disloyalty against the ruler; as a general category of crime, it does not lend nuance to the actual substance of the case at hand, nor does it explain why the challengers on trial acted as they did. Instead, such language provides strict definitions of right and wrong that are applicable to a wide range of political behaviors, reducing the complexities of internal rivalries to more simple categories of criminality. Invoking the law as a narrative device thus limits the range of possible interpretations that may be derived

from a given conflict, which can ultimately prevent other insiders from mobilizing around the idea that the insider on trial is a legitimate challenger of the incumbent.

To ensure that other insiders receive this message, a trial may be publicized through government press releases or live media coverage as the case unfolds. Sometimes the court is open to the general public, such that anyone can witness its proceedings first-hand. Indeed, compared to the often summary and secretive nature of extrajudicial violence, a judicial process is a relatively open affair.

However, the power of a judicial process lies not in the fact that all actors receive the same message, but rather that each actor believes that everyone else also receives the same message. Individual beliefs are stronger when they are shared by others (Scott, 1990; Chwe 2001), and when a trial is widely broadcast, this increases the likelihood that more people are assimilating shared information. The public ceremony of a trial can thus create general agreement on common knowledge, perpetuating a “master fiction” that underpins political order (Geertz, 1977). In this case, the master fiction is that the ruler is the only legitimate authority and no challenger can defeat him.

From beginning to end, this institutionalized process of information-sharing constitutes a ritual, or a ceremonial function designed to establish a shared set of beliefs and rules (Chwe, 2001). A ritual specifically uses a series of formal, routinized, and public demonstrations to promote coordination around a common idea or goal. As Chwe (2001, p. 27) observes, rituals are a valuable means of “shoring up” the rules of political behavior when “social strains and tensions...have begun to impair seriously the orderly functioning of group life.” These functions are especially useful in the aftermath of insider conflict or when the ruler’s authority has been directly undermined.

In a treason case, the ceremony of a trial serves as a reminder to all who bear witness that the incumbent has emerged victorious over his challengers. This idea, if widely shared, can deter future coordination against the ruler and promote discipline to authority within the regime. As Polanyi (1958, p. 224) observes, “if in a group of men each believes that all the others will obey the commands of a person claiming to be their common superior...all are forced to obey by the mere supposition of the others’ continued obedience.” Publicizing the formal proceedings of the court can thus generate a self-fulfilling prophecy, whereby insiders are more likely to support the status quo if they believe others also support it. The mere impression of power can thus contribute to actual power (Scott, 1990).

Note that the emphasis of a judicial strategy is the trial itself and the ideas contained therein, which are summarized by the final verdict. By the end of the trial, the rallying effect may have already achieved its goal, and whatever physical punishment befalls the challenger is secondary to what happens in court. The implication is that the insider on trial may ultimately be pardoned and even re-admitted back into the regime. In fact, allowing insiders to return to their former posts can be advantageous for autocratic regimes over the long-run: because these actors have been formally prosecuted, they have experienced first-hand the consequences of disloyalty and are more likely to be submissive in future.

Summary and Observable Implications

The argument outlined in this chapter contends that different challengers pose different threats to autocratic survival, which can affect subsequent strategies of repression. The key criterion is whether members of the regime are effectively united against the challenger. Because outsiders pose a broad-based threat to the regime, they are a common enemy to rally against. However, the fact that insiders pose a more uneven threat to autocratic survival makes them a more difficult target for conventional repression. In such cases, I argue that a judicial strategy provides a way to unite members of the regime behind the incumbent and against the challenger, which enables the incumbent to both punish the challenger on trial while deterring future insider threats.

This leads to the following testable implications. The first is that strategies of repression differ by challenger-type.

H1. Outsiders are more likely to receive extrajudicial repression, and insiders are more likely to receive judicial repression.

The second is that trials can rally insiders behind the ruler in the aftermath of intra-regime conflict. A judicial strategy thus promotes discipline to authority and helps ensure autocratic survival.

H2. Trials rally intra-regime support for the ruler.

Empirical Analysis

Information on insider-outsider threats can be uncovered by examining coup plots, defined as instances of conspired but unsuccessful regime overthrow (McGowan, 2003). Focusing on these events is analytically productive for two reasons. First, coup plots are often publicized events, typically receiving extensive coverage in both the local and foreign press. Second, regardless of whether a plot occurs in a civilian dictatorship or a military junta, the underlying premise of the conspiracy is the same: a challenger has connived to subvert the incumbent regime and, accordingly, poses a threat to autocratic survival. Coup plots thus provide a baseline for comparing political threats across different contexts.

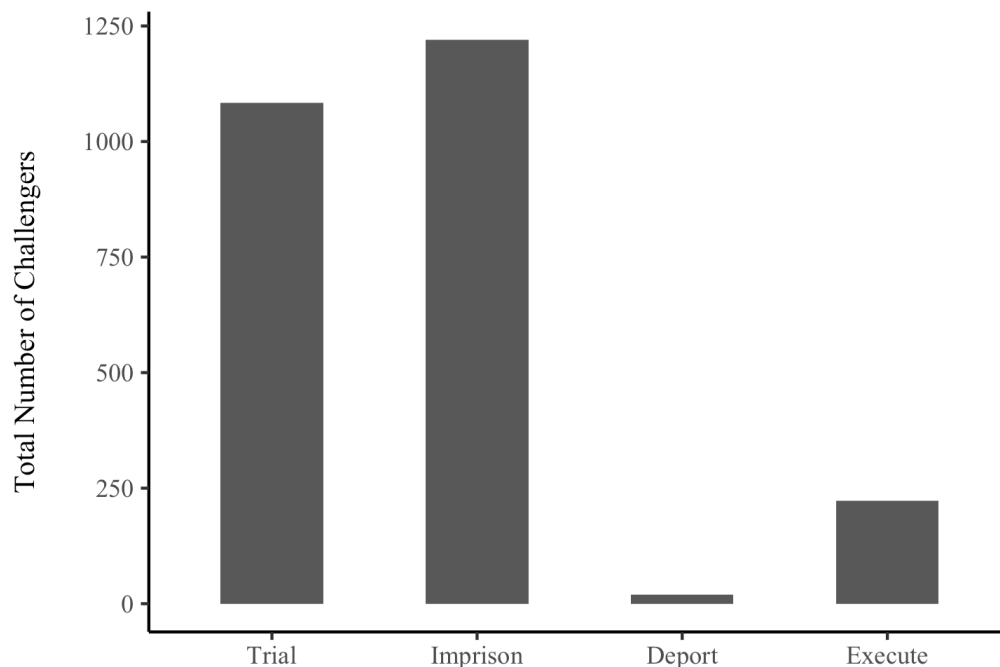
Although coup plots provide a useful benchmark for analysis, it is important to be aware of potential biases in reporting. Because plots are often announced before they become visible events, the veracity of these allegations may only be as good as the ruler's word (McGowan, 2003). The timing of these conspiracies might also correspond to broader political or economic crises, which suggests that the announcement of these plots may be intended to distract from other ongoing problems of governance (Powell and Thyne, 2011). Kebschull (1994, p. 568) similarly notes that plots could be "deliberately contrived nonsense, put forward to serve the regime's purpose of initiating emergency rule, suppressing a particular group, or justifying other actions sought by the regime." However, despite these concerns, the key aspect of a reported plot is not *whether* the coup attempt was actually due to occur, but *who* is being implicated. This is because whoever is targeted as an enemy of the state is subsequently treated as such; while the plot itself may be fake, the repression is real. A reported plot is thus a window into the

insecurities of autocratic rulers, specifically who poses a perceived threat to autocratic survival (Mitchell et al., 1972; Kebschull, 1994).

The main independent variable is *challenger-type*, coded as insider or outsider. In the African case, insiders included ruling party officials and members of the military, both of whom were vital pillars of support in the one-party dictatorships and military juntas of the postcolonial period (Decalo, 1989; Young, 2012). By contrast, outsiders were members of opposition groups that sought control of the national government. In classifying members of the ruling party and opposition, it is important to note that the early years of independence were defined by the merger, dissolution, or consolidation of different party organizations (Riedl, 2014). This meant that some opposition parties were founded by defectors from the ruling party, whereas others had always operated as peripheral groups. I account for these factors in the following analysis.

In the following model, the main dependent variable is *repression*, equal to one if the accused went to trial, zero otherwise. In this coding, I consider any type of punishment that does not take place in court – civilian or military – to be extrajudicial. A range of extrajudicial tactics are thus collapsed into the “other” category. Figure 2.1 illustrates the extent to which other tactics such as detention, deportation, and execution were actually used in postcolonial Africa. The findings reveal that the vast majority of challengers in the dataset were either put on trial or detained; deportations and executions were much less frequently used. For the following analysis, it is thus reasonable to conceive of the dependent variable as trial or summary detention.

Figure 2.1: Repression Tactics, Independence to 1994



A trial in these cases was conducted in either a common law or military court. Military courts are often assumed to be more arbitrary than their civilian counterparts because the main decision-

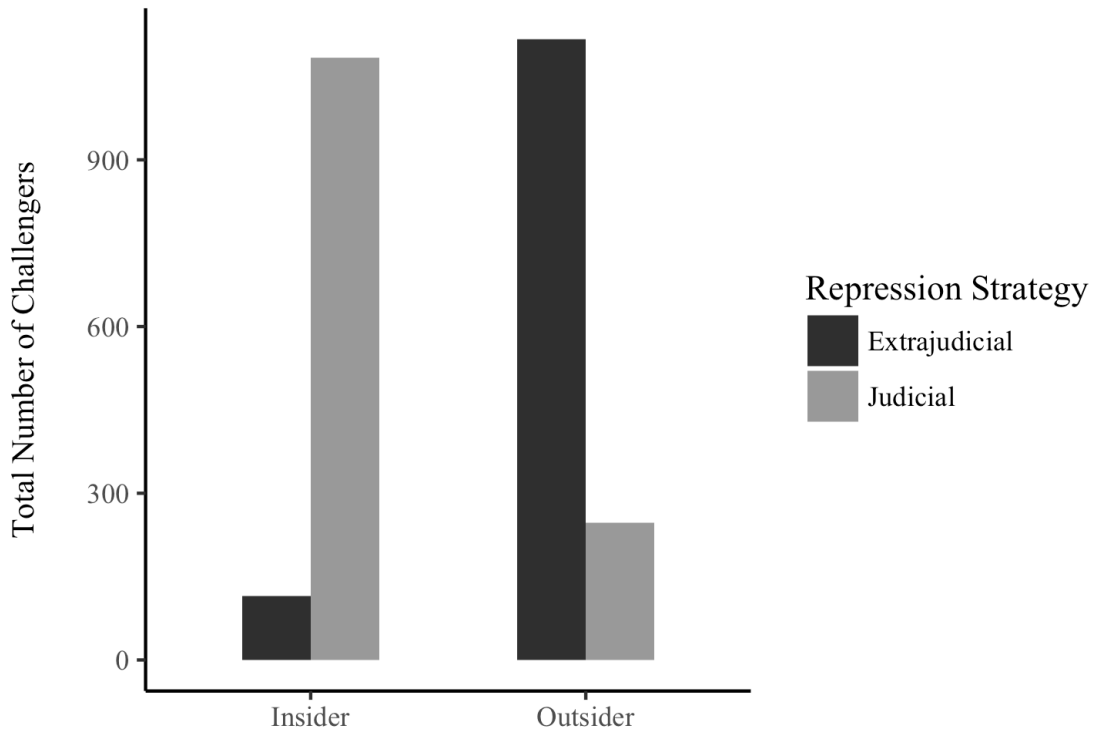
making authority is a military officer, not a civilian judge (Bienen, 1985; Tate and Haynie, 1993; Pereira, 2005; Moustafa, 2007; Geddes, 2004; Singh, 2014). However, in postcolonial Africa, military justice was not entirely divorced from the common law system. Even when military courts did not fall within common law jurisdiction, civilian judges were often required to participate in tribunal proceedings. For example, the Ghana Armed Forces Act 1962, Act 105 stipulates that a court martial includes a presidentially-appointed Judge Advocate General who advises on any question of law or procedure. These rulings could be appealed to a Court Martial Appeal Court, comprised of judges of the Superior Court of Judicature and any other common law professionals appointed by the Chief Justice. Uganda had similar measures in place to provide judicial oversight over military tribunal decisions, as detailed in the Economic Crimes Tribunal Decree 1975, which states that a military “tribunal shall have a legal advisor who shall be a Magistrate Grade I or other legal practitioner, of not less than two years’ standing, appointed by the Chief Justice after consultation with the Attorney-General.”

Furthermore, the logic of a judicial strategy remains unchanged in military forums. Like a treason trial in a civilian court, the objective of a court-martial is to reinforce hierarchy and maintain discipline within the broader organization (Geddes, 2004). This is a feature of military courts in both autocratic and democratic regimes alike. As U.S. General William Westmoreland (1971, p. 6) observed, “military justice should aid in preserving the authority of military commanders...and if we can rehabilitate an errant soldier and return him for duty, we have preserved a valuable asset.” In other words, the ultimate goal is not necessarily to destroy the challenger on trial, but rather, to reestablish their loyalty to authority. This is the essence of a judicial strategy.

Bivariate Relationships

Is there evidence to support the claim that the type of challenger a ruler faces affects the strategy of repression used against them? Figure 2.2 shows the total number of insiders and outsiders who were implicated in coup plots and subsequently repressed by the state from independence to 1994. The results illustrate that repression strategies do appear to differ between challenger-types: the vast majority of insiders were formally prosecuted, whereas most outsiders were never taken to trial. These descriptive findings lend credibility to the hypothesis that insiders were more likely than outsiders to receive a judicial strategy.

Figure 2.2: Repression Strategy by Challenger-Type, Independence to 1994



Regression analysis

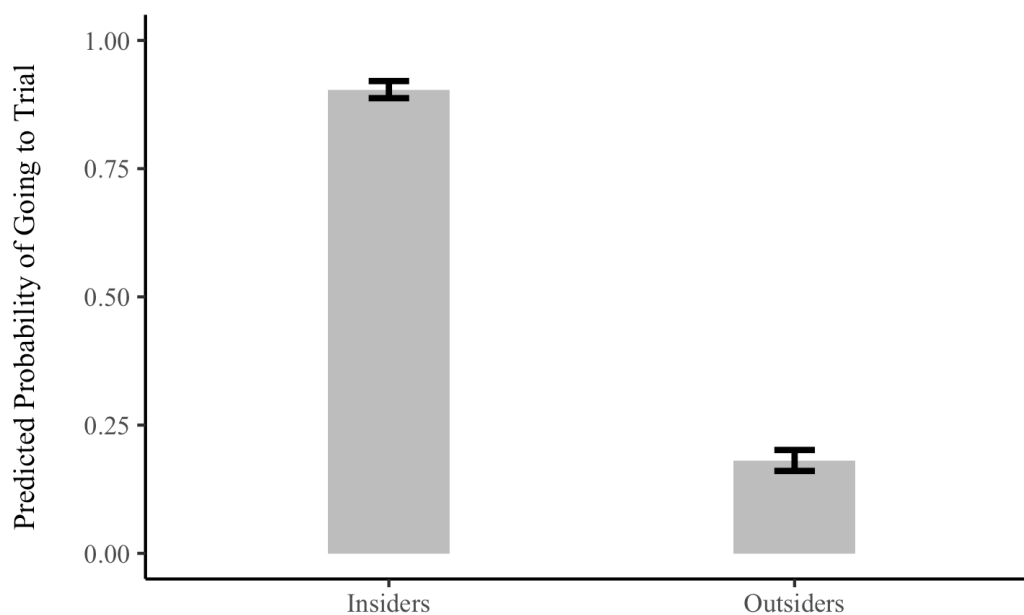
Moving beyond the simple bivariate results, I now turn to a set of logistic regressions in order to control for other potential explanatory variables that capture both regime and country characteristics. I model the relationship between challenger-type and repression strategy as a logit transformed linear probability model with a binomial error distribution. The unit of analysis is an individual challenger and the main outcome of interest is how they were repressed. The results are reported in log-odds units; predicted probabilities are shown in the figures that follow. To account for differences in repression strategies across space and time, I include country and year controls. I also include a control for regime-type, dichotomized as civilian or military. Table 1 reports the main results from the logistic regression. Column 1 shows the baseline regression of going to trial conditional on challenger-type, column 2 controls for military regimes, and column 3 includes additional controls for country and year trends.

In each column of Table 2.1, insiders have a positive logit coefficient and outsiders have a negative logit coefficient. Both estimates are statistically significant at the 0.01 level and are robust to the inclusion of country, year, and regime controls. Figure 2.3 illustrates predicted probabilities for the baseline estimates reported in Table 2.1, where the bands represent 95% confidence intervals. As the figure shows, the probability of going to trial is over 90% for insiders and only 18% for outsiders. These results corroborate the first hypothesis that insiders are more likely to go to trial than outsiders.

Table 2.1: Logit of Repression on Challenger-Type: Insiders and Outsiders

	<i>Dependent variable:</i>		
	Trial		
	(1)	(2)	(3)
Insider	2.243 ^{***} (0.098)	2.616 ^{***} (0.112)	3.812 ^{***} (0.373)
Outsider	-3.752 ^{***} (0.121)	-3.702 ^{***} (0.126)	-3.110 ^{***} (0.255)
Military Regime		-1.509 ^{***} (0.140)	0.773 (0.815)
Country Control	No	No	Yes
Year Control	No	No	Yes
Observations	2,563	2,563	2,563
Standard errors in parentheses. *p<0.1; **p<0.05; ***p<0.01			

Figure 2.3: Predicted Probability of Going to Trial in Africa, Independence to 1994



Disaggregated Coding

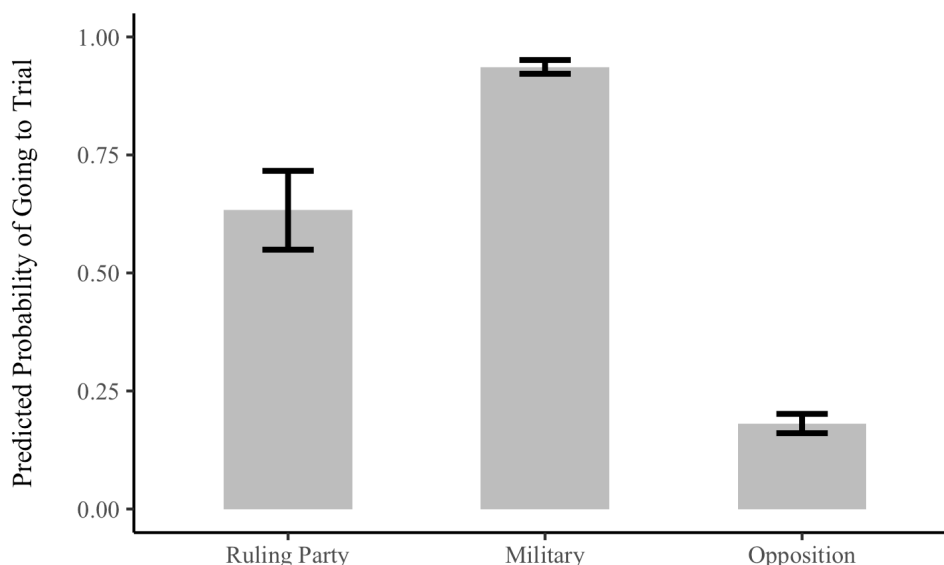
Recall that in the previous analysis, insiders include ruling party and military officials, whereas outsiders include ruling party defectors and original members of the opposition. Do the main results still hold when challengers are differentiated along these dimensions?

Table 2.2 reports the results from the logistic regression of repression strategy on challenger-type, where challengers are disaggregated by their ruling party, military, or opposition status. With the exception of how challengers are coded, columns 1-3 in Table 2.2 are specified in the same way as columns 1-3 in Table 2.1. The findings in Table 2.2 remain statistically significant and in the same direction as before. In each estimated model, ruling party and military challengers have positive logit coefficients, whereas opposition challengers have negative logit coefficients. Figure 2.4 shows the predicted probabilities derived from these estimates: military challengers have the highest predicted probability of going to trial, nearly 100%, providing evidence that judicial strategies were strongly preferred within African militaries; ruling party challengers had the second highest probability, approximately 60%; and opposition challengers had the lowest probability, less than 25%.

Table 2.2: Logit of Repression on Challenger-Type: Alternative Coding

	<i>Dependent variable:</i>		
	trial		
	(1)	(2)	(3)
Ruling Party	0.544 ^{***} (0.183)	0.544 ^{***} (0.183)	2.781 ^{***} (0.435)
Military	2.147 ^{***} (0.222)	2.752 ^{***} (0.238)	1.443 ^{***} (0.343)
Opposition	-2.053 ^{***} (0.196)	-1.570 ^{***} (0.199)	-2.066 ^{***} (0.347)
Military Regime		-1.889 ^{***} (0.164)	0.584 (0.784)
Country Control	No	No	Yes
Year Control	No	No	Yes
Observations	2,563	2,563	2,563
Standard errors in parentheses.	* p<0.1; ** p<0.05; *** p<0.01		

Figure 2.4: Predicted Probability of Going to Trial, Independence to 1994



I also evaluate whether different types of outsiders received different repression strategies. I specifically disaggregate outsiders by whether they were ruling party defectors (a defector had switched parties, whereas a non-defector had always been a member of the opposition). Table 2.3 reports the results from the logistic regression: the log-odds that defectors or non-defectors go to trial is negative and significant at the 0.01 level, and remain significant with the inclusion of military regime, country, and year controls. In other words, both types of outsiders are less likely to go to trial.

Figure 2.5 shows the predicted probabilities for the logit regressions reported in Table 2.3. The probability of going to trial is approximately 19% for non-defectors and 15% for defectors, and the difference between them is statistically insignificant. This suggests that irrespective of whether opposition challengers once belonged to the ruling party, they are effectively treated as outsiders once they have defected. The fact that ruling party defectors are unlikely to go to trial is also consistent with theoretical expectations. If a judicial strategy of repression is designed to enforce autocratic discipline, this strategy is largely wasted on ruling party defectors, actors who have effectively demonstrated their disloyalty to the regime twice: first by defecting from the ruling party, then by attempting to overthrow it. Current allegiances rather than prior loyalties thus appear to be a stronger determinant of how challengers are subsequently repressed.

Table 2.3: Logit of Repression on Challenger-Type: Outsider Defectors

	<i>Dependent variable:</i>		
	trial		
	(1)	(2)	(3)
Ruling Party	0.544 ^{***} (0.183)	0.544 ^{***} (0.183)	2.348 ^{***} (0.464)
Military	2.147 ^{***} (0.222)	2.819 ^{***} (0.240)	1.806 ^{***} (0.357)
Non-Defector	-2.011 ^{***} (0.199)	-1.364 ^{***} (0.202)	-1.069 ^{***} (0.395)
Defector	-2.269 ^{***} (0.258)	-2.269 ^{***} (0.258)	-3.282 ^{***} (0.435)
Military Regime		-2.021 ^{***} (0.163)	0.246 (0.767)
Country Control	No	No	Yes
Year Control	No	No	Yes
Observations	2,563	2,563	2,563
Standard errors in parentheses.	* p<0.1; ** p<0.05; *** p<0.01		

Figure 2.5: Predicted Probabilities: Outsider Defectors

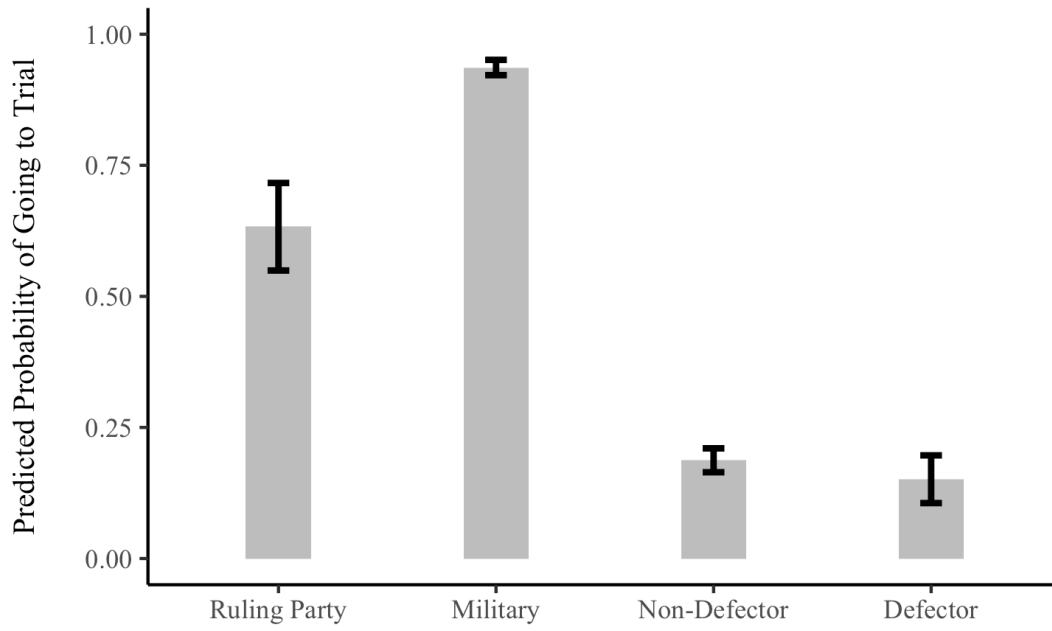
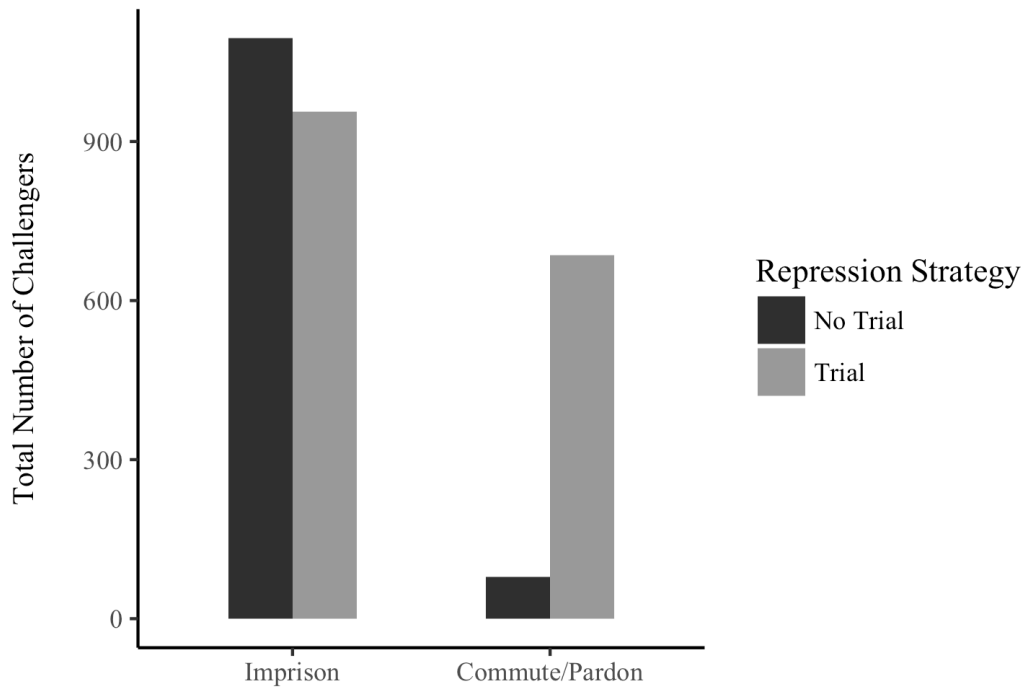


Figure 2.6: Long-Run Outcomes, Independence to 1994



Long-run outcomes

To evaluate the long-run outcomes of different repression strategies, Figure 2.6 reveals the final fate of challengers who were repressed judicially or extrajudicially, from independence to 1994. Most challengers were imprisoned or granted clemency by the state. Clemency here refers to commutations and pardons, both of which were issued by authority of the president. A commutation typically entailed replacing an execution order with a prison sentence, whereas a pardon meant forgiveness for past crimes and an early release from custody.

Figure 2.6 suggests that judicial and extrajudicial strategies of repression led to different consequences for the accused: of the challengers in the sample who went to trial, 956 were imprisoned and 686 had their sentences commuted or pardoned by the president; of the challengers in the sample who never went to trial, 1095 were imprisoned and only 79 were granted clemency.

These findings should be interpreted with caution, especially observations in the extrajudicial category. In particular, the summary and often secretive nature of extrajudicial tactics suggests that the number of detainees in the sample is likely underreported. However, the more intriguing finding is with regards to commutations and pardons. Approximately 7% of challengers who never went to court were subsequently granted clemency, as opposed to over 70% of challengers who went to court. In other words, the data suggest that challengers were ten times more likely to have their punishment reduced by the president if they were first subjected to a trial. Challengers who were formally prosecuted may have thus been effectively neutralized by their experience in court such that they no longer posed a viable threat to autocratic survival.

As evidence of this point, consider what happened in the aftermath of a 1964 treason trial under President Kwame Nkrumah in Ghana. The case centered around a failed plot to kill Nkrumah, allegedly masterminded by several high-ranking members of the cabinet. Attempted assassination of the president was a crime punishable by death, and Nkrumah was so determined to secure convictions against his rivals that he had the case tried twice under two different Chief Justices. However, soon after the guilty verdicts were delivered, Nkrumah commuted all of the death sentences to time in prison (*The Observer*, 1964). A similar pattern emerged in Sierra Leone following the failed coup against President Siaka Stevens. When the case finally came to the Supreme Court in 1970, Brigadier David Lansana and several others were found guilty of treason and sentenced to death. A year later, however, Stevens pardoned and released six of the condemned men, including Lansana (Cartwright and Cox, 1972). These cases were typical of postcolonial Africa, where presidents often granted clemency to challengers found guilty of treason in an apparent about-face. However, rather than reverse the decisions of the court, what these outcomes suggest is that the key component of a judicial strategy was the trial, not the penalty which followed thereafter. Or, in Feeley's (1979) words, the process is the punishment.

5. Case Study Illustration Of Theory

To evaluate the second hypothesis – whether trials promote intra-regime support for autocratic rulers – this section provides a case study of postcolonial Kenya under President Jomo Kenyatta.

The Kenyan case illustrates what happens when a judicial strategy of repression is selectively used against regime insiders. In line with theoretical expectations, opposition outsiders presented a common enemy for Kenyatta and other members of the regime to mobilize against; the opposition was thus an ideal target for extrajudicial strategies. However, threats from within the regime – including the ruling party and military – presented a more complex challenge for regime survival. To confront internal rivals, Kenyatta turned to the courts, using a treason trial to ritualize the punishment of insiders and rally members of the regime behind his rule. A judicial strategy thus helped Kenyatta reclaim his authority in the wake of an intra-regime crisis.

In the early years of independence, Kenyan national politics were defined by a rivalry between two opposing camps: the ruling Kenyan African National Union (KANU) and the opposition Kenya People's Union (KPU). The KPU was originally founded by former Vice President Oginga Odinga, and many of its early members were former KANU rank-and-file. In other words, the opposition was largely composed of ruling party defectors.

KANU was quick to draw a distinction between current members of the regime and those who had defected. On April 28, 1966, only a few weeks after the KPU's founding, the KANU-dominated parliament passed a constitutional amendment requiring all ministers who had defected to contest their seats in a "little general election." The message was clear: if ministers were going to resign from the ruling party, they could not automatically retain their position within the government and instead had to seek a new electoral mandate under a different party banner (Hornsby, 2012).

However, KANU exploited its monopoly in the legislature, bureaucracy, and security forces to repress the KPU and prevent it from becoming a viable party (Mueller, 1984). The logic behind these moves was articulated in Kenyatta's treatise "Toward a One Party State": "did we have to create leaders of the opposition, maintain them from public funds, and tolerate their insatiable desire for agitation merely because they wanted to oppose for 'opposition's sake'? Certainly not...instead of being constructive from within, [the opposition] prefers to be destructive from without" (The National Archives (TNA): Foreign Commonwealth Office (FCO) 31/209). By casting the opposition as a subversive threat to national security, KANU was able to justify a variety of coercive tactics under the Preservation of Public Security Act of 1966, which granted the state vast powers to detain dissenters without trial, control freedom of movement, impose curfews, and censor the press. Over the next three years, the KANU-controlled police detained several KPU officials and supporters without charge, especially during the lead up to local government elections (Hornsby, 2012).

The decisive blow to the KPU came in October 1969 at a campaign rally where both Odinga and Kenyatta were in attendance. After hostile words were exchanged, a violent clash ensued between KPU and KANU supporters and several dozen participants were killed. Over the next few days, Odinga and leading members of the KPU were arrested and the KPU was banned as a subversive organization deemed "dangerous to the good government of the Republic of Kenya" (Hornsby, 2012).

Whereas opposition outsiders were a relatively straightforward target for repression, rivals from within the ruling organization proved to be a more complex challenge. Such was the case in May

1971 when Kenyatta accused members of his own regime – including officials from the ruling party and military – of conspiring to overthrow the government. Most of the alleged conspirators came from politically underrepresented ethnic groups that had recently come into conflict with Kenyatta and his Kikuyu co-ethnics. For example, co-conspirator Gideon Mutiso, a minister of parliament and a Kamba, had repeatedly accused Kenyatta of playing ethnic favoritism, whereas army lieutenant Joseph Daniel Owino, a Luo, claimed he was driven to “hunger” and disloyalty by tribalism (*The Washington Post*, 1971). One of the highest ranking officials implicated in the plot was Major General Joseph Ndolo, Chief of Defense Staff and a Kamba (Decalo, 1989).

In response to internal dissent, Kenyatta decided to take his challengers to court. The decision to invoke a judicial strategy puzzled contemporary observers, especially considering the range of extrajudicial tactics that had already been used effectively to silence government critics. However, in this case, Kenyatta needed to ensure that other members of the ruling elite – and not just his Kikuyu co-ethnics - were actually rallied behind him. While Kenyatta could have ordered his rivals to be arrested, detained, and even disappeared, doing so might provoke further dissent among other insiders. This was precisely what happened in 1969 when Tom Mboya, one of the founding members of KANU and a vocal critic of Kenyatta, was publicly assassinated. While a low-ranking army engineer was ultimately convicted of the crime, many believed that the killing was ordered by Kenyatta and orchestrated by Kikuyu tribesmen (Meisler, 1969). In other words, rather than defuse elite conflict, Mboya’s murder only exacerbated it. Indeed, it was incidents such as these which fuelled inter-ethnic animosity within the ruling party and military and undermined support for Kenyatta’s leadership, perhaps contributing to the 1971 plot against him (*The Washington Post*, 1971).

In light of these ongoing tensions, in 1971, Kenyatta chose to ritualize the repression of insiders in the High Court. Attorney General Charles Njonjo directed the prosecution, developing a narrative of insider rebellion that made a potentially sizable threat appear small. Thus the message of the trial was not that Kenyatta’s authority had been challenged, but rather, had been foolishly challenged. For example, in his opening statement, the director of prosecution explained that the challengers on trial were incompetent criminals ultimately doomed to failure; their odds of success were “a million to one” (TNA: FCO 31/1190). The accused also delivered emotional confessions of guilt, begging for Kenyatta’s forgiveness “in an almost childlike way” (TNA: FCO 31/1190). Such displays reinforced the notion that the conspirators lacked “sufficient belief in the rectitude of [their] cause to defend [their] actions in any way” (TNA: FCO 31/1190). Of course, the fact that the accused were denied the right to counsel also meant that they lacked the resources or knowledge to deliver a counter narrative.

KANU also staged several rallies as the trial unfolded, delivering speeches that asked citizens to reaffirm their loyalty to the party and pledge support for their president. These rituals were widely attended: approximately 60,000 people attended one such rally on June 27, 1971, where President Kenyatta himself appeared (TNA: FCO 31/1190). Addressing the crowd, Kenyatta stoked animosity against the “traitors” on trial, but also downplayed the threat posed by these actors, remarking that “when the frogs make a noise, they do not prevent the cattle from drinking water” (TNA: FCO 31/1190). Such rallies were powerful, public demonstrations of support for Kenyatta and KANU, helping to reinforce the narrative being propounded in court. Convictions were thus foregone conclusions by the time of the final verdict.

Kenyatta thus effectively used a judicial strategy of repression to re-establish control over the ruling party and military. The conspiracy revealed intra-regime conflicts that could not be easily resolved through extrajudicial means. However, courts provided a platform to diminish threats from within the regime and thereby stabilize autocratic authority. Subsequent events suggest that Kenyatta was in a stronger position by the end of the trial. Less than a month after the guilty verdicts were delivered in court, Kenyatta announced plans to postpone local government elections by two years, a decision that received little backlash from KANU back-benchers. This was a stark contrast from when Kenyatta attempted similar moves in 1965, and rank-and-file party members protested in the streets (Hornsby, 2012). The cult of Kenyatta further deepened on July 4, 1974 when the KANU Governing Council conference declared Kenyatta KANU's "life president" (TNA: FCO 31/1190).

Conclusion

This chapter seeks to explain why a judicial strategy of repression emerges in autocratic regimes. I argue that autocratic rulers turn to courts when they confront internal threats to power. Unlike external threats, which pose a common enemy for the regime to mobilize against, internal threats present a more complex challenge. In particular, rulers need to first rally intra-regime support before they can eliminate their internal rival. Courts are an ideal forum for this task, wherein the ritualized nature of judicial proceedings are designed to generate a set of shared beliefs regarding the rules of political order. By the end of a trial, a narrative has been established against the challenger and their cause. A judicial strategy thus reveals how knowledge is generated in the aftermath of regime crises, or how rulers signal their ability to vanquish their rivals and reestablish their authority.

These findings raise important questions. While courts can provide powerful reinforcement for autocratic regimes, the success of a judicial strategy may ultimately hinge upon the behavior of judges. In particular, judges must be complicit to the broader repression objectives of the incumbent regime. How do autocrats cultivate compliant courts, and what effects do these decisions have on the subservience of the judiciary over time? If judges disobey their political masters, does this create openings to hold power accountable, or create greater backlash against the judiciary? I turn to these questions in the next chapter.

CHAPTER THREE

Compliant Courts

A judicial strategy of repression transforms courts into weapons of autocratic survival. A court specifically provides a forum wherein autocrats can delegitimize their challengers before an audience of potential rivals. This process relies upon the routinization of trial and punishment, procedures which can help generate a shared narrative regarding the supremacy of the ruler and his ability to thwart his political challengers. The theory laid out in Chapter Two assumes that judges are complicit in these outcomes. This means that when judges adjudicate cases of political import, they issue decisions that reinforce, rather than undermine, the interests of autocrats.

However, the compliance of courts is often taken for granted, especially during the early years of autocratic rule. When regimes remain unconsolidated, they are more susceptible to factional infighting, and it is not obvious to whom judges should pledge their loyalty. Why judges should align with the incumbent if regime insiders may overthrow him? If autocrats face heightened threats of insider insurrection, what prevents judges from also rebelling?

The fact that autocrats are able to secure favorable rulings under these circumstances is a finding that deserves further examination. Conventional explanations of judicial manipulation focus on *ex ante* and *ex post* methods of control, where *ex ante* refers to the pre-trial selection of judges, and *ex post* focuses on post-trial punishments and rewards. While autocrats and democrats alike utilize both methods to control judiciaries, some methods may be more effective than others in cultivating compliant courts.

I argue that *ex ante* methods are more effective than *ex post* sanctions. This is because rulers that openly attack the judiciary are more likely to exacerbate ongoing tensions rather than ameliorate them. In some cases, conflicts between rulers and judges can provide pretext for other insiders to challenge the regime. It is thus critically important for rulers to identify compliant judges before taking a case to trial, rather than risk the backlash associated with judicial attacks in the aftermath of a controversial ruling.

Who were the most compliant judges in postcolonial British Africa? I find that in the early years of self-rule, courts were more reliable agents of autocratic repression when judges were more insulated from partisan conflicts. In particular, judges who lacked a significant record of government service or political participation were more likely to convict political challengers accused of treason. This finding goes against conventional notions of court packing, which tend to argue that both democrats and autocrats alike are better off appointing judges who share their partisan views (Goldman, 1997; Hilbink, 2007). Rather, postcolonial Africa suggests the contrary: appointing politicized judges is riskier when regimes remain unconsolidated.

This chapter proceeds as follows. The first section briefly summarizes the record on judicial behavior and repression outcomes in post-independence Africa. The second section reviews common methods for controlling courts, including *ex ante* and *ex post* tactics used by political leaders to sway judicial behavior. The third section develops the argument for why *ex ante* methods were more effective in controlling courts in post-independence Africa. I argue that

appointing politically unaligned judges created judiciaries that were less susceptible to factional infighting and thus more reliable during periods of intra-regime conflict. I corroborate these claims using statistical analysis to show how appointing less embedded judges led to more repressive courts. By examining judicial appointments in comparative historical perspective, I link key features of judicial identity and performance. The fourth section evaluates the argument by utilizing case studies of Tanzania and Ghana, countries that confronted similar challenges to post-colonial governance, but varied in their *ex ante* approach to the courts. In Ghana, where the government appointed politically embedded judges, *ex post* methods were required to counteract disobedient courts, which exacerbated tensions within the regime. The fifth section examines an alternative measure of judicial identity in comparison to the notion of partisanship described above. I conclude by discussing the implications of these trends on legal development over time.

Judicial Behavior and Repression Outcomes

As Chapter Two argues, the objective of a judicial strategy is to establish a tidy narrative that delegitimizes regime challengers and dissuades future threats from emerging. In treason cases, this narrative requires judges to deliver guilty verdicts. Did African courts ultimately convict?

Figure 3.1: Average Conviction Rate in Postcolonial Africa

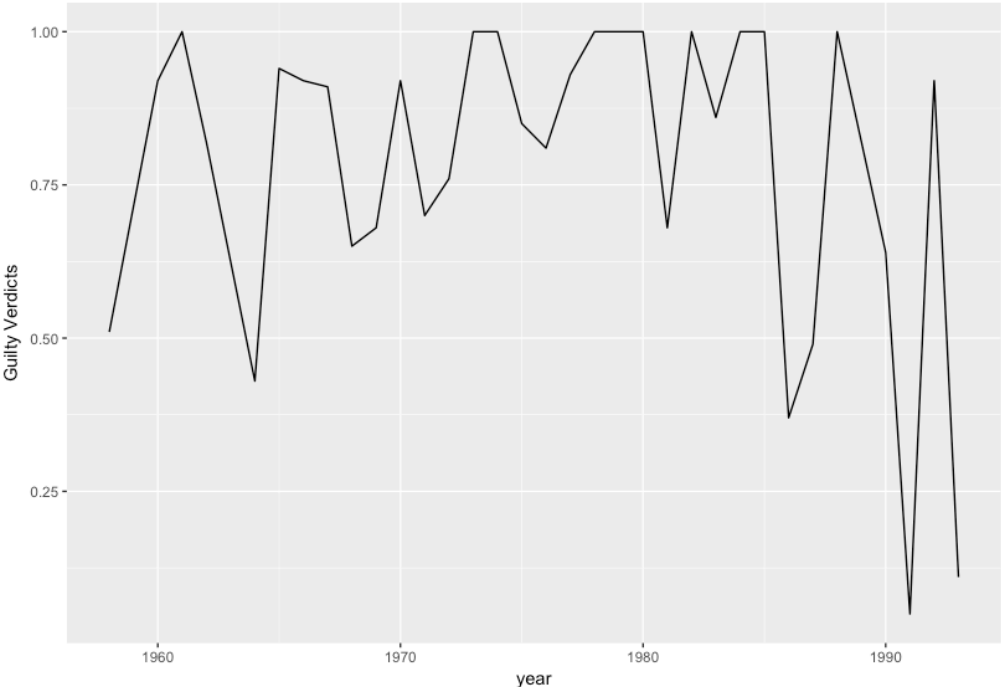


Figure 3.1 shows variability in conviction rates for treason cases, averaged across Ghana, Malawi, Kenya, Sierra Leone, Tanzania, Uganda, and Zambia.¹ The graphic shows a few important trends. First, the courts did not consistently deliver guilty verdicts against actors accused of government subversion, and the sharp spikes indicate that the conviction rate could rapidly rise and fall from year to year. Second, conviction rates were especially volatile during the early and late years of autocratic rule, reaching their lowest point in the early 1960s (around independence) and in the early 1990s (the return to multiparty rule). This suggests that judges were least compliant during periods of autocratic consolidation or breakdown.

The volatility of judicial repression outcomes deserves further examination, especially considering how some of these adverse rulings occurred during critical years of autocratic development. Existing theories of judicial behavior are rooted in the idea that judges are strategic actors who operate under a particular set of political constraints. Although judges are granted authority over legal decision-making, they “possess no direct enforcement mechanisms and few powers to guard their independence” (Vanberg, 2000, p. 333). Judges must therefore move strategically in order to guarantee their survival (Knight and Epstein, 1996; Moustafa, 2007; Ginsburg and Moustafa, 2008).

However, strategies for judicial survival are not always obvious, especially during transitions from one regime to the next. The early years of regime tenure can be especially awkward, when new patterns of power remain un-established and old patterns have yet to breakdown. During these periods, it can take time for judges to learn about the preferences of their new political superiors and how to act accordingly (Knight and Epstein, 1996). However, the “re-education” process can lead to awkward confrontations between executives and judges over “failures of the court” to rule according to regime desires (Solomon, 1987). In Soviet Russia, it took nearly three decades of Bolshevik rule to lower acquittal rates in criminal trials to politically acceptable levels. Acquittals only declined when bureaucratic and political agencies developed stronger rules of judicial monitoring and enforcing compliance of the courts (Solomon, 1987).

It is not just the early years of autocracy that produce executive-judicial conflict; judges may also rule against the interests of the regime when it appears that the leadership is about to lose power. In her seminal theory on “strategic defection,” Helmke (2002 and 2005) argues that as power wanes, judges begin to defect from the current leadership in order to secure a position in the incoming regime. As such, anti-government decisions will cluster at the end of weak dictatorships or democratic governments (Helmke, 2012; Von Doepp, 2005).

Existing theories are thus primarily concerned with explaining how judicial behavior is a product of its political environment, where strategic calculations are considered more fundamental determinants of behavior than other professional or policy goals to which judges may aspire (Helmke and Sanders, 2006; Helmke, 2012). In the African case, both dynamics seem to be at play: a period of judicial learning up front, and strategic defection at the end. While these theories help justify the logic of judicial noncompliance, they do not adequately explain why

¹ Data is drawn from the political prosecutions data introduced in Chapter Two. Observations include individuals who were formally charged and tried for treason between independence from colonial rule and democratization in the early 1990s.

noncompliance varied so widely across regimes: dictators in Ghana, Zambia, and Uganda had dramatic and sometimes violent confrontations with members of the court, but dictators in Tanzania and Kenya enjoyed largely positive relationships with the judiciary since independence onwards. What accounts for this variation?

Methods of Controlling Courts: *Ex Ante* and *Ex Post*

Methods of judicial manipulation are typically categorized along two dimensions: *ex ante* and *ex post*. *Ex ante* tactics center around judicial appointments and jurisdiction, i.e. who is allowed to serve and what they are allowed to decide,² whereas *ex post* tactics concern post-appointment punishments or rewards, i.e. what are the costs and benefits to judges of ruling either for or against the regime.³ The former influences judicial preferences, and the latter determines the degree to which justices must be strategic in order to avoid political sanctions and ensure their livelihood (Brinks, 2009, p. 15). These methods are summarized below in Table 3.1.

Table 3.1: Ex Ante and Ex Post Methods

<i>Ex ante</i> methods	<i>Ex post</i> methods
<ul style="list-style-type: none"> • Before appointment • Who is allowed to serve • What are judges allowed to decide 	<ul style="list-style-type: none"> • After appointment • Judges rewarded or punished • Rulings overturned or retried

While these methods are routine features of democracy, they are also frequently invoked under autocracy, where judges tend to be even more weakened relative to the executive (Moustafa, 2007 and 2015). Under autocratic rule, *ex ante* tactics can range from the appointment of political cronies to the courts (Garoupa et al., 2012) to the creation of auxiliary tribunals alongside the regular judiciary (Moustafa and Ginsburg, 2007). *Ex post* tactics can include impeachment, removal, criminal indictment, physical attack, to even murder (Helmke, 2002; Lubman, 1999; Peerenboom, 2002; He, 2012).⁴

² One of the most effective weapons against judicial authority is legislation itself, where the court’s statutory interpretation can be overridden by statute amendments (Wahlbeck, 1997). Limiting jurisdiction is another common way of containing courts. In Spain under the Franco regime, because judges were known to have diverging preferences from the political leadership, the courts lacked jurisdiction over the important political questions of the day (Toharía, 1975).

³ Costs and benefits are often related to the career incentives. For instance, in the hegemonic party system of Japan, judges who dared to rule against the ruling party regime were systematically punished through transfers to less prestigious posts (Ramseyer and Rosenbluth, 1993; Ramseyer and Rasmusen, 1997). Also, in the United States, data shows that judges systematically cast votes in the ideological direction of the president when there are opportunities for advancement in the judicial hierarchy (Black and Owens, 2015). These costs and benefits can also be indoctrinated into the judiciary, such that judges police their own behavior in order to guarantee their continued livelihood. In Chile, the process of education, selection, and promotion within the courts guaranteed that justices serving on the Supreme Court held conservative views in line with the presiding dictator and would discipline lower-court judges who did not (Hilbink, 2007).

⁴ Pressure can also be exerted indirectly, such as the “telephone justice” of the Soviet Union, where power holders literally phoned judges or chairs of the court and dictated how to handle certain cases of political import, where the consequences of disobedience were also made explicit (Ledeneva, 2008).

Yet the literature seems largely agnostic about which strategy is preferable to the other. In particular, it remains unclear which method is more effective in controlling the courts, especially during the early years of tenure when autocratic power remains consolidated. For instance, Levitsky and Way (2002) suggest that *ex post* attacks against the judiciary can harm a dictator's international legitimacy, but not all dictators care about legitimacy. It also remains unclear whether such attacks on the courts incur more backlash than appointing under qualified political cronies or undercutting jurisdiction in the first place.

Argument

I treat *ex ante* and *ex post* methods as substitutes, not complements. While both methods can be used in tandem – dictators can undercut judicial power both before and after rulings are delivered – in what follows, I contend that packing the courts with reliable agents should lessen the need for subsequent sanctions.

I argue that dictators can minimize the risk of judicial defection (and thus the need for *ex post* methods of control) by appointing judges who are politically unaligned. This idea runs contrary to conventional models of court packing, where politicians are expected to appoint judges who share their partisan policy preferences (Abraham, 1992; Goldman, 1997; Wahlbeck, 1997; Garoupa et al., 2013).⁵ However, these models assume that allegiances are relatively stable over time, which may be unrealistic when regimes are beset by factional infighting and the tenure of incumbents can remain uncertain. In post-independence Africa, frequent insider defection made partisan affiliation an especially unreliable marker of long-term loyalty. Indeed, if African dictators could not rely upon their own lieutenants for support, how could they ensure that partisan judges would not also switch sides?

Nonpartisan judges are an ideal appointment under these scenarios. Note that nonpartisan should not be confused with nonpolitical: judges are still strategic actors operating under considerable political constraints. Rather, nonpartisan simply means lacking a particular stake in intra-regime rivalries. The unaligned judge is principally motivated by the threat of regime upheaval and what this means for his future livelihood. Appointing such agents to the courts can thus help cultivate a judiciary that is fundamentally invested in preserving the status quo.

Zeckhause and Samuelson (1988) refer to this decision-cost calculus as “status quo bias,” defined as a preference for the current state of affairs that biases decision makers against actions that may change current endowments of wealth or power. These preferences are considered rational under the presence of transition costs and uncertainty, which are often driven by

⁵ Goldman's (1997) model of partisan judicial selection is actually based on the American democratic experience: the President selects judges to reward party loyalty and support, to bridge or reflect intrastate cleavages within the party, and sometimes reward personal friendships. In postwar America, judicial appointments reflected a partisan, not policy, agenda, and Presidents have used appointments as a means of rewarding the party faithful and shoring up party cleavages. In the Ronald Reagan administration, for instance, successful judicial candidates had to provide evidence of conservative policy views congruent with those of the administration. However, this idea about partisan courts is longstanding in the literature. As Dahl (1957, p. 291) wrote, it is “unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would hold to norms of Right or Justice substantially at odds with the rest of the political elite.”

cognitive misperceptions of sunk costs, regret avoidance, or the drive for consistency (Zeckhauser and Samuelson, 1988).⁶

Nonpartisan judges are likely to exhibit status quo bias, especially when deciding cases that bear upon the fate of the overall regime. As Scharff and Parisi (2006) argue, when the difference between upholding and overturning a given legal right entails significant transition costs, judges tend to err on the side of restraint in order to preserve the current state of affairs. The perceived tradeoffs between the status quo and the unknown should be greater for judges who are disembedded from the partisan conflicts being adjudicated. Such judges are primarily motivated by their own desire to survive, which overlaps with the incumbent dictator's desire to preserve the standing regime. Under these circumstances, nonpartisan judges are thus more reliable agents of the status quo, and thus more consistent enablers of judicial repression during times of regime crisis. This lowers the need for dictators to invoke *ex post* sanctions against the judiciary for bad rulings.

***Ex ante* tactics: Colonial legacies**

To understand how African leaders managed their *ex ante* and *ex post* relationship with the judiciary, we need to first examine the institutional legacies of colonial rule on postcolonial courts. One of the distinguishing features of judicial systems in postcolonial Anglophone Africa was their continuation of common law traditions. Not only did African courts continue to operate according on English common law procedures, but most of the justices appointed to the African bench were actually British expatriates, or else members of the British Commonwealth. The enduring legacies of these colonial policies are documented below in Table 3.2, which shows chief justice appointments during the first decade of independence (expatriate justices are marked with an asterisk).

These appointments were in many respects a continuation of long-established *ex ante* practices. British colonists had specifically chosen to appoint foreign, white judges to regulate indigenous affairs, since these officials were more likely to be disembedded from the local population. Such appointments helped cultivate courts that were more loyal to the central government than any particular localities. The fact that judges also served on regular rotations, often in various administrative roles around the British Empire, further disconnected these agents from the communities they ostensibly served.

Importing expatriate judges also helped restrict opportunities for indigenous Africans to serve in these positions. This was a deliberate tactic designed to prevent colonial subjects from becoming experts of the law, out of fear that they would turn it against their colonial oppressors. As Manteaw (2008) notes, “colonial policy deemed it more important to train engineers, doctors, and agriculturalists than lawyers because Africans who wished to read law were regarded as preparing for a career in politics” (914). This turned out to be the case – among the cohort of elite Africans who were able to travel to London for legal training, several became political

⁶ Regardless of what drives these preferences, however, a status quo bias indicates a positive value placed on the current state of affairs (Scharff and Parisi, 2006).

activists in the anti-colonial movement.⁷ Back in the colonies, the British attempted to counteract these trends by using the courts to repress African activists in the lead up to decolonization. In fact, the colonial courts prosecuted several future presidents in the decade before self-rule.

Table 3.2: Chief Justices in British Africa

	Independence	5 years after independence	10 years after independence
Ghana	Sir Kobina Arku Korsah	Sir Kobina Arku Korsah	Edward Akufo-Addo
Kenya	Sir John Ainley*	Arthur Denis Farrell*	Sir James Wicks*
Malawi	Sir Frederick Southworth*	Sir Peter Watkin-Williams*	James Skinner*
Nigeria	Adetokunbo Ademola	Adetokunbo Ademola	Adetokunbo Ademola
Sierra Leone	Sir Vahe Robert Bairamian*	Sir Banja Tejan-Sie	Christopher Okoro Cole
Zambia	Sir Diarmaid Conroy*	B.A. Doyle*	B.A. Doyle*
Tanzania	Sir Philip Telford Georges *	Sir Philip Telford Georges*	Augustine Saidi
Uganda	Egbert Udo Udoma*	Dermot Joseph Sheridan*	Samuel Wako Wambuza

It was somewhat ironic that several of the African presidents who were victimized by the colonial courts actually chose to work within these institutions after independence. In fact, not only did most regimes choose to streamline the courts under the English common law, they also continued to employ the same types of expatriate justices who had repressed them during the colonial era. Yet, from the perspective of emerging African dictators, expatriate judges offered certain advantages over their local counterparts. Whereas African legal professionals were often political actors in their own right – and likely had strong partisan ties to various factions within the independence movement – most expatriate judges had built legal careers by working around the British Empire, often on limited assignments that prevented them from building strong political ties to particular countries or governments. This was how colonial judges developed reputations for serving whomever was in charge, not a particular partisan cause. This might

⁷ The only way an African could become a lawyer was to “journey to London, join an Inn of Court, and acquire English professional qualifications” (Ndulo, 2002, p. 489). However, the British believed that training African lawyers would turn them into agitators for political independence upon their return to the colonies.

explain the appeal of expatriate appointments for the leaders of unconsolidated regimes, who were primarily focused on maintaining internal stability.

In addition to lacking a stake in local conflicts, the other main advantage of the expatriate judicial workforce was its relatively large supply. Expatriate judges could be enlisted from ex-members of Her Majesty's Overseas Legal Service, which was a cohort of colonial legal officers maintained and regulated by the British government. After decolonization, this service was not immediately dismantled, and continued to organize employment opportunities in various parts of the British Commonwealth. In fact, the British government even agreed to foot the salaries of these employees in their postings on development assistance terms. For the newly independent regimes of sub-Saharan Africa, the British service offered a much wider pool of candidates than the comparatively small local law community, and at a fraction of the price (TNA: DO 195/248). Together, these factors made expatriate judges highly desirable in post-independence Africa as a way to cultivate judiciaries that were disembedded from both intra-party factionalism and inter-party contests.

Recently declassified reports by the British Foreign and Commonwealth Office (FCO) illustrate the degree to which these legacies influenced the thinking of postcolonial African rulers. For example, in Sierra Leone, nearly five years after independence, Prime Minister Sir Albert Margai made secret requests to the British Government for assistance in finding an expatriate Chief Justice to replace the incumbent who was due to retire. This request surprised British officials, considering that the current Chief Justice, Sir Salako Benka-Coker, was a native Sierra Leonean. As one British official wrote, it would "seem strange if an independent country like Sierra Leone, which already had an African Chief Justice, should take what would seem to be the retrograde step of appointing a European" (TNA: OD 8/71). Furthermore, there was actually a qualified local candidate ready to take Benka-Coker's place: "Mr. Justice S.B. Jones has on a number of occasions acted as Chief Justice, and was a member of the United Nations Commission" (TNA: OD 8/71).

In response, Margai immediately dismissed the suggestion, stating that "Jones was young and needed more experience" (TNA: OD 8/71). However, when pushed further, Margai admitted his actual reasons were based on his distrust of Jones and his prior political record. According to the minutes of a confidential meeting between Margai and the British High Commissioner:

"Margai referred to the case last year when there was a head-on clash between the executive and the Judiciary over a deportation order served on...an active opponent of the Government. There is no doubt that the almost entirely Creole Bench (and Bar) saw this case as an opportunity of putting the 'native' government in their place...Jones was right, legally, but he exercised his powers in a way calculated to cause the maximum embarrassment to the Government" (TNA: DO 195/248).

It thus became evident that Margai's request for external assistance was due to a profound level of distrust between the ruling party government and the local legal community, composed

primarily of Creoles.⁸ Ironically, the ethnic makeup of the Sierra Leonean courts was itself a British creation. Creoles had historically been an educationally and economically a privileged elite and among the strongest supporters of colonial rule. This gave them greater access to positions within the colonial government, especially the courts, and created resentment among the more populist factions of the independence movement, which was composed of other minority ethnic groups. The Creoles were thus often in direct opposition to the ruling party (Cartwright and Cox, 1972). Taken together, these factors help explain why the government in Sierra Leone wanted an expatriate justice, and why Margai specifically requested a short-term overseas appointment, for one or two service tours (TNA: OD 8/71).

The experience of Sierra Leone suggests that the ethnicity of judges could play a significant role in the reliability of courts. However, foreign-born judges were not always themselves more reliable – partisanship also mattered. This was exemplified by Zambia, where some expatriate justices were deeply enmeshed in local politics. Consider James Skinner, a white, Irish-born Zambian citizen who was appointed Chief Justice of Zambia after building a respected political career in the Zambian independence movement. Skinner was a colonial minister and close ally of future President Kenneth Kaunda. As a vocal defender of African rights, Skinner actually alienated other white residents of the colony and was voted out of office for his pro-African views before independence. However, after Kaunda assumed the presidency, Skinner was rewarded for his political loyalty and became an active member of the ruling party. He was soon after elected to parliament, after which he served as both Attorney General and then Justice Minister. Finally, he was appointed as Chief Justice in March of 1969.

However, despite his long record of service to the ruling party regime and his close friendship with Kaunda, Skinner only lasted as Chief Justice for five months. By July of 1969, Kaunda and Skinner had a falling out over a case tried before another expatriate judge, involving an alleged border incursion by two Portuguese soldiers fighting in the Angolan civil war.⁹ After both soldiers were arrested by the Zambian authorities, they were charged with illegal entry and found guilty by the lower court in Livingstone.¹⁰ Each was fined 20,000 rupees and sentenced to two years imprisonment by the presiding magistrate, a Ghanaian Nkrumahist political refugee (TNA: FCO 45/211). However, upon appeal to the High Court in July of 1969, the presiding expatriate judge ordered the release of both soldiers, on the grounds that their border incursion was a “trivial” and “technical breach” (*The Guardian*, 1969a).

⁸ This request was also highly confidential. In discussing a possible recommendation, the Commonwealth Secretary stressed that Margai has “asked us to keep this question secret, since he said that none of his colleagues in the Sierra Leone Cabinet know of his enquiries, and grave damage would result from a leak” (TNA: OD 8/71).

⁹ The civil war for Angolan independence had begun to spill over into Zambia by the late 1960s, producing periodic, violent outbursts along the Angola-Zambia border. Portuguese violations of the Zambian frontier had become so frequent and controversial that they were put on the agenda of the United Nations Security Council, where the Zambian mission highlighted the growing number of aerial bombing incidents by Portuguese military aircraft within Zambian territory. These threats were especially alarming because Kaunda’s government had decided to openly support the Freedom movements in Rhodesia, South Africa, and Mozambique, putting Zambia in opposition to Portuguese and other imperial forces.

¹⁰ The issue of whether the soldiers had explicitly trespassed or crossed the border by accident was highly contested. It was noted that while both were in full military dress, neither soldier was armed (TNA: FCO 45/211).

President Kaunda condemned the High Court ruling. At a press conference held the day after the verdict, Kaunda directly responded to the language of the presiding judge: “how can this be ‘trivial’ when my people are being bombed...the Portuguese have destroyed human beings, property and villages in an attempt to change the thinking of Zambians...we cannot hold the bombing of our people as trivial” (*The Guardian*, 1969b). Kaunda accused the expatriate of attempting to discredit his regime through legal technicalities. He then questioned whether Zambia’s all-white judiciary was working in the interests of a foreign power (TNA: FCO 45/211).

Skinner defended the courts against Kaunda’s attack. In a personal letter sent to Kaunda, Skinner rejected the president’s complaints, point by point. He even held his own press conference after Kaunda, wherein he denied that the High Court had made a politically motivated judgment. Skinner refused to accept, as had been claimed by the President, that the “actions of a man who has divested himself of arms and steps within the borders of Zambia on the invitation of an official constituted a threat to security,” and he further believed that time already served by the soldiers while awaiting their appeal had been “adequate punishment” (TNA: FCO 45/211). Any excess sentence imposed simply on the basis that the offender was foreign “would be following the example of oppression set by [colonial] courts” (Keatley, 1969).

Two days after Skinner’s conference, President Kaunda announced plans to “Zambianize” the judiciary at a faster rate than originally scheduled. This would involve changing constitutional requirements for appointments to the High Court Bench to make it easier for Zambians to reach the legal qualifications for judicial service. These proposals followed a series of organized, often violent public demonstrations against the courts in Livingstone and several parts of the copper belt region. Demonstrators carried signs that read, “The only good white man is a dead one!” and “A white man will never be a Zambian!”¹¹ Members of the Zambian Youth Service even stormed the High Court and tore up legal documents while the expatriate justices barricaded themselves elsewhere in the building (Essack, 1969).

In the wake of this attack, which commentators assumed to be at least partly orchestrated by the ruling party, Skinner and another white member of the Supreme Court arrived at Kaunda’s State House to offer their resignation. Kaunda’s reaction was mixed. While he both privately and publicly apologized to the justices for his role in promoting violence against them, he also expressed gratitude to the Zambian protestors for their demonstrated loyalty (TNA: FCO 45/211). However, Kaunda’s subsequent actions proved more decisive. Despite his stated intentions to Zambianize the judiciary, Skinner was actually replaced by another white justice, a former member of the British Overseas Legal Service.

While it seems reasonable to presume that a foreign judge is less likely to be embedded in local political conflicts than an indigenous one, as the Zambian case illustrates, it is not enough to appoint a foreigner to the courts. The political background of the appointed justice is just as important, if not more so, than their ethnicity. Furthermore, the continued reliance on white justices in postcolonial Africa was becoming increasingly awkward for presidents who had come

¹¹ Other placards read “Skinner is a rebel” and “Skinner causes poverty and distress.” Protestor chants included “One Zambia, one nation, minus one” and references to “white man’s rule” (TNA: FCO 45/211).

to power on a platform of “Africanizing” the state. While expatriate justices had been an ideal method of *ex ante* control in the colonial period, the image of a white or foreign judge adjudicating the internal political affairs of African governments was problematic for many postcolonial regimes.

The preceding discussion suggests that postcolonial legacies persisted in many African regimes, most notably through the appointment of foreign expatriate justices. While such appointments were effective *ex ante* methods of judicial control during the colonial period, the Zambian example illustrates how expatriate justices were not always the most reliable.

***Ex ante* methods: Postcolonial Strategies**

Rather than rely on expatriate justices, African rulers could alternatively appoint political . This section turns to Tanzania and Ghana in the immediate post-independence period. In the early years of self-rule, both countries quickly transformed from multiparty rule to one-party dictatorships. Both countries also encountered significant challenges to consolidation that were largely rooted in the tensions between national authority and regional autonomy. With respect to the courts, however, experiences diverged: whereas President Nyerere of Tanzania relied on judges without political affiliations to the ruling party, President Nkrumah of Ghana packed the courts with his political cronies. These *ex ante* decisions had different ramifications over time. In the nonpartisan courts of Tanzania, Nyerere’s political rivals were convicted and sentenced to prison, but in the partisan courts of Ghana, Nkrumah’s political rivals received acquittals. Furthermore, failure to establish *ex ante* control in Ghana required *ex post* sanctions against disobedient judges. Yet punishing judges after the fact was a less stable strategy of autocratic consolidation in the long-run, since these actions were ultimately held against Nkrumah when he was successfully overthrown by military coup only a few years later. In what follows, I examine these trajectories in more detail.

In the immediate post-independence period, Tanzania and Ghana encountered common challenges to consolidating power. This was in large part due to the legacy of British rule and the politics of decolonization. As the British began the formal handover of power to their colonial subjects, indigenous leaders had to confront significant hurdles in establishing their control. One of the largest challenges was the creation of a centralized government over a supposedly united territory. The nation-state construct often had to be forced upon unwilling populations (Jackson and Rosberg, 1982). This was especially the case in Tanganyika and Zanzibar, where conflicts over national control produced two coup plots only months after independence. Tanzania was actually born of these crises, the union of two sovereign nations facing incredible insecurities in the early days of self-rule.¹² Although Ghana did not face the same immediate threat of military coup, the national government nonetheless confronted considerable opposition from a variety of

¹² Tanzania was the formal union of mainland Tanganyika and the neighboring island of Zanzibar in the immediate aftermath of these coup attempts. The first crisis occurred in Zanzibar in January 1964, after the ruling Arab minority was militarily overthrown and replaced by the opposition ethnic majority. Less than a week after the successful Zanzibar coup, another coup plot was discovered in Tanganyika that again implicated both the military and opposition, some of whom had earlier defected from the ruling party. The instability posed by these crises led to a solution that merged the two territories under the mainland government in Tanzania. Zanzibar was granted semi-autonomous authority, where the President on the island became Vice-President on the mainland.

highly localized groups, ranging from tribal kingdoms who feared the loss of regional autonomy, to opposition parties and labor groups who resisted political and economic dictatorship. One of the ways in which President Nyerere of Tanzania and President Nkrumah of Ghana reacted to these challenges was through repressive legislation. Both Nyerere and Nkrumah endowed themselves with considerable arbitrary powers to detain, deport, and restrict political dissent.

Against this backdrop of consolidation and contestation, Nyerere and Nkrumah adopted different approaches to the courts. Nyerere did not appoint a Tanganyikan nor a Zanzibari to head the Supreme Court. Instead, he chose Telford Georges, a Dominican justice who was both a political and ethnic outsider that lacked ties to either the mainland or the island. Georges' outsider status served him well as a career judge in various colonial outposts across the British Empire, including parts of the Caribbean, Africa, and Latin America. He had thus built a successful career by serving whoever was in power, regardless of where in the world he was assigned.

Nkrumah, by contrast, chose to pack the judiciary with partisan allies. This included Chief Justice Sir Arku Korsah, a native Ghanaian whose involvement in local politics traced back to the colonial era. In 1942, Korsah was one of only two Ghanaians to be appointed to the Legislative Council by the Colonial Governor. The other appointment was Nana Sir Ofori Atta, King of the Akyem Abuakwa, a brother, father, and uncle to several future opposition leaders. In 1959, Korsah was also a founding member of the Ghana Academy of Arts and Sciences, an institute of higher learning over which Nkrumah also served as president. In other words, Korsah had long been affiliated with important political figures within the Ghanaian government, from both the opposition and the ruling party.

Both appointments were soon put to the test. As Nyerere and Nkrumah began to centralize control, they encountered resistance from within their own parties. In each case, the regime chose to manage intra-party conflicts in the courts, where challengers were accused of treason crimes: in Tanzania, rivals were accused of conspiring in an international plot to overthrow and assassinate the President;¹³ in Ghana, rivals were accused of an orchestrated terrorist attack, involving a bomb which struck the President's motorcade. What were the outcomes of the judicial strategy in either case?

In Tanzania, Chief Justice Georges presided over a lengthy trial that rested heavily on the testimony of a single witness for the prosecution, a South African "Freedom Fighter" named Potalko Leballo. Georges questioned the reliability of this witness, whom he described as "not the dispassionate observer...on whose evidence one could not act without reserve and corroboration." Yet, despite these reservations, Georges used Leballo's testimony to convict all of the accused, whom he sentenced to lengthy prison terms.¹⁴

¹³ This was Tanzania's first treason case, which formally began in 1971. According to the state prosecution, the plot had begun as early as 1968, soon after the departure from Tanzania of Oscar Kambona, an ex-cabinet minister and General Secretary of the ruling party, as well as a former close colleague of Nyerere.

¹⁴ The first three and the fifth accused were convicted on three counts of treason and sentenced to life imprisonment. The fourth and sixth were found guilty of misprision and each sentenced to 10 years' imprisonment. The first treason count alleged that the accused formed an intention to kill the President; the second that they formed an intention to depose the President by unlawful means; and third that they formed an intention to overthrow the Government by unlawful means (Gray Likungu Mattaka & Others v. The Republic, 1971).

In Ghana, trial proceedings were more elaborate. At first, the actors involved in the motorcade bombing (all of whom were civilians) were tried before Chief Justice Korsah and subsequently convicted for treason crimes.¹⁵ However, the testimony of the accused revealed that the bomb plot may have been conspired by three high-ranking ministers of the ruling party and two opposition leaders.¹⁶ Based on this testimony, Nkrumah ordered a new trial before a special criminal court, also overseen by Korsah and two other Supreme Court justices. In the second trial, which was decided after only five hours of deliberation, Korsah delivered a mixed verdict, acquitting three members of the ruling party and convicting two members of the opposition. His ruling stated that the circumstances surrounding the plot might “generate suspicions but none led irresistibly to the inference that the [party officials] had conspired to overthrow the government by unlawful means” (Sanger, 1963).

Until this point, both Nyerere and Nkrumah expected the courts to rule in their favor. After all, judicial repression was not meant to ensure due process for the accused, but rather to institutionalize the process of punishment among the ruling elite. As it turned out, Chief Justice Georges, a careerist legal professional from the West Indies, delivered more repressive justice than Korsah, a locally embedded member of Ghanaian politics.

The difference between these two justices was apparent in the wider reaction to their verdicts. While Georges’ conviction was welcomed by the President in Tanzania, the East African Court of Appeals roundly criticized Georges’ “significantly mistaken” and “injudicious” judgment, especially his reliance on the testimony of the unreliable witness Leballo (Gray Likungu Mattaka & Others v. The Republic, 1971). The Appeals Court also remarked that the Chief Justice had made several errors in law throughout the trial, including his refusal to allow the cross-examination of the appellants who gave evidence of their co-accused, as well as his logic in sentencing some of the parties of the case (Gray Likungu Mattaka & Others v. The Republic, 1971). The Appeals Court ultimately overturned the conviction against three of the convicted ministers. However, the Appeals Court ruling came months after the original verdict. Nyerere had by this time effectively blocked the reentry of these ex-ministers into the ruling party, and thereby reestablished control within the regime.

Korsah’s acquittals led to a dramatically different response from the political leadership. Nkrumah interpreted the acquittals as a personal betrayal and enacted a series of *ex post* measures against the courts, beginning with the removal of Korsah from his position as Chief Justice the day after the ruling. Nkrumah also widened his arbitrary control over the judiciary, rushing a bill through Parliament that enabled the him to quash all verdicts of the criminal court.¹⁷ This enabled Nkrumah to nullify Korsah’s acquittals and retry the case under a different

¹⁵ Five were found guilty of treason and sentenced to death; two were charged with misprision and sentenced imprisonment with hard labor (*The Irish Times*, 1963).

¹⁶ Tawia Adamafio, the Minister of Information, Ako Adjei, the Foreign Minister, H. Coffie-Crabbe, the Executives Secretary of the Convention People’s party, Joseph Yaw Mannu, a former civil servant, and Robert Benjamin Otchere, an Opposition United member of Parliament.

¹⁷ Nearly 10 months later in October 1964, Korsah’s case was finally retried. The accused faced the same charges and the same court, but a new Chief Justice, Julius Sarkodee-Adoo. This time, all 5 ministers were found guilty and sentenced to death. President Nkrumah later commuted the sentences to 20 years in prison.

justice, which ultimately delivered guilty verdicts against the accused ministers. A month later, Nkrumah also amended the constitution to give the president powers to remove and appoint judges of the superior courts, which he used to dismiss the entire Supreme Court the following year.¹⁸ As the state-owned press reported at the time, justices were not to be dismissed because of their rulings *per se*, but rather if they should fail to consult with the President before issuing their verdicts.¹⁹

As Nkrumah continued to wage war against disobedient justices, members of the legal community began to organize against him. Members of the Ghanaian judiciary – including those Nkrumah himself had appointed – formally petitioned for Korsah’s reinstatement. Some judges even refused to acknowledge the appointment of a new Chief Justice in Korsah’s place. By personally attacking the judiciary, Nkrumah also lost support from his African neighbors. The Prime Minister of The Gambia regarded Korsah’s dismissal as “deplorable” and “very bad precedent.” Members of the Tanzanian judiciary also expressed their disgust at Nkrumah’s brazen manipulation of the courts. And as the Nigerian press commented at the time, “if other African judges are contaminated by the fear of being ‘Arkued’ [Arku Korsah], their independence can no longer be guaranteed. For this reason, all democrats in Nigeria must proclaim their revulsion that the Chief Justice of Ghana has been asked for taking a decision that was distasteful to a political party” (TNA: DO 195/12). With respect to these debates, the British privately took note but chose not to become directly involved, remarking “it would clearly not profit us to appear in any way to condone [Korsah’s dismissal]. Revival of press war now seems unavoidable” (TNA: DO 195/12). Thus it was generally concluded that Nkrumah’s “attack on judiciary” had “over-reached” (TNA: DO 195/12).

In the aftermath of these decisions, both Tanzania and Ghana saw important changes in the courts. Georges voluntarily retired and was replaced by another career justice, this time a Tanzanian. However, Korsah was forcibly and violently removed and replaced by another Ghanaian whom many considered to be “mentally unstable” (TNA: DO 195/12). In either case, the relationship between the dictator and the courts – stable in Tanzania, erratic in Ghana – reflected broader patterns of regime consolidation. While Nyerere had effectively demonstrated his authority by the end of the treason trial, Nkrumah continued to encounter significant opposition to his rule in the aftermath of the ruling and subsequent retrial. Resistance to Nkrumah continued to fester, and by 1966 was militarily overthrown by the National Liberation Council (NLC). In fact, one of the first legal actions undertaken by the NLC was to nullify the proceedings of the Korsah case, including the retrial that had been tried under Korsah’s replacement. The NLC had actually included judicial reform as one of the primary justifications for the coup, and thus declared the entire judiciary vacant in order to purge the courts of Nkrumah’s influence (TNA: FO 371/187873).

¹⁸ Dismissals included Justice Edward Akuffo Addo (presided over the 1963 treason trial), Justice Kofi Adumua Bossman, Justice Robert Samuel Bay. The same month, Korsah was officially replaced as Chief Justice by Julius Sarkodee-Addo, previously a member of the Supreme Court.

¹⁹ According to the *Ghanaian Times* (1963), a ruling party organ, Korsah had failed “to inform the Chief Executive of the land who assigned him the duty of trying the conspirators of the decision and judgment in the treason trial.”

Statistical analysis

I present here a test of my claim linking the political background of judges to judicial repression outcomes using the political prisoners data introduced in Chapter Two. I specifically evaluate acquittal or conviction rates for all regime challengers who were formally prosecuted in postcolonial Africa, a subset that includes 1,331 individual observations.

To evaluate whether courts were compliant to autocratic repression objectives, it would be ideal to look at the partisan identity of the presiding judge in each case. However, this information remains elusive in postcolonial Africa, where treason trial proceedings were not a part of the official record.²⁰ The lack of systematic information on how these trials were conducted means that any details regarding who actually served on the bench has to be gleaned from second- and third-party sources, many of which cannot be cross-referenced.

Rather than rely on unverifiable data pertaining to individual judicial appointments, I turn instead to the office of the chief justice, which is an institution whose profile has been well documented in postcolonial Africa. I specifically use the identity of the chief justice at the time of the trial as a proxy for the partisan composition of the judiciary. Unlike the judges and magistrates appointed to serve in lower courts, the chief justice was the most visible judicial appointment in the nation. In the postcolonial African context, the chief justice served as the symbol of the judiciary, and was often the main judicial actor in direct communication with the president. Indeed, in many cases, chief justices were often directly called upon by presidents to serve in treason trials. Even when chief justices were not involved in these proceedings, they were still considered the leader of the courts and thus responsible for whatever decisions occurred within them.

The independent variable is a dichotomous measure that captures whether chief justices were insulated from partisan conflicts, coded as one if the justice had held any political office before his appointment to the courts, zero otherwise. By this metric, I consider the chief justice partisan if he had previously served in parliament or the justice department. I adopt this broad definition of partisanship – based on political experience rather than party affiliation – because of the highly fluid nature of partisan allegiances during the post-independence period. As autocrats centralized control in the postcolonial period, allies could quickly become rivals, meaning partisan identities were frequently shifting and difficult to verify. However, it is reasonable to presume that justices who had backgrounds in local politics were less insulated from partisan conflicts than justices that lacked similar profiles.

The dependent variable is an indicator for whether courts were complicit in judicial repression, coded as one if the court found the accused guilty, zero if the court acquitted. This specification allows me to run a logit model that estimates the effect of judicial partisanship on the log-likelihood that a particular case ended in a guilty verdict. I also include controls that might affect repression outcomes including country and year effects. The logit estimates are presented in the table below, where *cj_foreign* is an indicator for whether the chief justice was an expatriate, and

²⁰ While most former British colonies published an annual Law Reports series, these records were not comprehensive, notably excluding treason cases from the official record.

cj_political is an indicator for whether the chief justice previously held political office (the intercept is the estimate for an indigenous chief justice who never held political office). In interpreting these estimates, recall that the chief justice, as leader of the judiciary, is considered a proxy for the presiding judge in each case.

As reported in Table 3.3, the results show that the impact of political chief justices on judicial repression is negative and statistically significant, which suggests that courts were less likely to convict regime rivals of treason when the chief justice had a political background. Courts were also less likely to convict in treason cases when the chief justice was an expatriate. Both of these results hold when controlling for country and year effects. Figure 3.2 shows the marginal effects calculated from the model specified in column (1). The marginal effect of conviction when the courts are led by a foreign chief justice is -0.02 , although the confidence intervals reveals that this marginal effect is indistinguishable from zero. By contrast, the marginal effect of a political chief justice is -0.17 , and this effect is statistically significant. This finding lends evidence to the central claim of the theory that political courts are less reliable agents of judicial repression, on average.

Table 3.3: Regression of Conviction Rates on Chief Justice Type

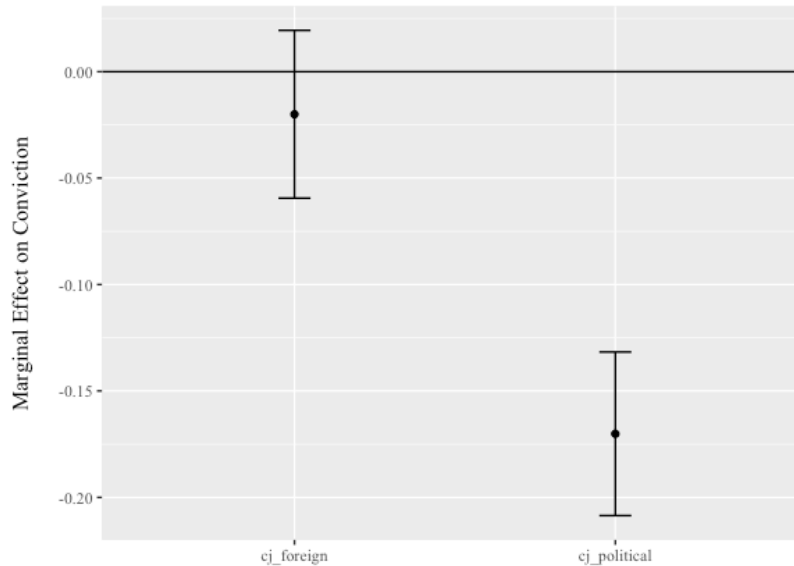
	<i>Dependent variable:</i>	
	guilty	
	(1)	(2)
<i>cj_political</i>	-1.322*** (0.191)	-2.813*** (0.683)
<i>cj_foreign</i>	-0.245 (0.192)	-3.895*** (1.163)
constant	2.388*** (0.193)	4.685*** (0.812)
Country FE	No	Yes
Year FE	No	Yes
Observations	1,331	1,331
Log Likelihood	-535.899	-247.744

Note: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$

What are the general conclusions from this statistical analysis? If chief justices are a reasonable proxy for the composition of postcolonial courts, the data seems to confirm the dynamics described above in relation to the Zambian, Tanzanian, and Ghanaian cases. In particular, colonial methods of *ex ante* control (appointing expatriate justices) created less compliant courts in the postcolonial period, possibly because expatriate agents were less reliable agents of African autocrats. However, when postcolonial regimes chose to appoint judges who lacked a

background in local politics to the bench, courts were more likely to comply to the repression objectives of autocratic rulers.

Figure 3.2: Average Marginal Effect of Chief Justice Type on Conviction



Conclusion

This chapter has explored the conditions under which judicial repression is more likely to achieve its desired objectives. It has focused on the background of judges themselves, specifically their prior political relationship to the ruling regime and how this influences their judicial decision-making over time. Scholars have long recognized the fact that judicial identity plays an important role in judicial behavior (Nagel 1961; Ulmer 1975; Ashenfelter et. al 1995). However, the prevailing view has been that partisan cronies are more reliable agents of the leadership, which is a reasonable assumption when configurations of power are stable. Yet when a regime is unconsolidated, the tenure of sitting dictators remains uncertain. This produces a heightened risk of defection from the center, which not only threatens the integrity of the political leadership, but also the allegiance of the courts.

I have shown in the post-independence African case that under conditions of uncertainty, justices who lack a political background are actually more reliable agents than their political counterparts. Statistical analysis and case studies demonstrate how judges who lack a stake in political conflicts are less likely to defect from the incumbent during times of crisis. By contrast, judges who have strong political affiliations are more likely to rebel against the ruler, prompting subsequent sanctions against the courts.

These findings also illustrate the complicated legacies of colonial rule in postcolonial courts. While the largely expatriate judicial corps helped cultivate a compliant judiciary during the colonial period, the persistence of white judges on African benches created potentially awkward tensions after decolonization, especially in regimes that had risen to power on nationalist platforms of “Africanization” and self-rule. However, this also raises the question of why some

African rulers chose to use colonial courts for postcolonial repression. I turn to this issue in the next chapter, where I examine why some regimes worked within their colonial inheritances, whereas others rejected them in favor of alternative forums of justice.

CHAPTER FOUR

Special Courts

The previous chapter describes the conditions under which courts are more likely to be compliant to autocratic rulers. Two factors affecting these outcomes are the function of judicial institutions – what types of services courts are designed to perform – and the character of the judicial corps – who is allowed or even eligible to serve on the bench. In postcolonial British Africa, courts were often called upon to repress political rivals, and judges were typically required to have competency in the English common law. I show that under these constraints, courts were more likely to be compliant to the objectives of their autocratic masters when judges were less embedded in local politics. Such appointees proved especially valuable during the early years of autocratic rule, when rulers faced heightened threats of defection from the ruling party and feared similar rebellion among members of the indigenous legal elite.

Whereas the previous chapter examines how autocrats designed courts to fulfill repression objectives, this chapter addresses the conditions under which autocrats establish alternative forums of trial and punishment. While special courts were ultimately used to eliminate political rivals, they operated according to a different logic of trial and punishment than the ordinary common law courts. For example, unlike common law institutions, which relied on formal legal procedures to justify the criminalization of democratic dissent, special courts invoked populist rhetoric, nativist or traditionalist norms, in order to deliver political justice.

Not all African autocrats chose to create special courts, but those who did were eschewing the common law system for an entirely new judicial apparatus. Why did these rulers choose to erect new forums when institutions of judicial repression already existed? What accounts for judicial forum-shopping under autocratic rule?

In order to understand judicial forum-shopping under autocratic rule, we need to examine the source of the threat to autocratic survival. In particular, threats to power that emerge from within the leadership are fundamentally different from those that emerge from the masses. Threats from above and below create different crises of legitimacy for autocratic rulers, either within the regime or among the general public.

In light of these dynamics, I argue that while a legitimacy crisis within the ruling elite is best addressed using regular courts, a legitimacy crisis among the masses is best addressed using special courts. This is because different forums are tailored to different audiences; regular courts have elite audiences, but special courts – especially those that invoke popular justice – have mass audiences. Note that regardless of the forum, the central objective of a judicial strategy of repression is not to establish truth or ensure due process, but to develop a simple, digestible narrative that supports a broader regime objective. Different audiences require different narratives. This means that the fundamental criterion for what type of forum an autocrat turns to is whether the threat to power comes from masses or the selectorate.

I provide evidence for these claims by drawing on examples from Kenya, Malawi, and Ghana, three former British colonies that inherited a similar set of judicial institutions, but confronted

different types of threat to autocratic survival following independence, resulting in different forums of judicial repression. In Kenya, the ruling party was an organization largely composed of elites, where local ethnic bosses exercised control over the masses in their areas. The main threat to autocratic survival thus emerged within the ruling party, where insider conflicts were taken to formal courts where they could be resolved before an audience of party elites. In Malawi, by contrast, the ruling party was purged of its elite members soon after independence, and the president turned instead to traditional authorities and everyday civilians for political support. However, by relying on these groups, the president made himself more vulnerable to mass threats, such that he needed to establish a new judicial forum to resolve political conflicts before general audiences. Meanwhile in Ghana, political instability following decolonization resulted in the rapid turnover from civilian to military dictatorship in the first few decades of independence. Throughout this period, a combination of elite and mass threats resulted in a unique configuration of judicial strategies that were designed to speak to both elite and mass audiences. Special courts in Ghana drew on revolutionary themes of popular justice to purge society of public corruption by placing authority over the law in the hands of the people.

In each of these country cases, autocratic survival was a continuous process of dictators attempting to reestablish their hegemony, often in regular or special courts. The main difference across forums were the trappings of justice each purportedly represented. For example, Kenyan judges wore the robes of their colonial predecessors, even donning the classic horse hair wigs, and used the language of common law to criminalize the behavior of the president's challengers. Meanwhile, Malawian chiefs wore their traditional dress and made decisions using the logic of customary law. In Ghana, various iterations of special courts invoked different symbols and rhetoric: military tribunals were composed of military officers in their official uniforms, whereas Public Tribunals were considerably more casual, since most panel members were laymen who wore whatever clothes they owned. The rhetoric of justice in Public Tribunals was also more informal, invoking vernacular speech rather than legalese (Attafuah, 1993).

The objective of this chapter is two-fold. First, by examining how trials unfold in special courts, I illustrate the generalizability of a judicial strategy across different forums. Second, my findings also lend insight into the function of all types of courts in autocratic regimes. To date, scholarship on these institutions has largely focused on the differences between judicial systems rather than their similarities. The general idea is that when autocrats fragment the judiciary between ordinary and extraordinary domains, it can both support judicial independence (Toharia, 1975) but also subvert it (Cheesman, 2011). However, I examine how auxiliary institutions can be used to target specific types of political threats and better maintain autocratic survival. I find that even irregular forums of justice can be incredibly powerful tools of political legitimation.

Theory

In this section, I argue that judicial forum-shopping under autocratic rule can be explained by looking at different types of threat to autocratic survival. In particular, threats to power that emerge from within the political elite are fundamentally different from those that arise among the masses, which can have different implications for how autocrats choose to repress. I briefly summarize these threats below and the different judicial strategies that can arise in response.

Elite threats

Recall from Chapter Two that insider threats pose a more complex challenge to autocratic regimes than outsider threats. This is because outsiders represent a shared challenge to members of the ruling elite, but insiders may be divided into factions that either support or undermine the leadership. In light of these dynamics, the principal challenge of dealing with insider threats is that conventional repression strategies – mainly those that rely on extrajudicial violence – risk exacerbating factional conflicts, potentially undermining the regime from within.

To prevent these destabilizing outcomes, incumbents can choose instead to invoke a judicial strategy of repression to eliminate their rivals. Recall that the key component of a judicial approach is the trial, a ritualized process which propounds a simple story of challenger weakness and incumbent strength. This narrative invokes the formal language of the law to frame anti-regime behaviors as illegitimate, criminal acts. Broadcasting this narrative in court can mobilize regime insiders behind the idea that the ruler is in charge and any attempt to dethrone him will fail. A political trial thus delegitimizes challengers before an audience of regime insiders, a performance which can ultimately deter others from challenging the incumbent in future.

However, the judicial strategy described above is designed to primarily target elite threats. What happens when an autocrat faces a threat from the everyday masses?

Mass threats

Unlike insider threats, which can potentially undermine the regime from within, mass threats pose a broad-based challenge to government authority. Mass threats are not the same as outsider threats, the latter of which refer to elite actors, such as political officeholders or powerbrokers.¹ Rather, the masses refer to everyday civilians.

As non-elites, the masses represent a different type of threat than outsiders. This is because whereas autocrats do not typically seek outsider support to maintain their survival, they may draw upon the masses to legitimize their rule. In fact, the masses often provide a critical source of support for autocrats, especially those that have come to power through violent or unconstitutional means.

However, if autocrats have lost popular support, the masses may engage in acts of popular protest or rebellion against the regime. In this way, civilians represent a collective threat, rather than an individual one. The threat of civil unrest is especially significant in Africa, where the path to independence was often paved by violent rebellion against colonial rule (Larmer, 2010). Furthermore, popular protest in the early 1990s was an important catalyst for the liberalizing reforms that swept across many postcolonial regimes (Bratton and Van de Walle, 1992). Mass threats have thus been linked to significant structural changes in many autocratic contexts.

Civil unrest can become especially potent when it is instrumentalized by political leaders, especially opposition groups (Geddes, 1999; McFaul, 2005). Bratton and Van de Walle (1992)

¹ As described in Chapter Two, regime insiders refer to ruling party officials and military officers, whereas outsiders refer to active members of the political opposition, including standing members of parliament.

observe that the popular protests which ultimately spurred political liberalization in several African countries only became vehicles for regime change when they were coopted by existing opposition movements. In these cases, outsider elites played a crucial role in transforming popular discontent into demands for multiparty competition. Pro-democracy rhetoric helped generate a legitimacy crisis for incumbent autocrats that pressured them into granting democratic concessions in the wake of growing civil conflict.

Mass threats can thus interact with elite threats in important ways, in some cases providing the momentum and wherewithal for outsiders to challenge the insider elite. As Przeworski (1986, p. 56) argues, “the first critical threshold in the transition to democracy is the move by some group within the ruling bloc to obtain support from forces external to it.” Autocrats are thus especially wary of partnership between outsiders and the masses, a union which provides both groups with the potential leverage to challenge the legitimacy of the incumbent regime.

Containing mass threats

How do incumbents prevent these groups from uniting together against the regime? Existing research focuses on the tradeoffs between strategies of repression and cooptation, although both approaches can be costly. Autocrats have various methods of confronting popular discontent (Geddes, 1999), ranging from violent repression to material concessions to aggrieved populations (Moore, 2000; Carey, 2006; Pierskalla, 2009). However, both approaches have costs. Mass repression is a large-scale operation that typically requires complex logistical coordination. Indeed, depending on the size of the movement, the day-to-day operations of arresting, detaining, torturing, and killing both civilians and the leaders of opposition organizations can quickly escalate into a herculean task for state security forces (Greitens, 2016). Cooptation can also be costly for regimes with limited resources; the fact that civil unrest is often motivated by economic crises means that regimes facing these bottom-up challenges tend to already have strained resources to combat them, making payoffs even more difficult. The underlying issue for regimes is that the costs of repression and cooptation can quickly escalate over the long-term.

A judicial strategy reconsidered

Rather than resort to extrajudicial violence or material concessions, there may be less costly means of containing mass rebellion. In particular, just as a judicial strategy can be used to rally insiders behind the ruler, so too can a judicial strategy be used to rally the masses behind the regime. The underlying logic is the same in both cases, where the ritual of a trial is used to legitimize the incumbent and delegitimize his challengers. Such a strategy can ultimately help autocrats win the loyalty of the masses and prevent their alliance with the opposition.

While the objective of the trial is the same, the audience is different. In this case, the target is the general public, and the ultimate objective is to prevent the masses from collectively mobilizing against the regime. The audience of a trial thus changes depending on the type of threat confronting the incumbent: insider threats need to be dealt with before an insider audience; mass threats need to be dealt with before a mass audience. A trial in special court is thus designed to rally popular support for the regime, in much the same way that a trial in a regular court is designed to rally insider support. Note also that when a judicial strategy of repression is

conducted in a special court, it is often more convenient to prosecute the leaders of a mass movement rather than all members of the group.

Note that even though mass movements can be co-opted by outsider elites, mass threats are still different from outsider threats. In particular, it is often more critical for autocratic rulers to rally support among the masses and thereby prevent collective mobilization from arising in the first place. Strategies of dealing with outsider and mass threats are thus distinct: extrajudicial methods are appropriate when the objective is to destroy the target, but judicial methods may be more appropriate when the objective is to legitimize the incumbent.

Executing a judicial strategy before a mass rather than elite audience can have important implications for the code and conduct of judicial rituals. In particular, while formal proceedings might be appropriate for an audience of elite insiders, the technical language of the law may have less resonance with the general public. This was especially true in postcolonial Africa, where there often was a profound disconnect between the largely rural population and urban-based common law courts. Indeed, these colonial legacy institutions were a world apart from the masses; average citizens were not going to travel from afar to watch highly technical judicial proceedings unfold in the capitol, and were thus unlikely to derive significant meaning from criminal prosecutions conducted under the authority of the common law.

This suggests that different audiences require different rituals of legitimation. Accordingly, autocrats may choose to sidestep regular courts and erect special courts when confronting a threat from the masses. The need to appeal to a civilian audience helps explain the type of special courts that were erected in certain African autocracies: highly localized institutions that invoked traditionalist rhetoric and were administered by populist adjudicators. These institutions based their rulings on local customs rather than colonial laws, promoting political justice at the grassroots level. Installing these courts in remote villages rather than the political capitol also encouraged locals to attend trial proceedings and thereby familiarize themselves with the adjudication process. By investing in such apparatuses, autocrats ultimately created local platforms to broadcast how threats to autocratic survival would be contained and dealt with. Special courts thus helped African autocrats publicize pro-regime narratives before a broader political audience.

In these ways, special courts can be considered an extension of regular courts, since both forums are judicial institutions employed to generate a narrative that legitimizes the status quo configuration of power. The key difference is the intended audience: regular courts have elite audiences, but special courts have mass audiences. Special and regular courts are thus complements rather than substitutes when it comes to the repression of political rivals. This leads to the following observable implications:

H1. Elite-based threats are more likely to be repressed in regular courts.

H2. Mass-based threats are more likely to be repressed in special courts.

Country Cases

The preceding section examines how a judicial strategy of repression can be used to confront a broader range of threats to autocratic survival. When confronting a threat from within the ruling circle, autocrats turn to regular courts to regain legitimacy among the political elite. However, when confronting a threat from the masses, autocrats can erect special courts to bring justice to the people, providing a forum for the general population to witness the trial of political rivals. In other words, the fundamental criterion for what type of forum an autocrat turns to is whether a given threat to power comes from the ruling elite or the masses.

This section illustrates how a judicial strategy differed across three country cases: Kenya, Malawi, and Ghana. In Kenya, the main crisis of legitimacy was within the ruling party, meaning that regular courts were preferred to special courts to resolve these disputes. By contrast, in Malawi, the main crisis of legitimacy was among the masses, and thus political trials were conducted in special forums designed to resonate with mass audiences. Ghana presents a mixed case, where the political turbulence of the postcolonial period reflected a combination of elite and mass threats. This led to judicial strategies of repression that alternated between regular and popular justice forums.

Table 4.1: Threats and Judicial Strategies

Country	Judicial Strategy
Kenya	Elite threat → regular court → elite audience
Malawi	Mass threat → traditional court → mass audience
Ghana	Mixed threat → military and people's courts → mixed audience

What is the basis for comparing Kenya, Malawi, and Ghana? As former British colonies, all three countries inherited a similar system of English common law and so-called customary institutions, the latter of which bestowed limited judicial power to traditional leaders. This dual system imposed important constraints on the design and operation of postcolonial courts, including the types of judges who were even eligible to serve on the bench. However, the degree to which these legacies affected the composition of postcolonial courts varied across cases. In both Malawi and Kenya, the lack of educational opportunities for indigenous Africans in the common law meant that superior courts in both countries were entirely composed of white expatriates, even after the transition to self-rule. Ghana, by contrast, had a more robust indigenous legal profession in the years leading up to independence and thus earlier successes in “Africanizing” the judiciary.

In addition to these shared legal and judicial legacies, many other colonial institutions were maintained rather than dismantled in the early years of independence, which provides a useful benchmark for comparison over time. For example, while parliamentary and party systems were largely retained after decolonization, multiparty democracy ultimately failed to consolidate in most cases. In Malawi, Ghana, and Kenya, postcolonial regimes were dominated by personalist

dictators who centralized control almost immediately after the transition to self-rule. However, while all three countries experienced democratic backsliding, there were key areas of divergence in the stability and tenure of the new autocratic regimes that emerged. For example, whereas President Hastings Banda of Malawi remained in control for over thirty years, President Kwame Nkrumah was overthrown in a violent military coup less than a decade after independence. Indeed, over the ensuing years, the Ghanaian government experienced a series of violent and chaotic transitions from civilian to military rule, beginning with the toppling of Nkrumah in 1966 and continuing through the successive military juntas of General Joseph Ankrah, General Acheampong, Dr. Busia, President Hilla Limann, and Flight-Lieutenant Jerry Rawlings. Kenya, meanwhile, was dominated by the Kenyan African National Union (KANU) for nearly forty years and experienced a non-violent transition from President Jomo Kenyatta to his successor President Daniel Arap Moi.

With this backdrop in mind, the following section examines how rulers in Kenya, Malawi, and Ghana confronted different threats to autocratic survival in the postcolonial period, and the impact these threats had on the design of courts.

Table 4.2: Judicial Strategies in Kenya, Malawi, Ghana

	Kenya	Malawi	Ghana
Regime-Type	One-party dictatorship	One-party dictatorship	Military junta
Source of threat	Elites	Masses	Elites and masses
Court	Common law courts	Traditional courts	Public courts
Court audience	Elites	Masses	Masses
Legal system	English common law	Customary	Populist
Jurisdiction	Criminal and civil	criminal	criminal
Structure	Appellate (local to national)	Appellate (local to national)	Appellate (local to national)
Judges	Justices and magistrates	Traditional chiefs and magistrates	Military officers, laymen, lawyers
Legal counsel	Yes	No	Yes

Kenya

Shortly after independence, Kenya was dominated by the one-party dictatorship of the Kenya African National Union (KANU). Access to the state was made contingent upon party membership, and localities were governed by party bosses who used patronage to control the masses in their areas (Mueller, 1983). However, despite its monopoly over the state, KANU remained internally divided along ethnic and ideological lines (Hornsby, 2011). This made the party susceptible to in-fighting and defections, the latter of which even led to the creation of opposition groups that initially posed a viable electoral threat to the ruling party. These intra-regime dynamics had important implications for Jomo Kenyatta, party leader and President of Kenya, whose position was more vulnerable to the elite, rather than mass, insurrection. As will be argued below, this is why Kenyatta pursued a judicial strategy designed to reach an elite audience.

High elite threat

Kenyatta was the leader of KANU from 1947 until his death in 1978, and it is easy to look at his uninterrupted tenure as a sign of his unrivalled political mastery. However, Kenyatta's position at the top of the political order was not always a foregone conclusion. In fact, he confronted a number of significant rivals during the early years of self-rule, especially among party elites. A key rival was Oginga Odinga, vice president of Kenya and second-in-command within KANU. Tensions between Kenyatta and Odinga escalated to the point that the latter eventually defected from KANU and formed the opposition party the Kenya People's Union (KPU). Shortly thereafter, several members of the KANU rank-and-file joined the KPU, illustrating the dangers of allowing intra-party rivalries to escalate to the point of defection.

Even after Odinga's departure, Kenyatta faced other rivals within the ruling party. Tom Mboya, the most significant non-Kikuyu in the government, was rumored to control half of the party branches, and often clashed with the interests of Kenyatta and his co-ethnic Kikuyus (Mueller, 1983). Pio Pinto was another significant leader of KANU, a founder of the KANU newspapers *Sauti Ya KANU* and *Pan African Press*, and a contributor to the Lumumba Institute, which was a school to train KANU party officials. However, Pinto was of Goan descent, and thus an ethnic outsider to the Kikuyu-dominated cabinet. The popularity of these ministers within KANU meant that they posed significant threats to Kenyatta's power, and both were threatened or attacked under suspicious circumstances.

Resistance to Kenyatta also extended to the lower branches of the ruling party. By the late 1960s, party backbenchers became increasingly dissatisfied with the "smoke-filled" back-room candidate selection process led by Kenyatta and the other Kikuyus which had resulted in the selection of unpopular candidates who lost important elections (Hornsby, 2011). In the face of growing criticism, Kenyatta made concessions to these party members, announcing in 1968 that KANU would hold open primary elections in each constituency to select its candidate. The idea was believed to have originated with Mboya, signaling the growing influence of rival elites within the ruling party (Hornsby, 2011). KANU would thus choose its candidates at a National Delegates' Conference, which increased the stakes surrounding control over local party branches.

What this discussion shows is that the primary threat to power during the immediate postcolonial period thus arose from the ruling elite, not the everyday masses. Kenyatta's main rivals were other party elites, specifically members of KANU who were dissatisfied with the internal governance of the ruling party. Indeed, the threat of defection from KANU was real, as the opposition Kenya People's Union (KPU) had been founded by the former Vice President and second-in-command to Kenyatta, Odinga Oginga. Kenyatta's position atop KANU was thus ultimately dependent upon the loyalty of party bosses, the latter of whom controlled local districts and received patronage from to the center.

Low mass threat

While elite rivals were a prime concern for the Kenyatta regime, the masses posed a much lower threat to autocratic survival. This is because of colonial-era policies that had ensured that the masses were more beholden to political leaders than vice versa. Specifically, the colonial government had engineered a middle class that was largely dependent on access to state resources and patronage. The fact that much of the private sector was foreign owned facilitated this dependency, since entrepreneurs depended on the state for licenses to operate (Mueller, 1983). There were thus few economic alternatives to the state, meaning the fledgling private sector could not serve as an independent source of power for political dissidents in search of employment or development funds. The economic monopoly of the state also made it easier for the ruling party to oppress the opposition because the latter, by virtue of their outsider status, had fewer resources to offer the masses.

Judicial Strategy: Regular Court

Given this combination of high elite threats and low mass threats, this meant that autocratic rulers were primarily concerned with punishing elite disobedience and maintaining the loyalty of regime insiders. A Kenyan judicial strategy was thus designed to speak to elite audiences.

Consider the language, location, actors, and logic of political trials in postcolonial Kenya. For example, in a 1965 case against KANU backbenchers who were arrested after protesting the party's backroom candidate nomination process, the state prosecutor charged them with cited "breach of the peace," unlawful assembly at party headquarters, and trespassing with intent to intimidate, insult, or annoy party members (*New York Times*, 1965). Attorney General and party leader Charles Njonjo underlined the severity of the charges by stating that the backbenchers had been involved in an "abortive coup d'état" (*The Irish Times*, 1965). These accusations were phrased in lexicon that resonated more sharply with educated elites than with the everyday masses, suggesting that the charges were designed for elite audiences. The fact that the trial proceedings were conducted in English, the language of the common law, and in a Nairobi magistrates court, the political capital, further suggested that the intended audience of the trial were members of the political establishment.

With regards to the logic of the trial, this was made evident in the verdict and sentencing of the accused. After a short deliberation, the presiding common law magistrate found all of the accused guilty and sentenced them to imprisonment. The sentences ranged from 12 to 18 months,

where the length of detention varied according to political rank of the accused. The fact that the accused were not punished more severely – and furthermore did not necessarily lose their party membership – suggests that the objective of this judicial strategy was to enforce party discipline rather than disappear the target.

As another example, consider the trial which occurred in the aftermath of the assassination of a major Kenyan leader Tom Mboya, cabinet member and secretary-general of KANU. Maybe discuss this case because it was politically sensitive, believed he was assassinated by order of Kenyatta. In the months leading up to his death, it was widely known that Mboya feared assassination at the hands of opponents within his own party (Hoagland, 1969; Meisler, 1969).

Malawi

While postcolonial Malawi was initially governed by a party of elites, President Hastings Banda significantly restructured the party by purging it of its founders, targeting high-ranking ministers who were best poised to challenge his authority. Banda was able to enforce these radical changes by turning to groups from outside the central party apparatus, specifically traditional leaders and everyday civilians, the latter of whom became responsible for enforcing Banda's bidding. However, by basing his legitimacy on local bases of support, Banda made himself more vulnerable to mass-based threats. Thus when the Banda regime pursued a judicial strategy of repression, it adapted judicial institutions and procedures for a mass audience.

Low elite threat

Banda's ability to expunge his own lieutenants from the ruling party was the ironic consequence of actions undertaken by those same party elites. In the lead up to decolonization, the main figureheads of independence in Malawi (then Nyasaland) were Henry Chipembere and Kanyama Chiume, two young leaders of the African National Congress (ANC) party (later the MCP). However, Chipembere and Chiume believed that they needed someone older than themselves to lead the African Congress. They specifically wanted a "man of about fifty or sixty, an intellectual, with a character combining nationalism with honesty, self-denial, and a spirit of cooperativeness." They found such a leader in Dr. Hastings Banda, a physician who had spent forty years abroad in the UK and was respected by the British, making him a suitable pick for the transition from colonial to self-rule. Banda's age also engendered a patriarchal, elder statesmen image that the fledgling independence movement needed. Chipembere and Chiume thus went to great lengths to generate a cult of Banda. As Chipembere put it, "although it is wrong to be led by a single man placed in such a powerful position, still human nature is such that it needs a kind of hero to be hero-worshipped if a political struggle is to succeed."

Having spent the last several decades abroad, Banda appeared to be an ideal puppet for the young leaders of the independence movement to control. However, Banda proved more adept at seizing power than following others' commands. Part of the issue facing the young ministers was that they had built a cult of personality around Banda, presenting him to the masses as a messiah, often invoking a mix of biblical images and indigenous traditions. For example, a significant portion of this redeemer image was linked to Banda's former career as a physician in the UK. He would thus attend rallies with a fly whisk, a symbol of traditional African medicine men

(Lwanda, 1993). Even Banda's name, *Kamuzu*, meant "little medicine," an translation which was exploited in popular songs that connected Banda's healing powers to the liberation of Malawi from colonial rule (Chirwa, 2001).

These efforts proved extremely effective, eventually generating a basis of popular support for the president that extended beyond the ruling party. However, the fact that Banda had been granted significant de jure and de facto power within the ruling party – including being declared Life President in 1960 – meant that party elites were also losing internal leverage against him. Such moves ultimately enabled Banda to purge his entire cabinet in 1964 without undermining his own position. This was the infamous Cabinet Crisis, wherein Banda expelled his main rivals within the ruling party and forced them to flee the country. Banda used the Cabinet Crisis as the impetus to declare a one-party state and require all junior ministers to pledge their loyalty to him, further entrenching his power.

It is important to note that Banda was able to achieve this radical transformation of the ruling party because a significant portion of his support came from outside the party apparatus. In particular, Banda maintained direct linkages with traditional authorities and organized civilian operatives, including the Youth Leaguers, the Women's League, and the paramilitary Young Pioneers. These groups not only provided security for and intelligence to Banda, they also helped perpetuate a Banda-centric political culture, popularizing songs which celebrated Banda as the *Ngwazi*, or "conqueror" and "hero," the "Lion of Malawi, the government and the law" (Chirwa 2001, 9). Such propaganda helped make Banda synonymous with the party, the law, and the state.

The cult of personality around Banda enabled him to establish a base of power outside of the normal political apparatus. By drawing on mass support, Banda was not only able to purge his rivals from the ruling party; he even exiled them from the country.

High Mass Threat

However, relying on popular support meant that Banda was more beholden to popular opinion, and thereby more sensitive to the threats posed by civil unrest. This became important in the late 1960s, when a series of violent murders in the Chilobwe suburbs of Blantyre, Malawi gained national attention and called into question the ability of Banda to ensure the safety of everyday Malawians. The murders had become a national news story because the bodies were often found mutilated and staged in grotesque sexual positions. For many locals, however, the most alarming aspect of the story was the fact that the murderer had evaded police capture for years. The murders thus continued unabated from 1968 through 1970, resulting in several dozen deaths. Failure to find the killer posed a problem for Banda, who by this time had become synonymous with the government and thus was seen as responsible for its failures to provide law and order. In fact, public confidence in Banda was so shaken that there was even a local "vampire" story that he had ordered the killings himself as part of a blood offering to South Africa.²

² The local rumor was that Banda had ordered the blood of the victims to be been drained and sent to South Africa in order to repay financial loans owed by the Malawian government. White men were believed to drink African blood and manufacture money from it (Brietzke, 1974, p. 362).

The threat of mass unrest was most evident following an attempt to resolve the crisis through a regular judicial process. In 1969, the state charged five citizens with the Chilobwe murders in an effort to demonstrate their ability to capture and punish the responsible parties. The defendants were brought before the High Court, where their cases were adjudicated by a British judge. However, the judge questioned the veracity of the prosecutions' case, arguing that the evidence was "so manifestly unreliable that no reasonable jury could possibly convict" (TNA: DO 224/4).

The acquittals led to a public outcry, which was quickly noted in parliament. Rather than acknowledge the limitations of the state's criminal case, however, parliamentarians attempted to shift attention and blame onto the "technicalities" of the English common law, which were characterized as both unintelligible and inappropriate for everyday Malawians (TNA: DO 224/4). As one minister stated:

If there was any loophole at all in our government in the eyes of the ordinary villagers...it was in this field of the judiciary system where something was still required to be done to prove to the villagers that the government was there for their protection...Many, many criminals have been let free for the mere reason that there was not sufficient evidence to prove the guilt...People are being murdered and no action is taken!" (Hansard, 1969: 59).

Judicial Strategy: Special Court

The presence of low elite threats and high mass threats led to a different strategy of autocratic survival in Malawi than in Kenya. Rather than rely on regular courts, as Kenyatta did, Banda instead turned to auxiliary judicial institutions that were explicitly designed to appeal to mass audiences.

A Malawian judicial strategy unfolded in traditional courts, where traditional authorities, not common law justices, decided cases of political import. Traditional courts were established in the weeks following the controversial acquittals in the Chilobwe murder case, which explains why these institutions were granted original jurisdiction over all criminal cases (Chipeta, 2016). In reaction to local frustration with the common law criminal justice system, the traditional courts bill stipulated that these courts would not be governed by common law procedures, but instead be administered by local chiefs drawing on customary law. Section 36 of the Traditional Courts Act stated that "no proceedings in a Traditional Court...shall be varied or declared void upon appeal...solely by reason of any defect in procedure or want of form" (TNA: DO 224/4). The same section further stipulated that the Traditional Court or Chief Traditional Courts Commissioner "shall decide all matters according to substantial justice without undue regard to technicalities," where "technicalities" was code for common law (TNA: DO 224/4).

Judges in these cases consisted of panel of three to five traditional chiefs who were personally appointed by Banda, as well as one resident magistrate. The decision to empower traditional chiefs was highly symbolic, since chiefs played a dominant role in local rural governance, where the majority of the population resided (Chiweza, 2007). Banda was thus creating a direct link between himself and authorities that were considered legitimate by the masses. Although common law trained magistrates were also appointed to traditional courts, it was ultimately the traditional chiefs who maintained a direct line of communication with Banda. The appointment

of resident magistrates was meant to provide a degree of legal legitimacy to these institutions, as well as to distinguish them from the irregular customary courts that existed in the colonial and precolonial periods. Yet in practice, traditional authorities were not beholden to the advice of the magistrates, the latter of whom were typically serving in their first appointments after university (Chipeta, 2016). Indeed, their youth and inexperience made these magistrates more beholden to traditional authorities rather than vice versa (Mwangulu, 2016).

Nearly every aspect of traditional courts was designed to resonate with local audiences. For example, in terms of location, traditional courts operated on a circuit, meaning courts would convene in rural localities to hear cases before the masses (Mwangulu, 2016). This was a contrast from the common law courts, which were located in major cities, and thus difficult for the vast majority of Malawians to access. However, local justice was not decentralized justice. Rather, the traditional courts also had a relatively institutionalized hierarchy of appeals that ran from the local to the national level. This meant that lower court decisions were ultimately supervised by the justice department, an arm of the executive branch.

The role of public opinion was crucial in legitimizing the verdicts of these cases. Consider what happened when one of the Chilobwe murder suspects case was tried in a traditional court in 1971. In the lead up to the trial, the suspect offered several contradictory confessions, including one that implicated ex-minister Chipembere, one of the chief architects of Banda's cult of personality, who had been driven out of power during the infamous cabinet crisis of 1964. The presiding chiefs were forced to adjudicate the validity of this story against the suspect's previous confessions, ultimately settling on a version of events that was less conspiratorial and placed the blame for the murders solely on the accused. However, there was severe public backlash against this version of events, which local Malawians perceived as a political cover up (Brietzke, 1974). People protested by laying down in the road outside the court to prevent the presiding chiefs from driving away. The head chief in the trial was also severely beaten when he returned to his home in Mulanje, and suffered a significant erosion in his local authority (Brietzke, 1974).

At the same time, Banda issued statements that signaled his alignment with the people rather than the traditional court, which he argued had ruled in error: "as an ordinary African, I can understand the reaction of those people in court...that is how I would have reacted myself... Whatever the case in England, in America... here the court is not above public feeling, public sentiment...lack of evidence is not proof of evidence" (Hansard 1981, 222-5).

These public demonstrations had an actual impact on the final decision of the court. When the case was revisited by the National Traditional Court of Appeal, the court confirmed the original conviction and sentence, but held that the accused could not have acted alone (Breitzke, 1974).

Political trials are conducted before a public audience. This is a crucial component of dissemination, ensuring that the message of the trial is widely publicized. Trials in Traditional Court were thus made open to the general public, where audience members included mostly local Malawians, especially law students. However, foreign officials and international human rights organizations were also allowed to attend trial proceedings (Kanyongolo, 2016). Trial proceedings in Traditional Courts also adhered to the same underlying routine of prosecution, testimony, adjudication, and sentencing. As Edge Kanyongolo personally observed during the

treason trial of Orton and Vera Chirwa in 1982,³ the panel of chiefs (and the lone resident magistrate) would even deliberate their opinions about the case before the court audience, allowing ordinary people to understand the logic of political justice in relatively concrete terms (Kanyongolo, 2016).

Ghana

Whereas Kenya and Malawi were governed by relatively stable one-party dictatorships for much of the postcolonial period, Ghana experienced a series of chaotic and often violent transitions from civilian to military rule. Trouble began under Ghana's first president, Kwame Nkrumah, who ultimately proved unable to contain elite threats from within the regime, leading to his violent ouster after less than ten years of power. While elite-based threats may have originated under the civilian dictatorship of Nkrumah in the late 1950s, they continued to plague each of his successors over the ensuing decades. Military overthrow became the norm as one junta succeeded another, a turbulent period punctuated by brief intervals of civilian rule. Amidst this irregular turnover, the political and military leadership of Ghana confronted a mixture of threats from both within the ruling elite as well as the masses. This led to a unique configuration of judicial strategies designed to speak to different audiences, to varying success.

High elite threat

Nkrumah was suspicious of both rivals within the ruling Conventional People's Party as well as leaders of several opposition groups, the latter of whom had collectively organized under a united opposition party banner. While such actors posed a credible electoral threat, Nkrumah also confronted formidable foes in the military who felt that the material wellbeing of the armed forces were being neglected by the civilian leadership, and it was ultimately military insurrection which led to Nkrumah's violent overthrow in 1966 and the installation of the National Liberation Council (NLC) under Lieutenant General Joseph Ankrah. Similar economic grievances were cited in the 1972 coup which overthrew civilian Prime Minister Dr. Kofi Busia. The army specifically alleged that the Busia regime was guilty of "economic mismanagement," arbitrary dismissals of military officers, the victimization of military and police personnel, currency devaluation, and an unjust five percent development levy on all salaries for civilian administrators and military officers (Baynham, 2007).

However, even after the military takeover, ethnic factionalism within the armed forces heightened the threat of counter-coups. When the NLC assumed power in 1969, for example, several alleged plots were discovered within the military, often motivated by tensions among rival ethnic military officers (*The Irish Times*, 1967). Sometimes these plots escalated to actual boots on the ground, as they did in April 1967, when approximately 120 members of the Army Reconnaissance Regiment attacked the Presidential Castle, government offices, and occupied the radio station. After an hour of heavy fighting, the mutineers were ultimately overwhelmed by

³ Orton Chirwa was a former Minister of Justice who fled Malawi in the early 1960s but remained a vocal critic of the Banda regime, even founding an opposition group with his wife Vera while based in exile. Nearly twenty years after they first left Malawi, in late December 1981, the Chirwas were detained while visiting eastern Zambia near the Malawi border and charged with conspiring to overthrow the Government of Malawi by unlawful means. They were brought to trial in July 1982 before a panel of five judges in a Traditional Court near Blantyre.

troops loyal to Ankrah. While the uprising was suppressed, the death of Ewe leader Lt. General E. K. Kotoka during the attempted takeover further intensified ethnic grievances among Ewe factions of the military, many of whom believed they were being marginalized in favor of the Ga, Ankrah's tribe. Such tensions persisted in successive regimes, including the civilian Progress Party regime, the Supreme Military Council (SMC), and the Armed Forces Revolutionary Council (AFRC).

High mass threat

At the same time, the leadership in Ghana also periodically confronted civil unrest. Much of the unrest was motivated by material grievances, especially the perception that certain ethnic groups were being more economically marginalized than others. However, beginning in the early 1960s, the Ghanaian economy was put under severe financial strain due to the expensive public works projects ordered by Nkrumah. As Ghana accrued more foreign debt, local shortages and price gouging led to frequent labor strikes.

Political leaders were aware of and sensitive to popular dissatisfaction with national economic policies. Perhaps in an effort to deflect blame for the growing financial crisis, the government began blaming civil unrest on foreign subversion. For example, in August 1971, Prime Minister Dr. Kofi Busia claimed that the Government had received credible reports that foreign agents were pouring money into Ghana with a view to organizing people to cause trouble (*The Guardian*, 1971).

Judicial Strategy: Regular and Special Courts

The combination of elite and mass threats in Ghana led to judicial strategies that were executed in both regular and special courts, depending on the identity of the challenger: under the civilian dictatorship of Nkrumah, regular courts were used to prosecute elite rivals; under the military juntas of Ankrah, Acheampong, and Rawlings, a unique configuration of special military and popular justice tribunals were developed to deal with military insurrection and mass threats, respectively.

Under Nkrumah, several elite rivals were prosecuted in common law courts. One notorious example was the 1963 treason trial of cabinet ministers, including the foreign minister and the executive secretary of the ruling party, who had allegedly attempted to assassinate the President. Although the case was brought to trial in a "special" three-man criminal court, the prosecution was essentially a regular judicial affair. For example, the head of the special court was Chief Justice Arku Korsah, the leader of the regular judiciary, and the criminal charges invoked the formal language of the common law. Information about the trial, including the location of the court and the nature of the charges, was published in the local press as well as the official law gazette. This evidence suggests that the main audience for the trial was the Ghanaian elite, not the illiterate masses.⁴

⁴ The case was actually tried twice because Nkrumah was dissatisfied with the first verdict, which was perceived as too lenient on the accused. The first trial was conducted by Chief Justice Sir Arku Korsah, who was fired by Nkrumah for his verdict and replaced by Julius Sarkodee-Adoo. In the second trial, Sarkodee-Adoo convicted all of the accused. The backlash against the initial ruling illustrates the importance of developing pro-regime narratives in

However, beginning with the first military coup in 1966, exceptional courts became a normal feature of exceptional rule. Military leaders were specifically concerned with containing intra-military rivalries, and subsequently turned to military courts to enforce discipline within the armed forces. Over time, the scope and audience of these courts expanded to include the masses. In 1972, for example, the National Redemption Council (NRC) issued a “subversion decree,” upending existing legal definitions of treason as stipulated by the common law system. The scope of subversion was much broader than treason, the latter of which was defined as acts of disloyalty to the sovereign, specifically by attempting to overthrow the government through unlawful means. Rather, subversion was defined as any act of sabotage, sedition, inciting and encouraging others to invade Ghana with armed forces, the illegal possession of arms, ammunition, or explosives, smuggling gold, timber, diamonds, or cocoa, and various acts of armed robbery. Subversion thus included a variety of military and civilian behaviors, both of which fell under the jurisdiction of military, not common law, courts.

Expanding the scope of military courts also meant expanding the audience for tribunal proceedings. This meant that military punishments – such as execution by firing squad – could now be witnessed by general audiences. Indeed, all Ghanaian citizens were subject to the subversion decree.

The fact that everyday civilians could now be prosecuted in military tribunals was a sign that such trials were not limited to military audiences. By the late 1970s, military governments made more overt gestures to the masses by invoking notions of popular or revolutionary justice. In 1979, for example, the Armed Forces Revolutionary Council (AFRC) established the *Public Revolutionary Courts* to prosecute government corruption; in 1982, the Provisional National Defense Council (PNDC) under Jerry Rawlings established the *Public Tribunals*, which were forums designed to deal with all types of criminal behavior ranging from murder and armed robbery to “economic sabotage” [author emphasis].

The creation of Public Tribunals was part of Rawlings’ attempt to legitimize his illegitimate seizure of power. While the coup which brought him to power was considered illegal under the common law, Rawlings argued that the Ghanaian people needed to break free from these legal traditions. He specifically portrayed such laws as “technical rules that in the past have perverted the course of justice and enabled criminals to go free” (*Daily Graphic*, 1982). In addition to creating these courts, Rawlings also oversaw a proliferation of public-oriented investigatory and adjudicative forums, including the revolutionary Worker’s Defense Committee, Public Defense Committee, and the Citizens Vetting Committee (Gocking, 1985). Such initiatives were designed to undermine the investigatory and prosecutorial functions of common law courts, putting “revolutionary” justice in the hands of non-elites.

Public Tribunals were also run by non-elites rather than formally trained judges. Tribunals consisted of five to fifteen members, the vast majority of whom were not required to possess any legal qualifications. While each tribunal required one practicing lawyer, legal experts still occupied a minority position (Attafuah, 1993).

criminal prosecutions. In particular, Nkrumah wanted to signal to other potential rivals within the ruling party that threats to his life would not be treated with leniency.

Public Tribunal sessions were also public spectacles that received significant local and international media coverage, and were even considered domestic tourist attractions (Attafuah, 1993). Tribunal sessions were conducted in public lecture halls and large conference rooms, where hundreds of observers would come to watch trial proceedings. Tribunal audiences were even allowed to participate in the decision-making process. On October 19, 1982, Addo Aikins, chairman of the public tribunal operating in Accra, declared that unlike ordinary courts, members of the public were allowed to ask questions or make suggestions during the trial. From 1982 until 1984, soliciting public input became routine. As an example, consider the 1982 case *People v. Joseph Ampah Kodwo*, where nineteen audience members gave recommendations for punishment. A local newspaper reported that:

Before passing sentence, Addo Aikens, Chairman of the Tribunal, invited the public to prescribe a sentence which in their opinion, would serve as a deterrent to gold smugglers. Five persons suggested that the accused who is a lawyer, and should have known better, be given a jail term ranging between 10 and 15 years...Five other persons suggested that since the accused had pleaded guilty, he should be fined and set free because in their opinion, he, being a civil servant in Britain, would repatriate his foreign exchange earnings to Ghana after he had retired from the services of the British Government. This suggestion met with an uproar from the public, apparently showing disapproval for it. (*Daily Graphic*, 1982).

After a five minute adjournment, the final decision meted by the Tribunal closely mirrored the suggestions put forth by the audience. In particular, the Tribunal ruled that the accused should have known better because he was a lawyer, decided to sentence him to 17 years imprisonment with hard labor (Attafuah, 1993).

Conclusion

This chapter has examined the circumstances under which autocrats will eschew regular courts for special forums. A key variable appears to be the source of the threat to autocratic survival: whereas elite threats have been directed to common law courts, mass threats have been directed to special courts, especially those that invoke populist justice. In both scenarios, the fundamental principle of a judicial strategy of repression is the same: the accused represents a challenge to the authority of the regime, and the trial is meant to delegitimize the accused and legitimize the incumbent. A judicial strategy is thus not necessarily limited to specific kinds of regimes or particular moments in history, but is instead generalizable across a variety of different forum-types over time.

In the next chapter, I explore the legacies of these autocratic strategies on post-autocratic courts.

CHAPTER FIVE

Post-Autocratic Legacies

The theoretical framework developed in previous chapters examines how courts helped consolidate autocratic regimes in post-independence Africa. When African dictators used the courts for political repression, their goal was to eliminate elite rivals and stabilize control of the regime. These objectives were especially pressing during the founding years of one-party dictatorship, when dictatorial authority was less established and hence more likely to be contested. However, African dictators were less willing to use courts when judges could not be trusted to rule in favor of the incumbent. This led to the circumvention of judicial authority, often through the creation of special auxiliary tribunals that were more subservient to political interests. These dynamics critically shaped judicial politics during the post-independence years.

It has been nearly three decades since the formal end of one-party dictatorship across much of the African continent. While the 1990s ushered in a new era of political and economic liberalization, creating unprecedented opportunities for institutional reform, the long-term impact of these initial openings has remained debatable. In fact, recent scholarship has highlighted global trends of democratic backsliding (Bermeo, 2016), drawing attention to the endurance of autocratic legacies on post-autocratic development (Riedl, 2014; Albertus and Menaldo, 2012). The evidence suggests that autocratic institutions are more impervious to reform than originally imagined (Carothers, 2002 and 2006).

To what extent have autocratic legacies persisted in African courts? Existing research on judicial performance has focused on democratic dimensions, often rooted in the concept of judicial independence (Moustafa, 2015). The central idea of independence is simple: judges should be autonomous agents of the law who make decisions without political interference (Linzer and Staton, 2015). This is considered a central pillar of the rule of law, which in turn is a critical component of a functioning democracy (Carothers, 2002). However, not all courts are designed to support the democratic rule of law. Previous chapters in this dissertation have demonstrated this point in fact, showing how a variety of autocratic regimes used the courts to both consolidate and maintain autocratic power. Considering that courts are often designed for explicitly partisan objectives, independence may not be the best criterion by which judicial performance is appraised.

In this chapter, I propose an alternative conception of judicial power: jurisdiction. Jurisdiction describes the scope of judicial authority, or the legal domain over which a court is allowed to make decisions. Scope affects our interpretation of independence, since independence means little if courts do not even have the authority to decide consequential cases. Consider how in the one-party dictatorships of sub-Saharan Africa, courts were granted jurisdiction over political conflicts only when judges could be trusted to deliver rulings in favor of the incumbent. Jurisdiction could shift over time, since judges who ruled against the regime might have their power eroded in future cases. Taken in this context, whatever jurisdiction a court is allowed to exercise provides insight into the underlying relationship between political leaders and judges, as well as the types of cases that are deemed worthy of adjudication.

Jurisdiction is a tangible concept that can be observed through a variety of different indicators, although conventional metrics have certain caveats. While legislation shows how political leaders formally define the scope of judicial authority, the law itself does not indicate whether such authority is ultimately invoked or challenged. In addition, court records can reveal what types of cases are actually brought before a judge, but they only contain the proceedings of a given case. As such, court records do not provide a complete picture of the dynamic relationship between politicians and judges, especially interactions that may occur beyond the courtroom.

To develop a more comprehensive measure of jurisdiction across countries and over time, I turn to news media. African courts have received extensive coverage in the local press since the early 1990s, ranging from stories of judicial reform to trial proceedings. Unlike formal legislation or court records, news media covers events before, during, and after judicial events. It also captures broader perceptions of judicial performance, including commentary on support for or backlash against decisions of the court. In these ways, news media, especially locally-based reports, can provide real-time coverage of judicial politics both in and out of the courtroom, contributing to a more holistic view of the courts in their environment.

Scholars have long used news media to collect event data and build aggregate indices of various political concepts (Weinstein, 2006; Bratton and Van de Walle, 1992; McGowan, 1984). However, the vast majority of this work is performed by human coders who are often required to sift through thousands of individual articles for relevant information. I propose a more efficient alternative using web-based methods of data collection and natural language processing, which allows for the systematic retrieval and analysis of news media on a much larger scale. I used web crawling methods to build a corpus of 18,944 news articles dating from 1996-2017 from *AllAfrica*, an online repository of local African news media. The media corpus is then analyzed using static and dynamic topic models, both of which are computational methods that infer latent topics from unstructured texts. The results suggest that contemporary African courts exercise a diverse array of jurisdictions, ranging from election petitions to the protection of human rights. However, when taken in broader historical context, contemporary trends reflect important autocratic legacies: courts which exercised more limited jurisdictions during the autocratic era have more volatile jurisdictions today. Furthermore, these outcomes suggest that the scope of jurisdiction can reflect the underlying relationship between judges and leaders, which may be adversarial, supportive, or mixed. My findings suggest that when relationships between judges and leaders become institutionalized, they are difficult to transform, even after transitions to more democratic rule.

In what follows, I provide an overview of the democratic concepts and metrics that have dominated existing research on judicial politics. I evaluate these concepts against the notion of jurisdiction, showing the conceptual and empirical advantages of the latter. Next, I provide a novel measure of jurisdiction that relies on news media and computational text analysis. My findings show that this approach provides a measure of judicial power that is both efficient and generalizable to both democratic and autocratic regimes. Finally, I evaluate the endurance of autocratic legacies by turning to Malawi and Kenya, countries with share common autocratic legacies but drastically different trajectories of jurisdictional development.

The study of judicial power in developing countries

Over the past three decades, research on comparative courts has converged on a single conception of judicial power: independence. Whether judges are considered autonomous agents of the law or mere pawns of power, the notion of independence has become one of the most widely used criteria for evaluating judicial performance (Rios-Figueroa and Staton, 2014; Linzer and Staton, 2015). Judicial independence is typically broken down into a variety of sub-concepts. Two commonly invoked categories are *de jure* and *de facto*, where *de jure* independence is rule-based,¹ and *de facto* independence is performance-based.² In either instance, the central idea is that judges have the power to constrain arbitrary authority.

The primacy of judicial independence in the broader literature on legal development reflects geopolitical trends that began to take shape in the late 1980s and early 1990s. This was an unprecedented period of political liberalization across the developing world, a phenomenon that largely became known as the “Third Wave” of democracy (Huntington 1991). The seeming global breakdown of autocratic regimes was welcomed by many western democracies, most notably countries within the U.S. foreign policy community (Carothers 2002). An array of governmental, quasi-governmental, and nongovernmental organizations thus began to actively promote the democracy transition paradigm, a sweeping program of development that was highly invested in rule of law reforms. These reforms were rooted in the idea that a functioning legal system, including an independent judiciary, was a panacea for political illiberalism and economic underdevelopment (Carothers 1998). Both scholars and democracy promoters began collecting data from developing countries, especially observable indicators of institutional reform that could be tracked across countries and over time. As such, a variety of rule-of-law measures sprang into existence, including several metrics related to judicial independence.³

Research on judicial reform in developing countries was profoundly influenced by these broader geopolitical forces, where the vast majority of legal development indicators were conflated with democracy.⁴ However, failures of the Third Wave have led to a systematic reevaluation of legal institutions in developing contexts (Carothers, 2002). In many cases, criteria for reform has become more stringent over time, in part to account for democratic backsliding. Fariss (2014) illustrates these dynamics using 35 years of human rights data on developing countries. The vast majority of this data has come from two monitoring agencies: Amnesty International and the U.S. Department of State. Fariss shows that both agencies have developed more rigorous methods of evaluation since they began collecting data, such that developing countries are being

¹ *De jure* concepts deal with formal rules designed to insulate judges from undue pressure (Rios-Figueroa and Staton, 2014). Examples include life-long tenure (LaPorta et al., 2003), multilateral appointment procedures (Melton and Ginsburg, 2014), and the creation of external supervisory bodies (Garoupa and Ginsburg, 2008).

² *De facto* concepts deal with the actual decisions delivered by judges, in particular, whether they reflect the autonomous preferences of judges (Becker, 1970). An extension of this idea is that judicial decisions are enforced in practice even when political actors would rather not comply (Rios-Figueroa and Staton, 2014).

³ Measure of CIM by Clague et al. CIM (1999); CIRI = Cingranelli & Richards (2008) measure of Judicial Independence; F&V-F and F&V-J = Feld and Voigts (2003) measure of *De Jure* and *De Facto* Judicial Independence; GCR measure of “judicial independence; Wittold Heniszs (2000) measure of judicial independence; H&C (2004) measure of judicial independence; KEITH = Keiths (2002) measure of judicial independence; La Porta et al (2004) measure “Judicial Checks” and Balances”; T&K = Tate and Keith (2007) measure of judicial independence; and, XCONST = Polity measure on “Constraints on the Executive” (Gurr, 1990).

⁴ See Varieties of Democracy, Polity IV, World Bank Governance Indicators.

held to higher standards of accountability than they were several decades ago. While improvements in identification and measurement are to be welcomed, changing standards over time can lead to inconsistent evaluations and inappropriate generalizations. Indeed, most cross-national, time-series data must be corrected using a variety of latent variable models in order to generate comparable findings (Fariss, 2014; Linzer and Staton, 2015).

Statistical corrections can only go so far, however, and they cannot always capture fundamental shifts in on-the-ground behavior. This is especially problematic considering that governments in developing countries have found a variety of ways to obfuscate practices that would otherwise be considered abusive and hence worthy of sanction. The anti-corruption movement in sub-Saharan Africa is a prime example. Since the early 1990s, a variety of institutions related to combatting corruption have proliferated in African countries. While these institutions are ostensibly targeted against public malfeasance, they are frequently used to eliminate political rivals (*Reuters*, 2017; Jensen and Kapoor, 2017). External evaluations of these institutions often fail to capture these behaviors, and instead argue that the mere creation of an anti-corruption agency represents a meaningful step towards reform. In other cases, governments have effectively sidelined opposition actors by accusing them of criminal activity. Framing political rivals as subversive criminals is a longstanding practice in many autocratic regimes, but the fact that such practices continued to be used by post-transition governments suggests more attention should be directed towards the criminalization of democratic behavior.⁵

In many cases, post-transition regimes have merely placed one form of repression into a more acceptable container, where political persecution is rebranded as legitimate prosecution (*Amnesty International*, 2002). However, if repressive practices have merely been rebranded, how can we develop a consistent means of evaluating judicial performance over time? What is an appropriate way of comparing institutions operating under fundamentally different geopolitical contexts?

Recent efforts to move beyond the democracy paradigm have led to innovative scholarship on courts in autocratic regimes (Moustafa, 2007; Moustafa and Ginsburg, 2008; Helmke, 2002 and 2005; Pereira, 2005; Magaloni, 2008; Solomon, 1996). This work shows that even limited judicial independence can be leveraged by autocrats to address key pathologies of authoritarian rule (Moustafa, 2007). While this research has provided valuable insight into the form and function of judicial power in nondemocratic settings, it has also led to a dichotomy between the literatures on democratic and autocratic courts (Moustafa, 2015). This is the danger of conflating legal institutions with regime-type, where courts are considered independent if they abide by democratic principles, and dependent if they do not constrain arbitrary rule (Kapiszewski and Taylor, 2008). The reality is that seemingly democratic or autocratic institutions are often neither: just because a country holds elections does not make them free and fair (Mickey, 2015), and a government which lacks a formal constitution does not necessarily rule without restraint (O'Brien and Han, 2009). While scholars have long recognized the existence of authoritarian or

⁵ In Kenya, for instance, the government developed new strategies of political repression after human rights monitors like Amnesty International condemned them for detaining political prisoners without trial in the 1980s and 1990s. The Kenyan government instead began charging opposition members with violent crimes against the state, dis-incentivizing human rights groups from intervening on behalf of allegedly violent criminals (*Amnesty International*, 1990).

democratic enclaves in so-called hybrid regimes, these insights have not been examined as extensively in the study of judicial politics (Levitsky and Way, 2002; Schedler, 2010).

The fact remains that our reliance on democratic indicators of law and courts has long outlasted the end of the transition paradigm (Carothers, 2002). Although recent studies on autocratic courts have highlighted alternative paths of judicial development, this research remains segmented from other work on courts in democratic regimes. Categorizing courts by regime-type has overlooked gradations of judicial behavior that are neither fully democratic nor authoritarian, which has stymied our ability to generalize the performance of law and courts across diverse geopolitical contexts. The result has been a profound disconnect between our understanding of why courts support rule of law in some contexts, but reinforce dictatorship in others.

A new concept of judicial power: jurisdiction

This section proposes an alternative conception of judicial authority that is not necessarily rooted in the democratic experience. I focus on jurisdiction, which describes the range of legal issue-areas over which a court exercises its power (Jaffe, 1964; Cover, 1985). This concept is fundamental towards describing the exercise of judicial authority, in both democratic and autocratic regimes alike. As U.S. Supreme Court Justice Samuel P. Chase observed in the late 19th century, “without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause” (Hart, 1953).

However, jurisdiction is about more than the legal-areas of judicial power; it also identifies whether judges are major political decision-makers or relatively marginal actors. This is distinct from conventional notions of independence, which focus on *how* authority is exercised, but not *where* that authority lies. Jurisdiction directs attention to the latter, since this essentially determines whether judges are even allowed to hear politically significant cases in the first instance.

Consider Singapore, where the Supreme Constitutional Court is considered both *de jure* and *de facto* independent by many economic indicators, yet lacks substantive authority over political rights (Silverstein, 2008; Rahj, 2012). Similarly in Hong Kong and China, the courts are granted relative autonomy in commercial cases that concern investors rights, but otherwise lack meaningful authority to adjudicate the violation of human rights (Lubman, 1999; Peerenboom, 2002; Wang, 2014). The key takeaway is that evaluating courts by independence alone can be highly misleading, since independence is often carefully controlled by limiting or expanding jurisdiction over discrete legal domains. Regimes can thus cultivate limited judicial independence without making themselves fully accountable to the law (Moustafa, 2015).

The scope of jurisdiction can also reveal broader governing priorities of political leaders. In the examples highlighted above, governments wanted to liberalize markets without liberalizing power, and hence granted judicial autonomy over economic, not political, rights (Wang, 2014). In other examples, governments extend the constitutional jurisdiction of the courts in order to legitimize unconstitutional behavior. This is especially common among leaders that have come to power via coup and seek legal validation of their illegal seizure of power (Mahmud, 1994; Del

Carmen, 1973; Tate and Haynie, 1993). Such tactics are not limited to autocratic regimes: democracies will also extend the authority of courts for various political objectives. For example, new democracies may grant judicial review over electoral or administrative rules as a means to defuse conflicts within the legislature (Finkel, 2003). Regardless of regime type, jurisdiction can thus reflect the specific priorities of a given government.

The discussion so far suggests that judges are relatively passive actors in their political environment. This is true to a certain extent, since judges are largely considered reactive rather than proactive agents of the law (Gloppen, 2003). However, this does not mean that judges lack all agency over the determination of their own jurisdiction. Jurisdiction can actually expand or contract based on the underlying relationship between judges and their political leaders (Hart, 1953). One of the most famous examples is the U.S. Supreme Court case *Marbury vs. Madison*, which radically expanded the powers of the Court to review the constitutional actions of government (Amar, 1989). According to Knight and Esptein (1996), this power was established as a byproduct of strategic conflict between the President and the Chief Justice, both of whom sought the supremacy of their respective offices. While the contest for supremacy set the precedent of judicial review in America, provoking conflict with presidents can backfire for judges in other contexts. In post-independence African countries, controversial rulings often undermined judicial authority in the early years of one-party rule. For example, when the Supreme Court in Ghana could not be trusted to rule in favor of the President, they lost significant jurisdiction over cases of political import, including treason cases. Political jurisdiction was redirected to a so-called Special Criminal Court, which operated outside of the normal justice system.

The creation of special courts is a common method of undercutting jurisdiction (Moustafa, 2015). By redirecting politically relevant cases to auxiliary legal forums or tribunals, regimes can fragment jurisdiction and thereby diminish judicial authority (Toharia, 1975; Pereira, 2005). Again, these tactics are not limited to dictatorships; they have also been routinely used by democracies, especially regimes that are emerging from long histories of autocratic rule (Kyle and Reiter, 2013). Even established democracies may erect special military courts or extralegal tribunals to limit the power of judges to hold democratic leaders accountable (Aoláin and Gross, 2013).

Evaluating jurisdiction against independence

This section illustrates the conceptual advantages of jurisdiction against conventional metrics of judicial independence. With respect to the latter, the vast majority of cross-national, time-series indicators rely on expert and household surveys or institutional and behavioral proxies (Linzer and Staton, 2015). These measures typically aggregate qualitative information about judicial performance as a one-dimensional score, facilitating comparisons across countries and over time. Recent studies have enhanced these scores through latent variable analysis, an approach which extracts and combines relevant information from multiple indicators to generate a more valid measure of the underlying quantity (Linzer and Staton, 2015; Crabtree and Fariss, 2015; Fariss, 2015). This approach is especially suited to the measurement of judicial independence since its practice is not directly observable (Rios-Figueroa and Staton, 2014). A recent example comes from Linzer and Staton (2015), who develop a latent measure of independence using time-series,

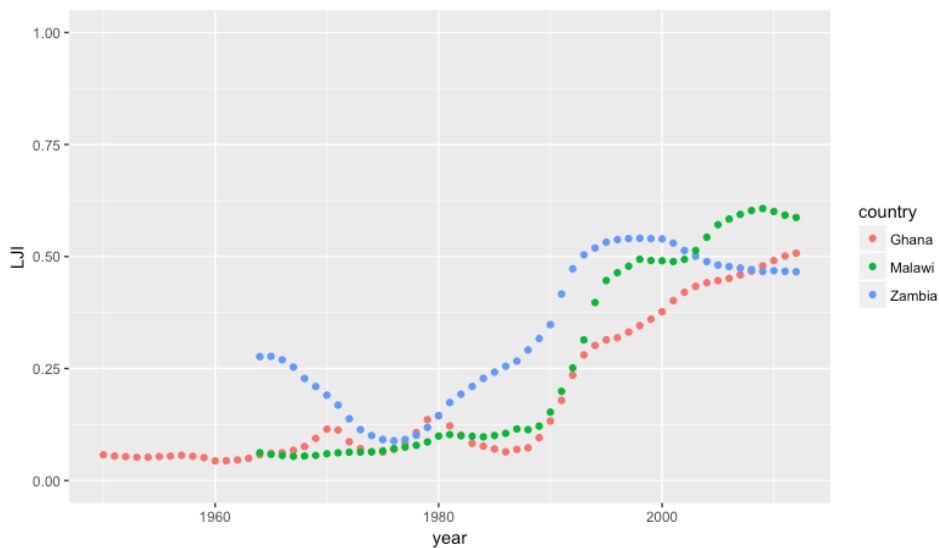
cross-sectional data derived from eight existing indicators (Feld and Voight, 2003; Howard and Carey, 2004; Gwartney and Lawson, 2007; Cingranelli and Richards, 2010; Marshall and Jagers, 2010; Keith, 2012; Johnson et al., 2013; PRS, 2013). The data covers 200 countries from 1948-2012 and measures independence along a one-dimensional, bounded interval scale ranging from zero (total dependence) to one (total independence). While the model assumes that scores trend smoothly within countries over time (Ginsburg, 2003; Helmke, 2005), it is still sensitive to sudden shifts in judicial behavior (North and Weingast, 1989).

Using the Linzer-Staton metric, Figure 5.1 shows the latent judicial independence score for Ghana, Malawi, and Zambia. The general trend suggests that while courts were relatively dependent during the post-colonial autocratic period, they have become more independent since democratization in the early 1990s. The measures thus conform to conventional expectations about regime-type and judicial power, where more democratic regimes have more independent courts. By looking at these indices alone, we might draw the conclusion that judicial power has followed a common trajectory of development across these three countries. However, governments in Ghana, Malawi, and Zambia adopted radically different approaches to jurisdiction over the post-independence period, reflecting different priorities of autocratic rule.

In Ghana, judicial development was notably affected by a series of military coups that led to judicial purges and the erection and dissolution of special courts. A series of unstable coup governments thus limited the political jurisdiction of the common law judiciary, mainly by granting military officers the power to adjudicate treason cases in their place. In Malawi, dictatorship was much more stable under the civilian leadership of Hastings Banda, who ruled as “President for Life” for nearly 30 years. Banda also deliberately limited the political jurisdiction of the common law courts, but chose to transfer adjudicating authority to so-called Traditional Courts, which were forums presided over by tribal chieftains. In this case, chieftains answering directly to the president were granted sweeping powers of trial and sentencing over treason cases, whereas judges trained in the common law tradition were politically marginalized. Finally, in Zambia, the civilian one-party regime of Kenneth Kaunda chose to work within, not around the common law courts. Rather than build auxiliary tribunals to adjudicate cases of political import, the common law courts retained their jurisdiction over major political issues of the day.

As these examples demonstrate, conventional metrics of independence can lead to oversimplified generalizations of how courts actually operate in different contexts. In particular, while latent judicial independence scores have converged over time, the political calculations driving these scores have differed in fundamental ways. Military and civilian regimes in Ghana and Malawi, respectively, chose to undercut judicial authority by working around the common law courts, undermining the political jurisdiction of formal judges and shifting these powers to military officers or tribal chieftains. By contrast, the civilian regime in Zambia chose to preserve the jurisdiction of the common law courts, but effectively created a judiciary that was subservient to the interests of the one-party regime. These more nuanced designs of judicial authority are lost in one-dimensional independence scores, which direct more attention to the potential pressures facing judges, but not what issues judges are ultimately allowed to decide. Conventional metrics of can thus obscure variation in the actual exercise of judicial authority. In what follows, I introduce a multidimensional metric of judicial performance that better captures these jurisdictional factors.

Figure 5.1: Cross-National Measures of Latent Judicial Independence (LJI)



Measuring jurisdiction in cross-national context

Jurisdiction is the scope of judicial authority, which can reflect the legislative, administrative, or regulatory priorities of political leaders. Courts may be asked to review constitutional amendments, or else rule on the legality of new legislation. Courts may also be delivered election petitions, and thus required to validate or invalidate certain members of parliament. In addition, courts may exercise authority over criminal cases, which means that judges are allowed to regulate the legality of political, economic, and social behavior. Whatever jurisdiction a court exercises, these cases can reveal the extent to which judges are major decision-makers or marginalized actors with little influence beyond the courtroom.

How should jurisdiction be measured cross-nationally? The literature on judicial independence offers some guidance. As mentioned before, most global measures of independence rely on expert assessments or *de jure* and *de facto* proxies, typically represented by categorical, ordinal, or interval variables. However, the few cross-national measures of jurisdiction that exist only define jurisdiction in *de jure*, not *de facto*, terms. While these metrics can help identify the formal dimensions of jurisdiction, they do not reflect how such powers are actually exercised in practice.⁶ The behavioral dimensions of jurisdiction are better captured through court records, which reveal what cases are actually presented before judges. However, such data remains elusive in developing contexts. While detailed case records have been effectively used in country-specific studies (Helmke, 2002; Pereira, 2005), a worldwide sample of case data does not currently exist (Ríos-Figueroa and Staton, 2014). Data sparsity is part of the reason why existing metrics have relied so heavily on expert surveys and proxy indicators.

⁶ For instance, the Varieties of Democracy dataset includes a categorical indicator for whether a given country recognizes “Specialized Courts,” some of which may fall outside of regular court jurisdiction. Similarly, the World Justice Project Rule-of-Law index includes an “Informal Justice” measure that accounts for whether customary systems of justice are recognized. However, beyond acknowledging the existence of these auxiliary institutions, these measures do not specifically evaluate whether this jurisdiction is actually exercised, or how it affects the authority of the regular court.

In light of these challenges, I develop a jurisdictional proxy that leverages information about judicial performance found in news media. I specifically propose using local news media to infer the scope of judicial authority, or what types of cases are brought before the courts and how these cases are interpreted in local context.

Scholars have long used news media to create a record of political events, ranging from non-violent protests to violent coup d'états (Jackman and Boyd, 1979; McGowan, 1984; McCarthy et al., 1996; Weinstein, 2006). Such data lends itself to historical event analysis by providing a record of contemporaneous events as they unfold in real-time (Franzosi, 1987). It is also reasonable to infer that issue-areas which receive greater media attention are considered more salient to a given body of readership (Woolley, 2000; Entman, 2007). In other words, the proportion of news coverage devoted to particular issues can be thought of as an indicator of public interest in different news topics (Walker, 1977; Flemming et al., 1999).

To date, news media remains underutilized in the comparative study of judicial politics. This is despite the fact that these sources can provide substantive information on the exercise of judicial power. Not only does the media often cover court cases as they unfold, they also describe legal-political developments beyond the courtroom. This broadened coverage can reveal how courts are positioned relative to other political actors, or the ramifications of legal decisions on political debates over time. Information found on the courts in news media is not always captured by formal court proceedings, which tend to be limited to the details of a given case.

However, media sources should be interpreted with caution. The most glaring criticism of this data is the potential bias of various reporting organizations, which are often driven by a variety of political and financial pressures (Franzosi, 1987). This bias can be partially offset by including reports from a variety of organizations, including state-owned, opposition, and private presses. Incorporating media from diverse news sources can provide a more holistic narrative around particular judicial events.

Data

Data for this analysis was collected from the online news site *AllAfrica*, an Africa-wide repository of news dailies produced by country-specific media organizations. The site covers a wide array of partisan perspectives, including government- and opposition-controlled newspapers and independent professional publications. To access the records published on *AllAfrica*, I programmed a web crawler to automatically retrieve every news article containing the term *judiciary*, *court case*, or *trial*.⁷ I restricted my focus to English articles published in Ghana, Kenya, Malawi, Sierra Leone, Tanzania, Uganda, and Zambia over the period 1996-2017.⁸ The final sample includes 18,944 news articles. To account for national variation in the size of news media, the following analysis evaluates results by country.

Topic modeling jurisdiction

⁷ These terms were selected for their specificity. Other judicial terms, such as judge, have multiple substantive meanings and thus returned many false positive search results.

⁸ 1996 is the earliest year of record on the site.

To analyze data of this magnitude, I utilize recent advances in computational text analysis and natural language processing that provide ways of leveraging “text-as-data” on a scale much larger than human annotators could achieve (Monroe et al., 2009; Quinn et al., 2010; Blei, 2012). Topic modeling is especially suited for the categorization task proposed here. The central idea behind this procedure is that while individual documents are directly observable, the underlying thematic structure connecting them may be “hidden” or latent (Blei, 2012). This problem is especially likely when dealing with large volumes of unstructured data, where thematic connections across thousands or millions of individual documents are not necessarily visible to the naked eye. However, topic models use a variety of algorithms to synthesize this information in a more digestible form. These algorithms are meant to approximate the human classification of text, but at a scale which is automated, scalable, and replicable (Mimno, 2012; Grimmer and Stewart, 2013).

For our purposes, topic modeling can help us infer how different jurisdictions actually operate. In an article about courts, for example, one topic might involve criminal prosecutions, featuring words such as *crime*, *murder*, *prosecutor*, and *jail*. Another judicial topic might center around land rights, using words such as *land*, *inheritance*, *property*, and *dispute*. These word patterns reveal what types of judicial behavior are actually discussed in the press, enabling us to infer the legal issue-areas over which a court presides.

Once topics have been identified, we can also examine the distribution of topics by country and over time. Analyzing these distributions can help us infer whether certain jurisdictions are exercised more frequently by the courts. Consider the following scenario involving countries A and B. In country A, the distribution of news coverage is evenly divided across three judicial topics: criminal prosecutions (30%), election petitions (30%), and civil litigation (30%). In country B, the distribution is more skewed: criminal prosecutions (70%), election petitions (15%), and civil litigation (15%). Comparing news coverage in countries A and B, it appears that courts in country B spend more time on criminal prosecutions than other legal issue-areas, or are at least deemed more newsworthy. The relative distribution of topics may thus reveal significant differences in the exercise of judicial authority in various contexts. In this example, the courts in countries A and B have been granted the same formal jurisdictions – criminal, electoral, and civil – but imbalanced coverage suggests that courts in country B devote more time and attention to criminal cases relative to other legal issue-areas. Topic modeling can thus reflect to what degree different jurisdictions are actually exercised.

This example also reveals the difference between *de jure* and *de facto* jurisdiction. While a court may be granted powers to hear all types of cases on paper, they may actually never be called upon to hear such cases in practice. This demonstrates the advantage of turning to newspaper articles rather than formal legislation. The latter would only capture the *de jure* authority of courts, not the *de facto* exercise of that power.

Estimation

Before estimation, the corpus is pre-processed to eliminate common lexical features that do not contribute to substantive analysis (Quinn et al., 2010). Capitalization, punctuation, numbers, stop

words,⁹ and various pronouns were removed. Sparse terms appearing in less than 5 documents and frequent terms appearing in more than 95% of the corpus were also dropped. Although many existing studies have taken the additional step of stemming the vocabulary, whereby all words are reduced to their stem root, recent work suggests that stemmers can actually degrade topic stability and often fail to provide meaningful improvement in estimated likelihood and topic coherence (Schofield and Mimno, 2016). I thus chose to preserve the original form of the vocabulary words.

These steps reduce the corpus vocabulary to a set of relevant lexical features. This vocabulary is summarized as a document-term matrix, where each row represents an individual news article, and each column contains the frequency of unique vocabulary words. The matrix dimensions are 18,944 x 73,974, representing 18,944 documents and 73,974 unique words. This matrix provides the basis for the following analysis.

The most popular topic modeling approach uses probabilistic algorithms, where topics are represented by distributions of words that co-occur with high probability (Grimmer and Stewart, 2013).¹⁰ These models are mixed-membership, meaning that each document is assumed to contain a mixture of topics (Blei et al., 2003; Lucas et al., 2015). However, recent work has highlighted the advantages of deterministic algorithms (Wang, 2012). Topics in this case are as defined as weighted word clusters, estimated by calculating the relative rarity of terms across all documents. Most deterministic models rely on the term frequency-inverse document frequency (TF-IDF) weighting scheme, which has been shown to be especially useful in identifying niche topics with specialized vocabularies (Greene and Cross 2016).¹¹ Deterministic approaches have also demonstrated greater topic coherence, defined as the degree of semantic similarity among terms used to describe a particular topic. In other words, a judicial topic that includes words such as *judge*, *court*, and *law* is considered more coherent than a judicial topic that consists of *cat*, *horse*, and *avocado*.¹²

Deterministic algorithms have also been successfully used in dynamic topic models that can trace the evolution of topics in a sequentially-organized corpus (Greene and Cross, 2016). Unlike static models, which assume that all documents in the corpus are drawn from the same underlying topics, dynamic models assume that topics can vary over time (Blei and Lafferty, 2006). Dynamic models can thus reveal more subtle thematic distinctions that may change over time (Greene and Cross, 2016).

Regardless of approach, both probabilistic and deterministic topic models require the number of topics to be specified prior to estimation. To date, there are no strict guidelines for specifying this number (Blei, 2012). Conventional practice has instead largely relied on “human judgment” to

⁹ Stop words are frequently occurring words such as “a”, “and”, “are”, “the”, and “it”.

¹⁰ More specifically, topics are generated by taking each word within a document and calculating the probability that this word is associated with a pre-specified number of latent topics (Blei, 2012).

¹¹ The IDF is the logarithm of the number of documents divided by the number of documents containing the term. This reduces the TF weight by a factor that grows with the number of documents. Higher weights are given to terms that occur frequently within a small number of documents, lower weights are given to terms that occur rarely or frequently across many documents. See <https://nlp.stanford.edu/IR-book/html/htmledition/tf-idf-weighting-1.html>.

¹² Probabilistic models tend to over-generalize and produce redundant results (O’Callaghan et al., 2015).

assess the quality of different specifications (Chang et al., 2009; Grimmer and Stewart, 2013).¹³ In line with existing approaches, I present the findings for a 4-topic model, which produced the largest number of distinct categories without substantive overlap.

In what follows, I present findings for both static and dynamic topic models. I estimate the static models two ways – with latent Dirichlet allocation (LDA) using Gibbs sampling as implemented in the MALLET toolkit (McCallum, 2002), and non-negative matrix factorization (NMF) using TF-IDF as implemented in sci-kit learn in Python. I then estimate a dynamic topic model across five-year increments using the dynamic-NMF method developed in Greene and Cross (2016).

Results: Static Models

Tables 1 and 2 provide LDA and NMF estimates for each 4-topic static model, respectively. For LDA, topic words are ranked according to the most probable terms from the underlying topic distribution; for NMF, topic words are ranked by their TF-IDF weights. A cursory examination reveals that LDA and NMF produce semantically similar topics across the corpus as a whole. Topic 1 describes general features of the courts themselves, including words such as *court*, *justice*, and *judge*. Topic 2 includes words such as *government*, *corruption*, *public service*, and *development*, suggesting a common theme related to public malfeasance. Topic 3 consists of *president*, *government*, *constitution*, *election*, and *power*, indicative of a constitutional topic. Finally, Topic 4 includes words such as *prison*, *crime*, *suspect*, and *violence*, which are associated with criminal activity. These word distributions (LDA) and rankings (NMF) can be categorized in the following terms: *general judicial function* (Topic 1), *corruption* (Topic 2), *constitutional* (Topic 3), and *criminal* (Topic 4). Note that Topics 2-4 may reflect different political jurisdictions exercised by the courts.

To understand how topics evolve over time, Table 3 reports the result from the dynamic NMF topic model, estimated across 4 discrete time windows spanning 5-year intervals. The results show semantically coherent topics resembling the output generated by the static LDA and NMF models, and are labeled as such. However, the dynamic model provides additional leverage over static analysis by tracking the extent to which different topics are represented in the corpus over time. Consider Figures 1-3, which illustrate topic proportions for Malawi, Kenya, and Tanzania (see Appendix for the rest of the countries in the sample). Each stacked bar represents the proportion of dynamic topics featured in a given time window.

These figures demonstrate how news coverage of jurisdiction has shifted over the past twenty years. These trends are most conspicuous in Malawi, where jurisdictional issues have been extremely volatile since the transition to democracy in 1994 (Figure 5.2). This volatility reflects the general tenor of Malawi politics in the post-autocratic period, where extreme party fluidity has generated political uncertainty and undermined public confidence in government leadership, especially in election years. While this uncertainty created openings for courts to resolve constitutional conflicts, it also heightened distrust between political leaders and judges during the late 1990s and early 2000s (Gloppen, 2003; VonDoepp, 2005; Ellet, 2015).

¹³ In other words, models are repeatedly run with varying numbers of topics and ultimately evaluated by whether the model produces substantive output or coherent topics.

These dynamics are on display in Figure 5.2, where the proportion of news coverage devoted to constitutional jurisdiction is denoted by the white bars. In the first time window, 1996-2000, constitutional cases received approximately 15% of news coverage. This was a critical period of constitutional development in Malawi, characterized by an unprecedented number of electoral petitions. Opposition actors were especially eager to use the courts as a forum to resolve electoral disputes, and in many cases were rewarded by sympathetic judges (Ellett, 2015). In fact, the courts actually declared several acts of the incumbent government as unconstitutional, providing greater leverage for the opposition to challenge the ruling party (Gloppen, 2003).

However, by the second time window, 2001-2005, coverage of constitutional cases was nearly halved. This precipitous drop reflects systematic efforts by the government to restrain the power of judges or to at least prevent them from trying cases of political import. In 2001, for instance, the President of Malawi initiated impeachment proceedings against three justices after a series of controversial anti-government rulings were delivered in the High Court (VonDoepp, 2005). While the charges were ultimately dropped, the lengthy inquiry was itself a significant distraction from the normal duties of the judiciary (Ellett, 2015).

Despite these earlier trends, subsequent efforts to limit the constitutional authority of the Malawian courts have largely failed. This reversal can be seen in the latter two windows of Figure 5.2, where the proportion of constitutional cases begins to increase in window 3 and expands considerably by window 4. In some cases, these trends have been driven by external pressure. For instance, the 2011 Injunction Bill, whose purpose was to ban the judiciary from issuing injunctions against the government, was repealed only a year later after foreign donors threatened to withdraw aid.

However, the explosion of constitutional cases from 2010-2015 has to a large extent been driven by internal factors. In particular, a series of constitutional and corruption crises beginning in 2012 revealed systematic dysfunctions within the Malawian government, creating unprecedented opportunities for the courts to hold leaders accountable to the law. In 2012, the death of the sitting president created a constitutional crisis and a dispute over succession rules. This dispute led to a failed coup d'état, allegedly abetted by the Chief Justice, and resulted in a treason trial in 2013. By 2014, the new government became embroiled in a massive corruption scandal that involved hundreds of millions of dollars in foreign aid being misappropriated by government officials. The scandal, which became known as "Cashgate," resulted in several high-profile prosecutions in the High Court. Former President Joyce Banda, who faces potential prosecution for her involvement in the affair, has not returned to Malawi since 2014.

Now consider Kenya, where news coverage of jurisdiction has remained relatively stable across successive time windows (Figure 5.3). This stability may be an indicator of the cohesive relationship that has developed between the courts and the government in Kenya, where judges are notoriously deferential to the interests of the ruling party (Mutua, 2001). However, the notable exception to this trend is window 3, 2006-2010, where the focus on constitutional jurisdiction falls relative to criminal and corruption.

The timing of this dip is not coincidental. In 2007, Kenya held a presidential election, the results of which were contested by both national and international observers (Gainer, 2016). While the

opposition accused the government of fraud, they refused to settle the issue in court because the judiciary was widely believed to be under the control of the ruling party. As opposition leader Raila Odinga remarked at the time, “we will not go to the courts controlled by President Kibaki” (Ndegwa, 2007). The contested election results sparked widespread violence around the country, resulting in death and displacement. While the government’s role in stoking this conflict was roundly condemned by both domestic and foreign actors alike, leaders were not held accountable for their actions in the courts. In fact, a 2011 Human Rights Watch report found that of the 1,300 killings committed in the aftermath of the election, only two resulted in murder convictions (Human Rights Watch, 2011). Police officers, widely implicated in killing and rape, enjoyed absolute impunity. The President was brought before the International Criminal Courts, but the charges were ultimately dropped.

The aftermath of the 2007 violence led to significant promises of reform, including a new constitution in 2010 and plans for major restructuring of the judiciary. Priorities for reform included greater insulation between the Supreme Court and the executive, doubling the national judicial budget, and a new vetting process for judicial appointments (Gainer, 2016).

However, by the 2013 elections, old habits rose to the fore. When an opposition leader challenged the findings of the Independent Election and Boundaries Commission (IEBC), the Supreme Court dismissed the petition and unanimously ruled that election had been conducted in accordance with the constitution. While the findings of this report remain contested, the integrity of the courts continues to be called into question. A month after the Supreme Court denied the petition, it was revealed that the chief registrar of the Supreme Court had embezzled 25 million USD. Pervasive corruption in the courts thus remains a lingering issue, and bribes to sitting justices are still common.

Table 5.1: Probabilistic Model (LDA)

Rank	Topic 1: Judicial function	Topic 2: Corruption	Topic 3: Constitutional	Topic 4: Criminal
1	court	government	president	police
2	justice	corruption	government	person
3	judge	public	constitution	case
4	judiciary	service	person	prison
5	case	development	political	child
6	chief	national	election	crime
7	judicial	report	party	government
8	law	judiciary	parliament	suspect
9	high	system	power	violence
10	lawyer	ministry	mp	security
11	public	sector	law	woman
12	committee	million	state	law
13	office	ministry	national	human
14	appeal	economic	leader	international
15	president	bank	minister	court

Table 5.2: Static Model (NMF)

Rank	Topic 1: Judicial function	Topic 2: Corruption	Topic 3: Constitutional	Topic 4: Criminal
1	justice	government	president	court
2	judge	person	constitution	case
3	chief	public	parliament	law
4	judicial	service	party	criminal
5	case	corruption	election	order
6	commission	right	political	appeal
7	lawyer	police	power	right
8	tribunal	law	government	constitution
9	public	state	mp	lawyer
10	service	national	minister	justice
11	magistrate	development	national	decision
12	president	political	state	trial
13	law	international	commission	magistrate
14	high	institution	constitutional	legal
15	court	security	leader	person

Table 5.3: Dynamic NMF Topic Model

Rank	Topic 1: Judicial function	Topic 2: Corruption	Topic 3: Constitutional	Topic 4: Criminal
1	judge	corruption	constitution	prison
2	court	government	election	police
3	justice	public	parliament	right
4	magistrate	report	president	prisoner
5	case	bank	mp	court
6	chief	sector	party	suspect
7	judicial	service	political	human
8	judiciary	institution	commission	inmate
9	high	economic	committee	case
10	appeal	corrupt	power	child
11	lawyer	police	minister	woman
12	law	person	national	officer
13	tribunal	development	constitutional	person
14	supreme	donor	government	law
15	cj	fight	person	death

Figure 5.2: Dynamic NMF Topic Model Malawi

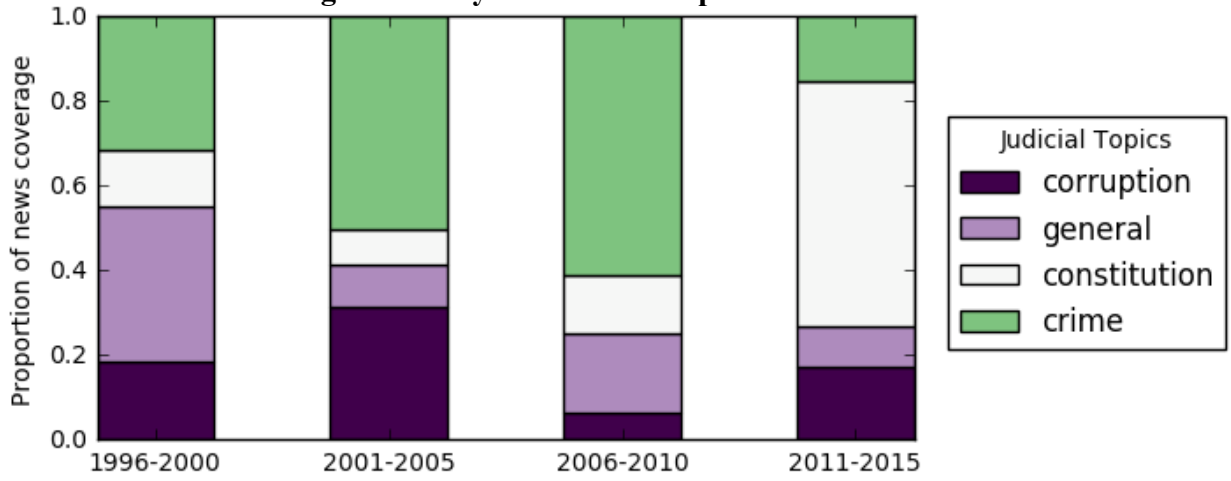


Figure 5.3: Dynamic NMF Topic Model Kenya

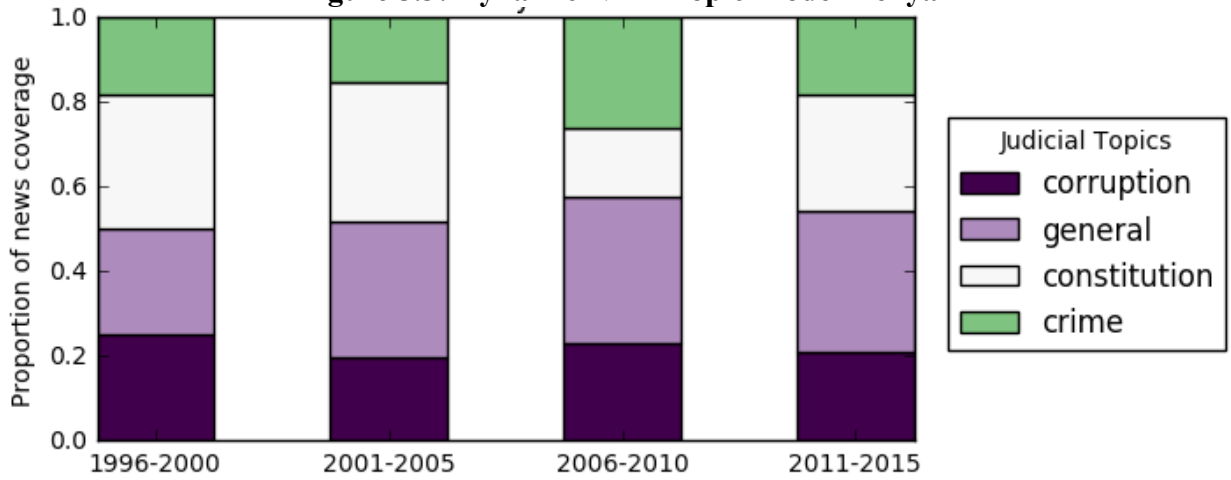


Figure 5.4: Dynamic NMF Topic Model Ghana

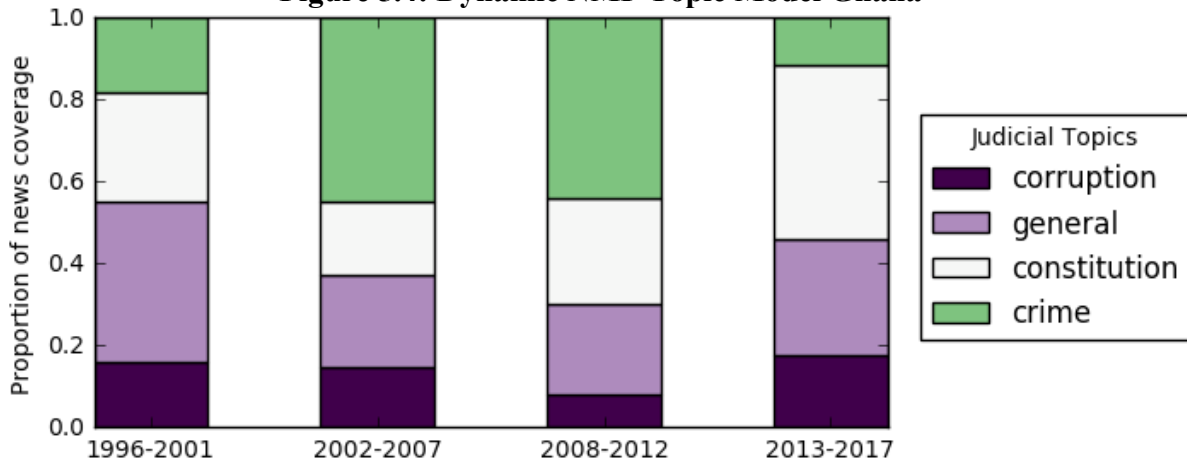


Figure 5.5: Dynamic NMF Topic Model Sierra Leone

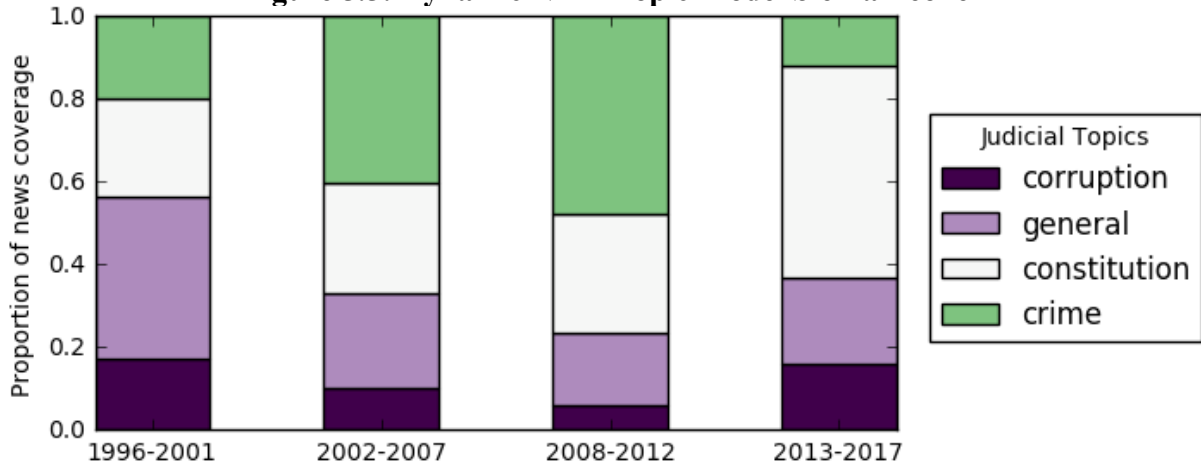


Figure 5.6: Dynamic NMF Topic Model Tanzania

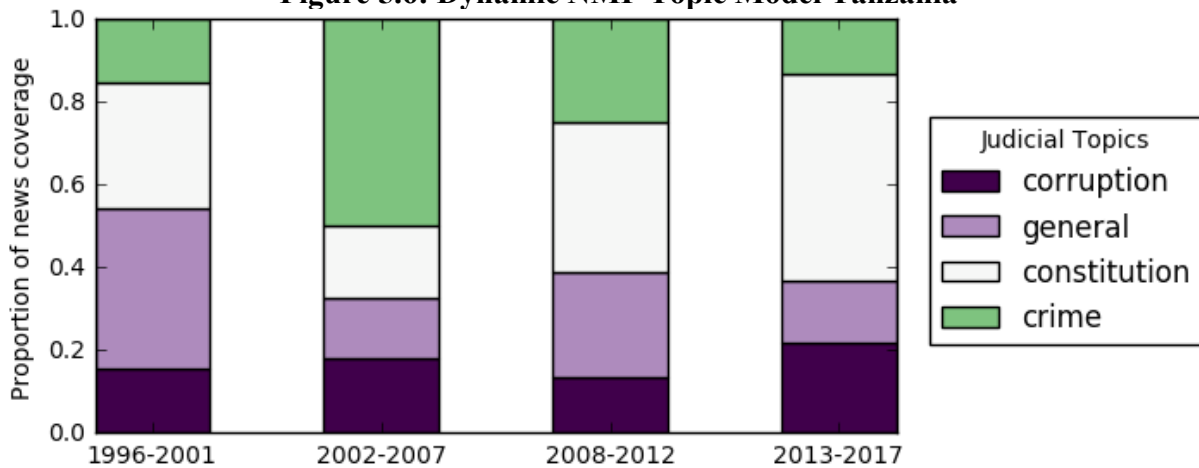


Figure 5.7: Dynamic NMF Topic Model Uganda

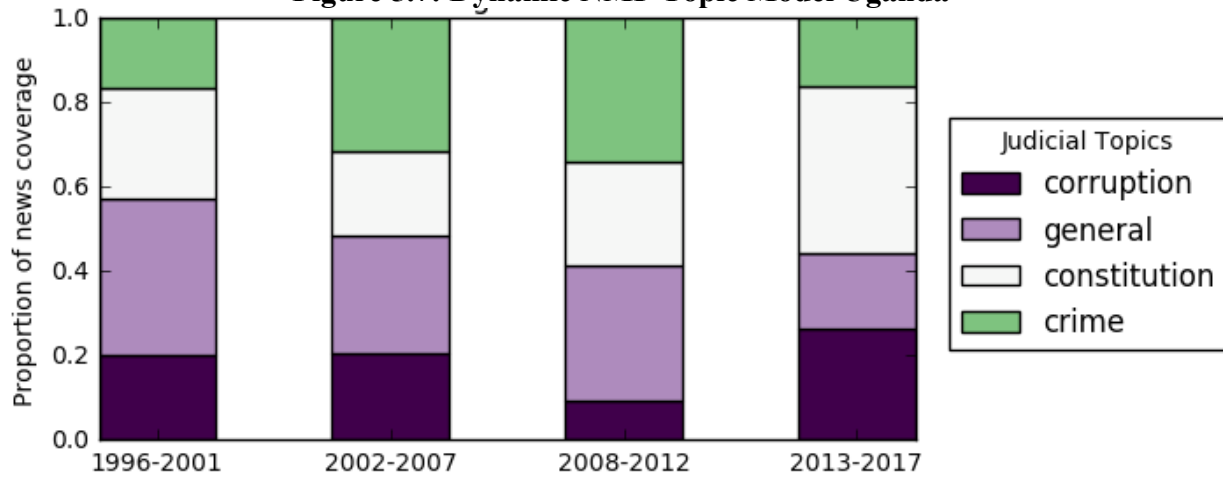
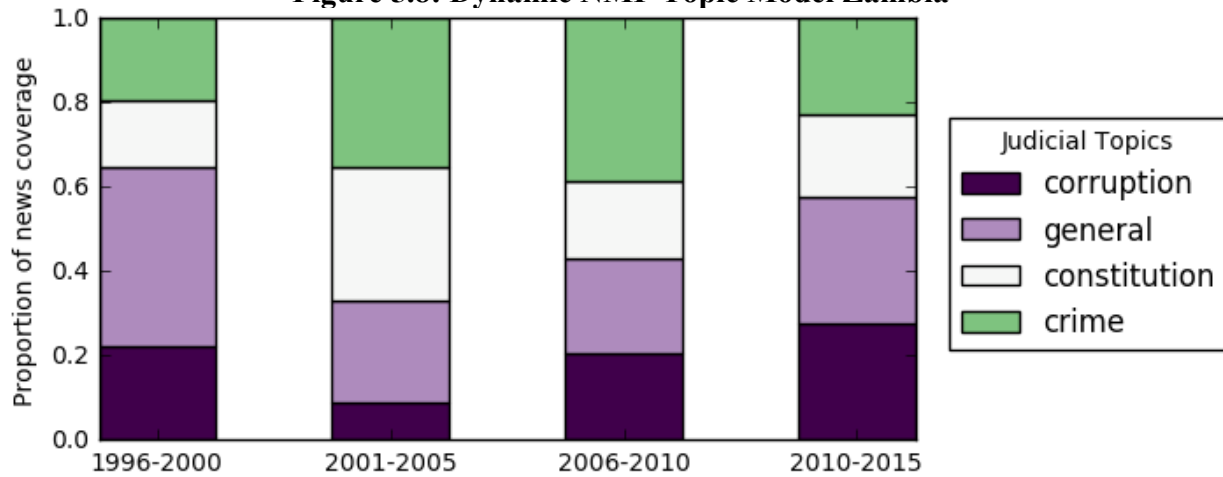


Figure 5.8: Dynamic NMF Topic Model Zambia



Discussion

The fact that courts have proven less subservient in Malawi than Kenya is no accident of history. These divergent outcomes reflect longstanding legacies of autocratic rule. In Malawi, the judiciary has never been a reliable agent of the executive. This distrust traces back to the early years of independence, when conflict between the English common law courts and Malawian president led to the establishment of the Traditional Courts in 1969, a system of retributive justice that operated beyond the purview of the normal judicial system. The creation of these tribunals was a direct attack on common law courts, which was in many respects a holdover institution from the colonial period. While the common law courts continued to exist, they were politically neutralized under the one-party dictatorship that governed Malawi until 1994. The Traditional Courts thus exercised jurisdiction over all criminal cases, including treason, where decisions were made by tribal chieftains answering directly to the president.

When the Traditional Courts were formally abolished in 1994 under the new democratic constitution, this required streamlining the judiciary under the common law system. Criminal jurisdiction was thus deferred back to the regular courts, which at least partially explains the refocus on criminal jurisdiction during the 1990s and early 2000s in Figure 5.2. The other factor driving these trends were rising crime rates (Ellett, 2015).

These trends also reveal lingering legacies of autocratic practices on post-transition governance. In particular, the hostilities between the executive and judiciary which defined the one-party era to a certain extent carried over to multi-party era. In Malawi, the common law judiciary was never a perfect agent of the president, and only continued to challenge political authority when their jurisdiction was expanded after the democratic transition. Taken in historical perspective, recent efforts to stymie judicial power after controversial rulings, especially in constitutional affairs, is part of a long-standing tradition of executive-judicial interaction in Malawi.

By contrast, the Kenyan judiciary has long held a reputation for political subservience (Oseko, 2011). From independence in 1963 until the general elections of 2002, the common law courts were relatively reliable agents of the government, rarely ruling against the interests of the ruling party. This meant that the common law courts exercised relatively wide jurisdiction over cases of political import. During the autocratic years, the common law courts heard a variety of election petitions, sedition cases, and treason cases, and could ultimately be relied upon to deliver verdicts that were favorable to the one-party regime (Rule, 1988).

While decades of judicial obedience have led to a stable relationship between judges and presidents, they have also weakened public trust in the judiciary and undermined confidence in the rule of law. Widely held perceptions of political bias in the courts have dis-incentivized people from using these institutions, and even encouraged forum shopping for the “right” judge (Afrobarometer, 2015). Such behaviors not only undermine the legitimacy of formal legal institutions, but are detrimental to the consolidation of democratic power (Carothers, 2002).

While recent efforts at judicial reform have attempted to address some of the worst excesses of judicial corruption, these efforts have not significantly improved public evaluations of judicial behavior, which have remained relatively consistent over time (Majtenyi, 2012). It will likely take much longer for the Kenyan courts to overwrite these autocratic legacies.

Conclusion

The findings from this chapter demonstrate that jurisdiction is a dynamic and multifaceted aspect of judicial power. I illustrate these findings using a series of static and dynamic topic models on jurisdictional topics in African news media, which reveal how judicial authority is discussed and interpreted in local context. By examining the exercise of jurisdictions in different countries over time, I have shown that the scope of judicial authority can be interpreted as product of broader political factors, including conflicts over government control and the level of trust between judges and executives.

This analysis has several implications. First, jurisdiction may be a more useful concept of judicial power than independence, especially when evaluating countries with long histories of autocratic rule. In these settings, courts were originally designed to protect arbitrary power, not democratic rule of law, usually by delimiting the scope of judicial authority. This meant that

courts could be relatively independent in some cases, but completely dependent in others. These were the institutional legacies confronting most African countries during the early 1990s when governments began to liberalize, and may help explain why evaluations of judicial performance have been largely mixed ever since. Contemporary African courts have been both lauded for their efforts to hold government accountable but also criticized for deferring to political interests (Gloppen, 2003; VonDoepp, 2005; Ellet, 2015). This inconsistency has made it difficult to discern whether courts have actually made meaningful advances or remain under the thumb of incumbent politicians (Gloppen and Kanyongolo, 2005). In light of these trends, jurisdiction may be a more nuanced indicator of autocratic holdovers than democratic metrics of judicial independence. These findings also suggest that whatever jurisdiction a court exercises today is not merely a reflection of contemporary politics, but also stems from deeply entrenched historical behaviors.

Second, the topic modeling approach provides a relatively efficient means of analyzing jurisdiction in cross-national context. By leveraging contemporary news media, this method is also able to discern how patterns of jurisdiction can evolve over time. While the models presented here are able to synthesize a vast quantity of textual information in a relatively condensed form, they are not a substitute for qualitative text analysis. Rather, these models are merely a tool to categorize text on a massive scale, the output of which still requires human interpretation.

Third, any news-based metric of jurisdiction is only as reliable as the news sources themselves. While the media sources analyzed in this chapter are considered largely reliable, countries with more restricted or polarized media environments may be more difficult to analyze. Jurisdictional studies would thus be greatly enhanced by turning to primary court documents, such as court transcripts or formal verdicts that are issued directly by judicial actors. The current limitations of such data have been discussed elsewhere in this chapter, but in a variety of developing countries, court records are increasingly being published online. The continued digitization of these records will ultimately create new avenues for generating jurisdictional topic models.

CHAPTER SIX

Conclusion

“The life of the law has not been logic: It has been experience...The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.”

– Oliver Wendell Holmes, *The Common Law I* (1881)

This study has sought to explain why autocrats turn to courts to institutionalize and regulate repression outcomes. To date, repression research has focused extensively on extrajudicial methods of state violence and coercion, and scholarship on comparative courts has more often characterized judicial power in democratic terms. While a separate literature on autocratic judiciaries highlights how courts can address key pathologies of authoritarian governance, the insights derived from these works remain disconnected from broader findings on strategies of autocratic survival. Indeed, the role that courts play in state repression, by both facilitating arbitrary abuses and resolving conflicts over power, remains under-theorized.

This dissertation analyzes these themes using a novel theoretical framework that highlights three critical dimensions of judicial authority under autocratic rule: function, compliance, and jurisdiction. First, function refers to the tasks judges are required to perform in service of the regime. For example, one critical function of courts under autocratic rule is to provide a forum for the government to formally prosecute political rivals. Second, compliance describes whether judges ultimately obey the objectives of their political masters, in this case, by convicting rivals for crimes against the state. Third, jurisdiction refers to the scope of judicial decision-making, or the issue-areas over which judges are allowed to exercise influence. Evaluated jointly, these three dimensions of judicial power help explain why courts become major political players in some autocratic contexts, but not others.

Using this framework, I argue that courts help autocrats both punish challengers and deter future coordination against the regime. These outcomes are achieved through a trial, defined as a formal, ritualized routine which generates common knowledge regarding the rules of political order. Establishing such rules or “laws” is vital towards regulating insider conflict within the regime, which is important towards maintaining autocratic survival. I refer to this process, wherein laws and courts are used to repress political rivals, as a judicial strategy of repression.

To substantiate the argument, I use both qualitative and quantitative tools to marshal support for each link in the causal chain. My analysis focuses on former British African regimes in the postcolonial period, a setting that is ideal for the study of autocratic courts for two reasons. First, the British erected similar judicial institutions across different colonies, structures that were largely maintained by post-independence governments. Second, while most African regimes transitioned from multi-party government to one-party dictatorship after decolonization, the process and rate of consolidation varied. Focusing on cases with shared judicial infrastructure

thus enables me to control for common institutional and geopolitical factors while exploiting variation in the development of repression strategies over time.

I find that in former British Africa, a judicial strategy of repression was more effective when rulers chose to work within, rather than around, colonial institutions. In fact, some of the most repressive, compliant courts were direct legacies of British rule, even employing former colonial expatriate judges to decide major cases of intra-regime conflict. Appointing British judges also allowed African presidents to circumvent the indigenous judiciary, which was important because African judges were often less obedient to the directives of their political superiors.

To understand the legacies of autocratic repression on democratic development, I then examine how African courts have evolved since the end of one-party rule in the early 1990s. In Blantyre and Zomba, Malawi, I interviewed Supreme Court and High Court justices, human rights lawyers, constitutional law experts, and former political dissidents, actors who provided insight into how legacies of autocratic governance during Malawi's one-party period have been manifested in post-autocratic rule of law. I also created a novel cross-national measure of judicial power based on local perceptions of courts as reported in African media. Using a custom web-scraper, I collected over 20,000 articles published by various African news organizations between 1996 and 2017, the period following the end of one-party rule. Natural language processing of this media corpus revealed that political topics – constitutional and administrative – feature more prominently in countries that did not heavily politicize courts during the one-party era. I pair these findings with country case studies to analyze potential mechanisms linking postcolonial jurisprudence and contemporary judicial practices.

Implications for autocratic survival

The argument advanced in this dissertation deviates from conventional understandings of judicial politics, specifically, the role courts play in strategies of autocratic survival. When autocratic rulers turn to the courts to resolve political disputes, scholars and practitioners alike tend to depict such moves as a positive development. Whether it's an election petition, a sedition case, a treason case, a corruption case – the fact that an autocrat is deferring decision-making authority to another actor makes the action less arbitrary, de-personalizes it to a certain extent. However, it is too easy to look at these processes from the outside and jump to the conclusion that a judicial process is going to be more just. But in many cases it is window-dressing. Talk about British officials that did not want to interfere with a judicial process. Like in Malawi, even though the Traditional Court proceedings were far from free and fair – judged by tribal chiefs who deferred to police, no lawyers allowed – British officials thought it was a judicial process and could not interfere.

Autocrats may adopt the trappings of liberal democracy without actually democratizing. We have long recognized this fact with respect to parties, legislatures, and elections. But for some reason, we are less willing to take this stance with respect to courts. The role that courts play in consolidating personalist dictatorships, in democratic backsliding, has been long ignored. This dissertation is an attempt to fill that gap.

Implications for judicial politics

This study also has implications for our understanding of judicial politics. The notion that courts are a double-edged sword – capable of enabling but also constraining arbitrary authority – is pervasive in studies of democratic and autocratic regimes alike. Such scholarship tends to share an underlying assumption that judicial independence is an achievable outcome, and in many cases, a product of institutional maturity. In other words, all courts have the potential to be free and fair, so long as political leaders and judicial agents are invested in right reforms. This widely-held belief in a natural trajectory of judicial development has led to the logical conclusion that all courts, both democratic and autocratic alike, should be evaluated by the same criteria, mainly whether judges are independent arbiters of the law. However, my findings suggest that fixating on questions of judicial autonomy can lead us to overlook alternative dimensions of court performance that may be more relevant to the autocratic experience. Many courts around the world have been designed for an entirely different set of political objectives, including autocratic survival, which can result in an alternative trajectory of institutional development.

Implications for post-autocratic rule of law

This dissertation provides evidence that a judicial strategy of repression helped many autocratic regimes weather major conflicts in the postcolonial period. In the Kenyan case, President Jomo Kenyatta Kenyatta effectively managed intra- and inter-regime conflict by directing different challenger-types to different forums, and was ultimately able to consolidate his authority in the form of a one-party state. The more frequently these institutions were used, the more enshrined these practices became. And the fact that most of these regimes remained autocratic from the early 1960s through the early 1990s suggests that patterns of judicial and extrajudicial repression were relatively established by the time of democratization. What legacies, if any, did judicial strategies of repression have on post-autocratic rule of law?

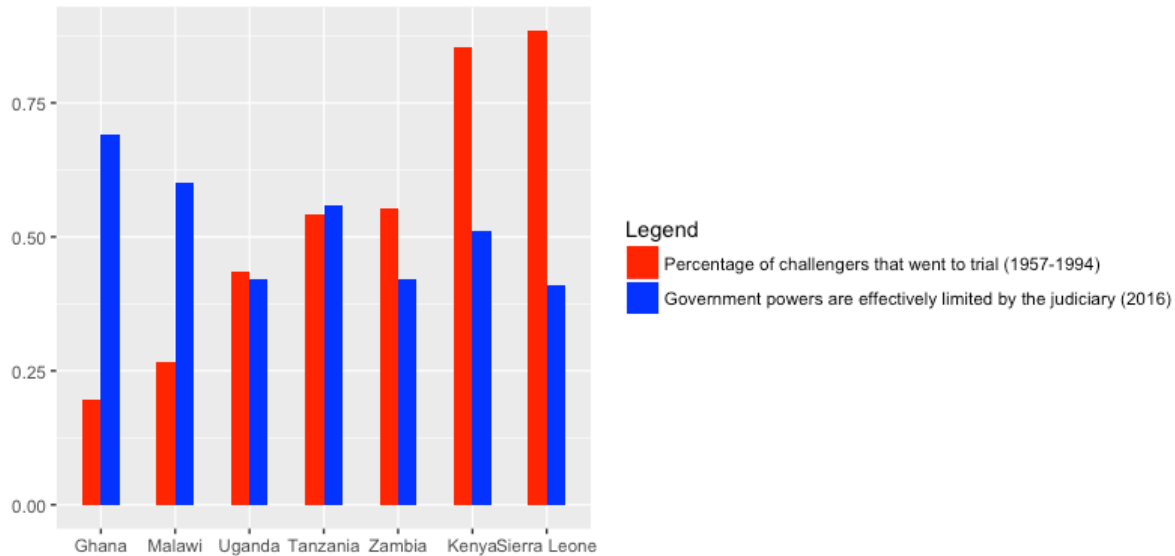
Consider Figure 6.1, which summarizes repression trends for all party, military, and opposition challengers from 1957-1994 in the dataset, sorted by country. The height of the bars indicate the percentage of challengers who were prosecuted in court. For example, the first bar indicates that in Ghana, approximately 25% of all challengers were repressed judicially, meaning that the remaining 75% of challengers were dealt with extrajudicially.

The historical repression data is plotted against the 2016 World Justice Project's Rule of Law Index. This data comes from both household and professional surveys that are further validated against third-party sources. Scores are normalized along a [0,1] interval, where 1 indicates strongest adherence to rule of law. I plotted the indicator measuring the extent to which government powers are effectively limited by the judiciary.

Intriguingly, the data suggests an inverse relationship between the politicization of courts during the autocratic era and judicial independence in the democratic era. In particular, the degree to which the courts were used to repress political rivals before democratization seems to have had lasting impact on the ability of the judiciary to hold leaders accountable, or else created judicial institutions that are resistant to democratizing reforms. This pattern is especially striking in Kenya, where a judicial strategy of repression was effectively used to stabilize autocratic power

in the wake of two major coup conspiracies. Kenya’s 2016 judicial independence score is approximately 0.5, among the lowest in the sub-Saharan African region. These findings are only suggestive, since there are likely a variety of other contemporaneous factors which drive modern rule of law indices. However, future work should examine whether these trends reflect the persistence of autocratic institutions in post-autocratic judiciaries.

Figure 6.1: Autocratic Repression and Post-Autocratic Rule of Law



Future Questions

The African countries analyzed in this dissertation have undergone significant transformations since the early days of independence. After several decades of autocratic rule, nearly all have transitioned from one-party or military dictatorships into multi-party systems, and many have attempted to restructure the nature of executive-judicial relations in the process. These transformations raise important questions about the ultimate trajectory judicial reform and the evolving role of courts in political survival. In particular, is a judicial strategy of repression still relevant for a post-autocratic world? Who are the insiders and outsiders in a multiparty democracy? How do ostensibly democratic leaders cultivate compliant courts?

The analytical framework advanced in this dissertation – function, compliance, jurisdiction – lends insight into answering these questions. Regarding function, current trends suggest more continuity than change in how courts are used as instruments of repression. The main difference is that the types of judicial procedures being used have adapted for the democratic age. Thus rather than prosecute insiders for treason, incumbents have increasingly charged their inner rivals with corruption crimes in court. And rather than detain opposition actors without trial, incumbents have instead increasingly resorted to prolonged “pre-trial detentions.” While pre-trial detentions are legally justified on the grounds that the accused will eventually face trial, in many instances, state prosecutors have dropped the charges after detaining the accused for months or years without bail, often during sensitive election periods. Pre-trial detentions under multi-party democracies are thus akin to the detentions without trial that occurred for decades under one-party dictatorship.

The question of compliance is even more important under multiparty regimes, where courts may feel pressure from a variety of political actors and interests. The elusive quest for judicial independence in many African democracies reveals how contemporary courts are struggling to confront their repressive or corrupt legacies. However, there has been variation in the ability of African judges to resist the directives of their political masters. For example, whereas judges in Kenya and Zambia remain mostly compliant to the incumbent, judges in Malawi and Uganda have directly challenged executive authority, even at the risk of damaging their careers or personal safety. Focusing on who these judges are and why they are disobeying broader regime objectives remains an important line for future inquiry.

As for jurisdiction, the issue of where a court directs its attention has become a key component of modern judicial reform. The significant and growing backlog of unresolved cases across all African courts has forced both political and judicial leaders to prioritize how a court spends its time, often directing judges to decide issues that are politically and economically pressing for the government. For example, many courts must focus on election petitions in a timely manner, and increasingly courts are required to resolving pending criminal cases as part of the government's commitment to restoring law and order. Examining how jurisdiction grows or contracts over time can thus lend insight into the governing priorities of modern democracies.

In conclusion, this dissertation provides a springboard for understanding not only how autocratic regimes use courts to maintain their own survival, but also post-autocratic regimes. Furthermore, these strategies are not static, but instead can evolve to confront different types of threats in a variety of political contexts. This is because courts do not merely provide legal cover for political authorities; they also generate shared beliefs in the legitimacy of power. Law is, as Cover (1986, 1604) writes, the "projection of an imagined future upon reality," and it is through courts that regimes can project this reality to a broader audience. This is not a new phenomenon, nor is it limited to the African experience. Indeed, the fact that regimes around the world continue to invoke such methods serves as a powerful reminder that strategies of autocratic survival often lie at the intersection of politics and the law.

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