

### Chapter 3: Challenges of Judicial Repression

When rivals to power threaten to undermine the regime from within, courts provide a convenient platform to showcase the trial and conviction of the autocrat's challengers, a performance designed to help the autocrat defuse threats from other political elites. However, using courts as forums of repression is not without challenges. While we often assume that judges in autocracies are more subservient than their democratic counterparts, judicial defection under dictatorship is not uncommon, especially when factionalism produces uncertainty about the amount of control autocrats exert over the ruling elite. In fact, the temptation for judges to defect may be greater when it appears that autocratic control is waning; a strategic judge may thus align with whomever appears to be the presumptive new ruler and issue judgements in their favor. And because autocrats turn to courts when their leadership is under threat, this may be the opportune moment for judges to strike against them.

That rivalries over power can prompt judges to defect reveals a key tension that autocrats face when using courts to repress: what makes a judicial strategy of repression appealing – uncertainty about the loyalty of insiders – is also what makes going to court potentially costly. In other words, if autocrats cannot guarantee the continued support of regime insiders, what is to prevent judges from aligning with their rivals?

This chapter examines how autocrats overcome these challenges by ensuring that judges do not defect when the regime is in danger of undermining from within. I argue that when the threat of elite defection is high, the autocrat may be better off packing the bench with judicial nonpartisans rather than partisan cronies. This argument runs counter to conventional notions of court packing, which typically presume that courts are more reliable when judges hold the same partisan preferences of their appointers. While such arrangements may be effective when partisanship is fixed, they can be considerably riskier in contexts where present allies are liable to become future foes. It can be less risky in these scenarios for the autocrat to select nonpartisan rather than partisan judges, since the former are not predisposed to align behind a particular faction.

The remainder of this chapter is organized as follows. I begin by summarizing the challenges of ensuring courts comply with autocratic objectives when elite loyalty is under strain and the consequences that judicial defection can have on regime survival. I then examine different methods autocrats can employ to punish judicial defection or prevent it before it occurs and evaluate the tradeoffs of these approaches. This is followed by my argument for how autocrats can mitigate the risks of judicial defection pose by packing the bench with nonpartisans.

To evaluate my argument, I turn to cases from postcolonial ex-British Africa. I first provide a broad overview of the institutional landscape confronting African autocrats after independence from British rule, in particular, the colonial holdovers that structured the legal and judicial system in the decades that followed. I next describe judicial decision-making trends and unpack these patterns by looking at how judicial identity corresponded with behavior on the bench. I show that more partisan judges tended to be less reliable agents of repression in treason cases, despite explicit signals from autocrats about their preferred outcomes. Declassified intelligence

reports compiled by the British government provide insight for why this was the case. In particular, private communications between African executives and British officials reveal concerns held by insecure autocrats regarding the reliability of partisan judges, especially those agents who had forged their political identities in the leadup to decolonization. These concerns led several African executives to make secret requests to the British for expatriate judicial professionals who could serve on short, regular rotations. In some cases, such staffing arrangements were maintained for decades after the formal end of colonial rule and ultimately helped mitigate the risks of judicial defection in cases of political import. I conclude by evaluating competing explanations for these patterns and the ramifications of these decisions on long-run judicial development.

### **The threat of defection**

Judicial subservience is often taken for granted in autocratic regimes. Because norms of judicial independence and due process tend to be less respected by strongmen rulers, it seems logical to assume that autocratic courts are subject to greater political pressures than their democratic counterparts. But arbitrary rule does not guarantee compliant courts. This is especially the case in fragmented regimes where judges may face competing pressures from different factions, all of whom are vying for a position at the top. When courts are called upon to adjudicate political disputes among such groups, strategic judges may choose to defect from the autocrat to rival factions if they believe the latter will soon be in charge. However, strategic defections can be trickier to manage when partisanship is unstable, as is often the case in less established autocracies where elite actors may be continually defecting from and reentering the central ruling group. Under such conditions, it is not clear who is aligned with whom and for how long these alliances will last. Partisan fluidity can thus generate uncertainty about the level of support autocrats actually enjoy, which can prompt judges to issue rulings that disfavor the autocrat in favor of his rivals, especially if it appears that the autocrat's grip on power may be loosening.

*>>>Give examples of how judicial defections have contributed to the downfall of autocrats or perpetuated crises: Kwame Nkrumah, Hastings Banda...*

### **Ex post punishment**

In light of these challenges, when autocrats decide to use a judicial strategy of repression, the key task is ensuring that judges act in concert with repression objectives. To this end, autocrats can employ a variety of strategies to punish judicial defection after it occurs, including both direct and indirect forms of violence. Such violence is common in autocratic contexts, where errant judges have been physically abused, harassed, exiled, murdered, and even disappeared. In addition to overt acts of violence, autocrats may invoke more institutionalized sanctions against judges, ranging from dismissals or demotions to investigations or prosecutions. Typically, the logic of direct and indirect violence is deterrence, to demonstrate to judges the consequences of defection and thereby deter repeat offenses in future. The fact that the judiciary stands relatively defenseless vis-à-vis the other branches of government makes it reasonable to assume that judges are more vulnerable to such methods of coercion.

Yet, just because judges lack the wherewithal to defend themselves does not mean that attacking them is without cost. Consider the potential ramifications of attacking the bench. First, reacting negatively to judicial rulings reveals failure to dictate judicial outcomes in the first place. This admission can be compromising for autocrats when the judiciary is already considered weak: if it appears that autocrats cannot control even a supposedly toothless institution such as the courts, it is logical to presume that they will also face difficulty ensuring the compliance of more powerful branches of the state, such as the military. The act of attacking judges can thus make it appear that autocrats are losing their grip on power, which exposes them to future attack.

Second, going after judges can prolong, rather than resolve, ongoing tensions within the regime. This is because whatever conflicts that were supposed to be settled in court have now escalated into discord between autocrats and judges. Widening the scope of conflict to multiple actors – i.e. political rivals and now disobedient judges – can be problematic when there is already uncertainty about the ability of autocrats to defuse threats to power. And because judges operate in spaces designed to bring conflict out into the open, whatever conflict transpires between autocrats and judges is more likely to be brought to the fore. Ironically, the very thing that makes courts valuable to autocrats – visibility – is what makes judges risky to attack.

Using courts to repress political rivals can thus be challenging for autocrats along multiple dimensions: judicial defection may not only contribute to broader perceptions of autocratic weakness, but attempts to sanction judges may actually exacerbate, rather than resolve, ongoing conflicts within the regime. This suggests that when autocrats invoke a judicial strategy of repression, they should find ways to restrict opportunities for judges to disobey rather than deal with disobedience after it occurs.

### **Ex ante controls**

Autocrats can adopt a variety of preventive measures to reduce the risk that judges disobey *ex ante* and thus eliminate the need to punish judges *ex post*. One of the most straightforward ways to cultivate compliant courts is through judicial selection. Specifically, autocrats can strategically select judges who are like-minded agents and thus predisposed to rule in their favor. This practice is known as court packing, a strategy oft-employed in both democracies and autocracies alike.<sup>1</sup> Conventional court packing strategies use partisanship as a predictor of future behavior, the idea being that partisan judges will tend to rule in favor of their co-partisan appointers.

In autocratic contexts, rulers often have greater discretion to pack the bench with agents who lack extensive legal training but have a background in politics, whether this consists of prior government service or membership in a political party. This does not mean that partisan judges always lack a background in the law, but rather that a partisan judge's political record takes precedence over their formal legal qualifications. Regardless of whether autocrats employ explicitly political agents or more formally trained legal professionals, partisan judges should not be considered as impartial arbiters of the law, but as actors who are deeply enmeshed in and thus responsive to the demands of their broader political environment.

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<sup>1</sup> Court packing is common practice in many established democracies. In fact, one of the most cited examples of court packing comes from the United States: President Franklin D. Roosevelt's attempts to pack the Supreme Court to pass his New Deal legislation.

However, regime instability can make partisan court-packing a risky strategy. This is because when judges themselves are partisan, judicial allegiance to the autocrat is subject to the same uncertainty that affects the loyalty of the ruling elite. Co-partisanship is not a reliable predictor of future support when partisanship is volatile, for political and judicial agents alike. That is, if the autocrat fears defection from regime insiders, they should also fear defection from partisan judges.

This discussion points to a broader issue about the role that judicial identity plays in the execution of a judicial strategy of repression: autocrats need to appoint subservient agents who deliver rulings that ensure their survival, but this requires being able to identify who is reliable in advance. When even co-partisans cannot be relied upon to repress, how do autocrats select judges who will comply when they need them to most?

### **Strategic selection: judicial nonpartisans**

When allegiances are uncertain, I argue that the autocrat can mitigate the risks of judicial defection by avoiding partisan judges entirely. The autocrat can instead pack the bench with nonpartisan judges who come from outside rather than from within the political system. Nonpartisan judges are formally trained legal professionals who have built their careers in the regular judiciary, not political office. Because they come from outside the regular political system, such judges are less likely to come to the bench with a strong stake in partisan conflicts and may thus be less susceptible to factionalism if and when it occurs. Judicial nonpartisans should thus be less likely to defect from the autocrat when rivals to power come from within the regime.

I refer to judges as nonpartisan in order to distinguish them from the partisan elites that we typically associate with conventional court packing strategies. But it is important to note that judicial nonpartisans are not merely valuable because they are less overtly political. More importantly, such agents come to court with a particular set of preferences that the autocrat can manipulate to create more compliant courts. A judicial outsider is specifically motivated by a careerist as opposed to partisan agenda, where their primary objective is to maintain or advance their status within the judicial hierarchy. The autocrat can thus cultivate the loyalty of a judicial outsider in exchange for protecting their status and livelihood on the bench. This is not to say that nonpartisans have no political interests whatsoever, but rather that such preferences remain secondary to their professional goals. The primacy of careerist over partisan objectives is what makes outsider judges more reliable agents of repression when partisanship is unstable.

While partisan judges may also be influenced by careerist objectives, such agents tend to be more personally invested in partisan conflicts than nonpartisan judges. This is because partisan judges come to court with a set of political preferences that may compete with or even supersede their professional goals, especially if they share the same preferences with whomever is on trial. From the autocrat's perspective, given the tradeoffs of relying on judges who have potentially competing partisan agendas versus those who come into office without such predispositions, they are often better off selecting the latter.

This discussion assumes that nonpartisan judges are more reliable agents of repression than partisan ones because they are less susceptible to the partisan conflicts that threaten to undermine autocratic regimes from within. But what prevents nonpartisan judges from becoming more partisan over time? And if we assume that nonpartisan judges are strategic, what is to stop them from defecting from the autocrat when struggles over power imperil the survival of the regime?

The autocrat can take *ex ante* precautions to prevent nonpartisan judges from becoming more partisan over time. In particular, the autocrat can limit the exposure of nonpartisans to partisan factionalism by shortening their tenure. Doing so helps reduce the time horizon of a given judge when deciding a particular case. Rather than make strategic calculations about whether the autocrat will survive over the long-run, a nonpartisan judge serving on a short rotation may be more inclined to issue rulings that preserve their immediate security and livelihood, which typically means ruling in favor of the incumbent. Shorter tenures can thus mitigate the pressure of judicial nonpartisans to strategically defect.

Requiring judges to serve on shorter assignments can mean that judges are frequently shuffled around the judicial system, assuming the supply of judges remains relatively constant. Judges may thus serve in different courts on regular rotation, moving in and out of different posts when needed. The regular, rapid movement of judges across different courts and localities can prevent them from establishing personal relationships with political elites, thus limiting opportunities to build strategic connections or alliances beyond the autocrat. This means that the short tenure and regular rotation of nonpartisan judges can help prevent such agents from becoming personally embroiled in partisan conflicts.

It is important to recognize that the autocrat's strategy is to keep judges insulated from pressures from other factions rather than to foster judicial loyalty. In other words, by lacking connections to other insider elites, judicial nonpartisans are more linked to the autocrat who appointed them, which can create powerful incentives for such judges to serve the incumbent, regardless of who is on trial and to which faction they belong. Furthermore, the fact that outsider judges come into office at the autocrat's discretion and without other connections to fall back on makes them more dependent upon the autocrat for their immediate survival. This dependency makes it unlikely that outsider judges will defect. In particular, the strong linkage between outsider judges and the autocrat who appointed them can make it more difficult for the former to survive the latter's ouster. This is because the judiciary poses a convenient focal point for new regimes to attack, especially if they want to distinguish themselves from the *ancien régime*. It is thus common for new autocrats to purge the judiciary soon after coming to power. From the perspective of an outsider judge, it remains uncertain whether they can curry the favor of a future autocrat by issuing a decision in their favor. But it is much more straightforward to please the incumbent, whose protection is more likely to continue if the judge complies. Better to serve the devil you know rather than the devil you do not know. This idea of linked fate between judicial nonpartisans and the autocrat can create strong incentives for the former to protect the interests of the latter.

By appointing judicial nonpartisans rather than partisan cronies, the autocrat is attempting to insulate courts from regime factionalism. However, removing partisan agents from the bench is not tantamount to establishing judicial independence as it is conventionally understood. Judicial

independence, defined as the ability of judges to make decisions without undue political interference, is considered a necessary component of rule of law and, by extension, a functioning democracy. But providing institutional safeguards to courts in a full-fledged democracy is categorically different from insulating courts from partisan conflicts in an unstable autocracy. In the latter case, the autocrat wants to ensure that courts are a reliable institution of repression, regardless of who is on trial. In other words, the objective is still judicial subservience to autocratic rule, and shielding judges from factional conflicts can help generate compliant courts rather than impartial forums of justice.

In sum, rather than entrust judges who are liable to become embroiled in factional conflicts, the autocrat can instead strategically select judicial agents who come from outside rather than from within the political system. Because judicial nonpartisans assume office without established political preferences, they are less likely to be predisposed to favor any particular faction when factionalism threatens to undermine the regime from within. This is not to say that outsider judges will never become partisan. But when the objective is to prevent judicial defection before it occurs, the autocrat may be better off from the outset appointing a judicial agent who lacks partisan ties that one who does.

### **Empirics: cases from postcolonial Africa**

To evaluate the argument, in this section I turn to cases from postcolonial ex-British Africa, where judicial compliance to autocratic repression varied across the region. I restrict my analysis to judges who served in the English common law courts, an institution originally installed by the British but preserved by many independence regimes. Focusing on how judges behaved within these institutional structures (as opposed to all types of fora) allows us to control for institutional legacies across different countries and regimes.<sup>2</sup>

### **Patterns of judicial defection**

Were judges reliable agents of repression in African one-party regimes? To answer this question, it is useful to examine sentencing trends, specifically, conviction rates of autocratic rivals who stood accused of treason. Recall that a judicial strategy of repression is principally concerned with conveying a simple narrative of political conflict: the rival rebelled, the rival failed, the rival is accordingly punished. Importantly, the conclusion of this story is a guilty verdict because this establishes the wrongdoing of the rival. Should the judge acquit rather than convict, however, they confuse this simple story and generate a new narrative: the rival rebelled, the rival failed, but the rival will be freed.<sup>3</sup> In fact, an acquittal may even suggest that the rival was right to challenge the autocrat and may thus legitimize further disobedience. Acquittals thus compromise the central objective of a judicial strategy of repression, which is intended to generate perceptions of control, not diminish the autocrat's authority. This suggests that conviction rates

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<sup>2</sup> The next chapter will examine the use of alternative judicial forums outside of the common law courts, institutions typically favored by military and personalist regimes.

<sup>3</sup> Alternatively, an acquittal may also suggest that the rival did not actually rebel and the autocrat was wrong to accuse them to begin with. What this suggests is that non-guilty verdicts are more inconclusive than guilty verdicts, the former of which can spawn multiple interpretations that undermine the autocrat's attempt to create common knowledge about their strength.

in treason trials are an important indicator of whether judges comply or defect with the autocrat's objectives.

Table 1 summarizes the sentencing outcomes of treason trials that were conducted in common law courts, broken down by country.<sup>4</sup> In nearly every country, courts more often convicted than acquitted, which suggests that judges were relatively reliable agents of repression. However, the rarity of acquittals did not make the impact of judicial defection, if and when it did occur, any less severe for the autocrat. This is because even a single acquittal could severely undermine the authority of the autocrat and perpetuate a crisis of confidence in their leadership, especially if the rival on trial was considered a viable threat to power. This is what happened to Kwame Nkrumah in 1963 and Kenneth Kaunda in 1971...

Table 1: treason trial decisions, common law courts  
1958-1994

	<b>Convict</b>	<b>Acquit</b>
Ghana	68	9
Kenya	555	9
Malawi	31	5
Sierra Leone	51	6
Tanzania	114	27
Uganda	94	58
Zambia	59	69
<b>Total</b>	972	183

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<sup>4</sup> As discussed in previous chapters, the sample includes seven former British colonies (Ghana, Kenya, Malawi, Sierra Leone, Tanzania, Uganda, Zambia) and spans independence through 1994.