

## I

## The Process of Punishment

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

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

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

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

<sup>1</sup> Albertus and Menaldo (2012); Huq and Ginsburg (2018); Scheppele (2018); Waldner and Lust (2018).

<sup>2</sup> Amnesty International (2017). <sup>3</sup> Shklar (1964), p. 149.

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

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

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

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

<sup>6</sup> Hodos (1987), p. 5. <sup>7</sup> Geerling et al. (2017).

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

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

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

### 1.1 THE PUZZLE OF POLITICAL TRIALS

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

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

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

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

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

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

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

## 1.2 Existing Explanations

5

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

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

### 1.2 EXISTING EXPLANATIONS

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

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

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

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

## 1.2.1 Concealment Theories

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

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

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

<sup>13</sup> Ginsburg and Moustafa (2008); Ginsburg and Simpsen (2013).

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

<sup>15</sup> Bermeo (2016). <sup>16</sup> Magaloni (2008).

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

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

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

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

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

<sup>18</sup> Hodos (1987).

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

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

### 1.2.2 Coordination Theories

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

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

<sup>20</sup> Chwe (2013), p. 19.

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

<sup>22</sup> Albertus and Menaldo (2012); Gandhi (2008); Ginsburg and Simpsen (2013); Slater (2010); Wright (2008).



## 1.2 Existing Explanations

9

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

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

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

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

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

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

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

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

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

### 1.3 A THEORY OF JUDICIAL REPRESSION

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

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

<sup>27</sup> Foucault (1979).

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

<sup>29</sup> Svolik (2012).

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