Introduction

"My legal team painstakingly prepared my documents. The District Election Commission had no choice but to register me as I followed the law to the t," my interlocutor explained and whipped out a thick pink legal file with documentation, ready to start proving his point. He did not look like the type of guy who follows the letter of the law very often. He was a former Soviet Army officer, who had made it in business during the messy post-Soviet transition. By his account, his efforts to reform his sector had won him many enemies among bureaucrats who then tried to "get rid of him" by sabotaging his business, putting him in jail, or worse. Even the political consultant whom he had hired from Kyiv to run his political campaign in a small, provincial single-mandate district, quit after only a few weeks, explaining that he had to look out for his family. Unfazed, my interviewee said he continued the campaign with the help of his former Army buddies. As the March 2002 campaign entered its final two-week stretch, polls showed that the Army officer turned entrepreneur had a realistic chance at winning a seat in Ukraine's parliament, the National Rada. That is when, in his words, *vlast'* (i.e., the regime) decided to remove him from the race. The district election commission that had registered him suddenly discovered a mistake in his property declaration and cancelled his registration. Over the next two weeks, his legal team appealed the decision all the way to the Supreme Court only to see the highest court dash his hopes of a parliamentary seat less than 24 hours before voting started.

"I knew all along that I stood no chance of winning in court against the regime, but the Army taught me to always stand up for myself," he said with a tinge of pathos in his voice. I sheepishly suggested that some oppositionists did win in court, so his chances at victory were not nil. He insisted that any victorious oppositionist must have bribed the judge and added that every judge had a price. I asked about the judge hearing his case. The answer took me on a short roller coaster of waxing and waning hope for the rule of law in

Ukraine. "He turned out to be an honest man," my interviewee started, "he told me that there was no point in taking my money to put me back on the ballot, because my victory would be short-lived. Apparently, he had heard that there was a direct order from Kyiv to take me out of the race, so even if I won at the district court, I would be deregistered by a higher court and eventually by the Supreme Court. A refreshingly honest guy, I tell you." The tough, ex-Army officer and current entrepreneur then spent the rest of the conversation showing me petitions and court decisions, explaining in detail his legal case, and trying to convince me that he had meticulously followed the law and deserved a place on the ballot. He also ruefully decried the lack of rule of law and independent courts in Ukraine. He complained that without them all the promised civil and political rights guaranteed by the Ukrainian Constitution were meaningless. He said he hoped to live to see the day when law trumps money and power. He also said that he would enthusiastically participate in another election, if he lived to see it.

As I left the gawdy, nouveau riche restaurant where our interview had taken place, I thought about a paradox that I grappled with often during my field research in Russia and Ukraine. Most post-Soviet citizens appeared to be supporters of the rule of law, not legal nihilists. They professed to want to live in a society governed by law, and they eagerly pursued their legal rights through the legal process. The explosion of litigation rates in virtually every single legal issue area in both Russia and Ukraine has been extensively researched and documented and demonstrates that my interview subjects were not exceptions. Yet, the rule of law was clearly in crisis in both Russia and Ukraine. I heard repeatedly about how politicians leaned on the courts often to obtain favorable rulings in cases that interested them. I also heard about judges, who either yielded to political pressure, or, purportedly, took bribes in order to resist it. In either case, very few people, including post-Soviet judges themselves, felt that the courts were independent from outside influence and decided cases only according to the letter of the law.

Why has the rule of law proven so hard to establish in postauthoritarian settings, despite what appears to be near universal consensus that it is the most desirable legal arrangement. Why are independent courts such a rarity outside of the old consolidated democracies of Western Europe, North America, and Asia? Specifically, what factors promote the development of independent courts and what factors undermine this process? These are the questions that this book seeks to address through systematic qualitative and quantitative analysis of the output of Russian and Ukrainian lower courts during the late 1990s and early 2000s. I collected extensive information on litigants in 800 defamation lawsuits against media outlets and 252 electoral registration disputes and

used quantitative methods to calculate and compare the probability of victory in court for progovernment and opposition litigants. Both types of cases are politically salient and directly affect the provision of two central political and civil rights, enshrined in both the Russian and the Ukrainian post-Soviet constitutions – the right to stand in elections and the right to free speech. I also conducted interviews with judges, lawyers, litigants, and judicial administrators in both countries to probe the results of the statistical analysis and to examine the theoretical mechanisms that I identify.

Currently, two views dominate both the political science literature on judicial independence and the agenda of rule of law promoters at organizations, such as the World Bank, the U.S. Agency for International Development USAID, and the American Bar Association. An institutional theory posits that judicial independence results from the structural insulation of the courts from the other branches of government. In other words, the courts will be independent, if institutional safeguards are put in place, which make it impossible for politicians to interfere in judicial decision making. The second view holds that independent courts are the product of robust political competition. When incumbents are unsure about their chances of reelection, they offer or institute independent courts as insurance against persecution by future incumbents. In other words, politicians who expect to be out of power prefer to respect judicial independence today in order to increase the likelihood that the next incumbents will do the same.

This book presents and tests a third, competing theory of judicial independence, which I call the theory of *strategic pressure*. It applies to those regimes that are neither consolidated democracies nor consolidated autocracies, whether they are electoral democracies, hybrid regimes, or competitive authoritarian regimes. The theory posits that, in these regimes, political competition has the exact opposite effect on judicial independence that it purportedly has in consolidated democracies: It *hinders* rather than *promotes* the maintenance of independent courts. Specifically, political competition makes dependent courts more useful and more attractive to vulnerable incumbents. At the same time, intense political competition in these regimes does not seem to make it more costly for weak incumbents to exert pressure on the courts. Finally, political competition markedly increases the number of court cases whose outcomes matter to incumbents. As a result, weak incumbents (i.e., those who face stronger competition and a higher probability of losing the next election) are more likely to try to extract favorable judicial decisions in a greater number of cases. The consequences are the politicization of justice, the subordination of the courts to the executive, and the failure of the rule of law project.

The data presented in this book overwhelmingly support the predictions of the strategic pressure theory of judicial independence. In new democracies, where crucial democratic institutions such as a free press and an institutionalized party system are underdeveloped, electoral insecurity creates negative, rather than positive, incentives for incumbents. Rather than refrain from leaning on the courts and buttressing judicial independence, incumbents who face intense political competition and a realistic chance of losing power lean forcefully on the courts. Electorally insecure, weak incumbents interfere not only in high-profile cases that may be crucial to their survival in power, but also in many less salient, but politically consequential cases. Thus, political competition results in a politicization of justice and a reduction in independent judicial output.

The broader implication of this argument is not that political competition is bad for the rule of law and we should not welcome it. The suggestion is that the broader institutional context within which political competition takes place can determine its effects on the rule of law. Intense political competition and electoral uncertainty may create one set of incentives for politicians serving in consolidated democracies and a totally different set of incentives for politicians serving in new, emerging democracies. Thus, most broadly, this book's argument contributes to a vast and growing literature on the distinctive nature of regimes that hover in between consolidated democracy and consolidated authoritarianism. These regimes may mimic a lot of the accoutrements of a democracy, but in effect they operate very differently.

WHY STUDY THE RULE OF LAW?

The rule of law has become synonymous with a desirable legal system, just as democracy is widely seen as the epitome of a desirable political regime. International organizations advocate strengthening the rule of law around the globe. During the 1990s alone, the World Bank, USAID, and other development institutions spent an estimated US$700 million on programs promoting judicial reform and the rule of law (Messick, 1999). In a rare display of consensus, political scientists are also virtually unanimous that the rule of law, defined as equal protection and responsibility under the law, is desirable.

First, the rule of law promotes justice by increasing the predictability of state action. The rule-of-law doctrine's emphasis on the equality of litigants means that the laws on the books get applied more consistently, which increases predictability. Liberals argue that predictability is justice enhancing because it expands individuals' autonomy vis-à-vis the state and grants them more choice to govern their lives (Hayek, 1975; Waldron, 1989; Raz, 1990; Shklar, 1986).

Communitarians agree that greater predictability equals more justice because it contributes to the stability and viability of communities to which individuals naturally belong (Selznik, 1996).

Second, the rule of law facilitates the consolidation of democracy by guaranteeing basic civic and political rights (e.g., Linz & Stepan, 1996; Diamond & Morlino, 2004; Howard & Carey, 2004; O'Donnell, 2004). For example, the freedom and fairness of elections and the freedom of the press can both be easily undermined by powerful incumbents in the absence of stable rule of law. In addition, the absence of the rule of law usually undermines popular trust in formal democratic institutions (Rose, 2001) and thus contributes to political instability and regime fragility.

Third, the rule of law has long been considered an important predictor of economic development. The idea that a fair judiciary is indispensable to economic growth goes back to Adam Smith. A slew of recent empirical studies have confirmed an association between the rule of law and the expansion of a country's economy (e.g., Knack & Keefer, 1995; Kaufmann, Kraay, & Zoido-Lobaton, 2000; Feld & Voigt, 2003). The mechanism through which the rule of law purportedly causes economic development focuses on long-term investment. A judiciary that applies the laws on the books equitably and predictably effectively protects property rights from encroachment either by the state or by fellow competitors. As a result, economic actors feel secure to make long-term investments, which in turn foster economic growth.

In short, it seems that if a country is to overcome political instability, establish a democratic regime, and achieve higher economic growth, it has to have the rule of law. Establishing the rule of law is easier said than done, however. Some of the Latin American countries have had functioning democratic regimes for over two decades, but most have yet to establish solid foundations for the rule of law. Among the challenges are enduring executive interference in Supreme Court or Constitutional Court decision making, legal impunity for politically powerful actors, and lawless areas where the law simply does not reach. These problems are not specific to Latin America either. Virtually all postauthoritarian regimes in Africa, Asia, and the post-Soviet region display serious shortcomings when it comes to the rule of law. Instead, they feature elites that instrumentally use the law to extend their tenure in power by amassing personal fortunes, boosting their supporters, and/or weakening opponents.

JUDICIAL INDEPENDENCE AND THE RULE OF LAW

Why is it so hard to implement the rule of law where it has not existed before? Perhaps the biggest hurdle for postauthoritarian regimes is the absence of the

main institutional prerequisite for the rule of law, namely an independent judiciary. Only independent courts are likely to maximize the equality of litigants before the law. In Chapter 1, I argue that courts are independent when they produce decisions that do not systematically reflect the preferences of extrajudicial actors. I conceptualize judicial independence as a relational concept, which implies that every time we talk about how independent courts are, we need to specify the potential source of dependence. For example, in some countries or in certain time periods, courts may be independent from politicians but dependent on organized crime. In this book, I focus on explaining the variation in judicial independence from incumbent politicians.

In postauthoritarian regimes, judicial independence from politicians is crucial not only for establishing the rule of law but also for building a stable democracy. The courts can be instrumental to the functioning of basic democratic institutions such as free and fair elections, a free press, and a competitive party system. The courts can either act as watchdogs that protect basic civil and political rights or become attack dogs that destroy any viable opposition at the behest of the incumbents. Independent courts can effectively constrain powerful political actors from imposing their preferences in any dispute where they have a stake. Dependent courts can facilitate or tighten incumbents' undemocratic grip on power.

WHY DO SOME COUNTRIES HAVE INDEPENDENT COURTS AND OTHERS DO NOT?

Currently, political scientists attribute judicial independence to two main causal variables: structural insulation of the judiciary from the other branches of government and political competition. Institutional theories posit that structural safeguards make it impossible or too costly for politicians to interfere in judicial decision making (e.g., Fiss, 1993; Russell & O'Brien, 2001; Finkel 2004). Political competition or "insurance" theories hold that electoral uncertainty, which is high in competitive regimes, makes it beneficial for politicians to provide independent courts. Independent courts allow incumbents to minimize the risks of finding themselves at the receiving end of politicized justice when they are voted out of office (Ramseyer, 1994; Magalhães, 1999; Ginsburg, 2003; Stephenson, 2003; Finkel 2005), to monitor bureaucrats through the courts (McCubbins & Schwartz, 1984), and to deflect blame for unpopular policies to the independent judiciary (Shetreet, 1984; Salzberger, 1993; Whittington, 1999).

The majority of the theorizing about judicial independence has focused on constitutional adjudication and, consequently, on the behavior of the highest

courts (Whittington, 1999; Ginsburg, 2003; Chavez, 2004; Helmke 2005; Finkel, 2005; Vanberg, 2005; Moustafa, 2007; Trochev, 2008; etc.)[1]. However, the output of the lower courts seems to be just as important, if not even more important, to the overall level of the rule of law in the country. Lower courts hear the vast majority of cases. They are also the first point of contact between citizens and the justice system, and thus their behavior greatly affects citizens' perception of the level of the rule of law in their country. This perception is in turn important because it affects citizens' future decisions as to whether to take their disputes to court or to look for alternative ways of resolving them. We cannot assume that theories that explain Supreme Court output would also account for lower court behavior. After all, there are significant differences not only in the number of actors but also in the status between the higher and the lower court judges. Finally, some of the most influential theories of the rule of law and independent courts focus on judicial behavior in contract enforcement (Landes & Posner, 1975; North & Weingast, 1989; Weingast, 1997). However, the level of judicial independence from politicians may vary significantly across legal issue area within one country during the same time period. For example, in post-authoritarian regimes, economic disputes might be less important to incumbent power holders, than disputes related to the mechanism of attaining and holding on to power.

This book aims to fill these gaps in the literature by analyzing lower court behavior beyond the area of property rights enforcement. It considers the determinants of judicial independence from incumbents in politically salient legal issue areas. It focuses on the dynamic relationship between political incumbents and the courts in regimes that are neither consolidated democracies nor consolidated authoritarian regimes. This large, and growing, set of polities is characterized by an often-volatile combination of formal democratic institutions and leftover, informal authoritarian institutions and practices. For example, these regimes routinely hold elections to select the incumbents in the executive and legislative branches, but often lack some or most of the informal institutions that guarantee fair contestation and full participation. In addition, uncertainty is pervasive in such regimes, as old institutions crumble and old elites weaken, but new institutions and elites are of questionable strength and durability.[2] As a result, politicians in these regimes often have shorter time-horizons – they either (1) cannot be sure that they can plan to be in politics for the long haul or (2) think they could remain in power indefinitely, even if

[1] Notable exceptions are Ramseyer (1997) and Hilbink (2005).

[2] On the pervasive uncertainty of transitional settings, see, for example, O'Donnel and Schmitter (1986), Bunce (1993), Crescenzi (1999), and McFaul (1999).

elections take place, by manipulating the levers of power. Chapter 2 discusses the negative consequences of mixed institutions and high uncertainty on the rule-of-law project in these regimes.[3] It advances the argument that political incumbents, who care only about the present and the immediate future, choose to subordinate the courts more often than their counterparts in consolidated democracies, who have the relative luxury of engaging in longer-term planning of their political careers and legacies. In addition, the costs of pressuring the courts in the context of leftover authoritarian informal institutions and practices are lower on average, compared to the costs in consolidated democracies. Consequently, subservient courts are the norm rather than the exception in the regimes that are neither consolidated democracies nor consolidated authoritarianisms.

The main theoretical contribution of this book is the strategic pressure theory, which focuses on the relationship between political competition and independent courts in emerging democracies. The theory posits that intensifying political competition only further reduces the level of judicial independence because it increases the benefits that weak incumbents get from dependent courts and expands the set of cases that become politicized. The benefits of exerting pressure are larger because weak incumbents can significantly boost their chances of reelection through favorable court decisions. In addition, vulnerable incumbents not only insist on winning each case they are involved in but also try to exert pressure in all cases in which their competitors have a stake in order to weaken the competitors or simply to signal strength and thus prevent the opposition from recruiting supporters. Lower court judges, who face a collective action problem with resisting this pressure, end up systematically favoring the incumbents in all disputes. Thus, the end result of intense

[3] Finding a short term to describe all regimes that are neither consolidated democracies nor consolidated authoritarian regimes has proven to be very challenging. This is not a coherent regime type, and scholars have identified over 550 different configurations that populate this portion of the regime spectrum (Collier & Levitsky, 1997). In the title of the book and, intermittently in the book, I use the "emerging democracy" term. The term is very often used in news coverage of postauthoritarian countries, but it is less often used in scholarly accounts, perhaps because it implies that any regime purportedly transitioning to democracy is necessarily heading toward the ultimate consolidation of a democratic regime. This latter has been exposed as an erroneous and overly optimistic assumption (Bunce, 1995; Carothers, 2002), and I do not seek to revive it. With this choice, however, I partly aim to get away from the scholarly debate about the (possible) distinctions between some of the other more popular terms such as "electoral democracy," "hybrid regime," "competitive authoritarianism," or "diminished democracy." As I emphasize in this paragraph and elaborate in Chapter 2, the two regime characteristics that are crucial to my analysis are the mixed democratic/authoritarian institutional landscape and the high level of uncertainty. I do not want, however, to introduce yet another regime term to an already overcrowded field, so I have opted for "emerging democracy."

political competition is an even lower level of judicial independence and, consequently, the failure of the rule of law project.

JUDICIAL (IN)DEPENDENCE IN RUSSIA AND UKRAINE

December 3, 2004, was a coming-out party of sorts for the Ukrainian Supreme Court. In a defiant move against the incumbent Kuchma regime, twenty judges from the Supreme Court's Civil Collegium cancelled the decision of the Central Election Commission, which had declared President Kuchma's chosen successor, Viktor Yanukovych, the winner of the November 21 presidential election runoff. In the pithy, two-page decision, the Supreme Court argued that electoral law violations during the campaign and on election day (November 21, 2004) were so significant and pervasive that they made it impossible to determine with certainty the true outcome of the free vote. The ruling also ordered that a rerun of the runoff and scheduled it for December 26.[4] Embattled opposition candidate Viktor Yushchenko, his political allies, and the millions of supporters who had been protesting peacefully for over two weeks in Kyiv's Independence Square won a resounding victory. The court decision was, without a doubt, the climax of the Orange Revolution. It has been hailed as a rare triumph for the rule of law in the post-Soviet region and a demonstration of the Ukrainian judiciary's growing independence from politicians.

On May 31, 2005, it was Moscow's Meshchanskii district court's turn to enter news headlines around the world. A three-judge panel convicted Russia's wealthiest man, Mikhail Khodorkovsky, on charges of fraud and tax evasion, sentenced him to 9 years behind bars, and ordered him to pay the equivalent of US$613 million in taxes and fines. Once imprisoned, Khodorkovsky saw a series of court decisions dismember his multibillion-dollar company, Yukos. In February 2007, the Russian prosecution office opened a new criminal case against Khodorkovsky, and in 2010, Judge Viktor Danilkin from Moscow's Khamovnicheskii district court convicted Khodorkovsky again and sentenced him, this time, to a 14-year prison term. Khodorkovsky will not be a free man anytime soon. The oil tycoon himself, his defense, human rights advocates, opposition figures, and even former Russian judges have claimed that the numerous criminal cases against Khodorkovsky, his company Yukos, and other Yukos's employees were decided in the Kremlin rather than in court. Most in

[4] The full text of the Supreme Court decision can be found in English, here: http://www.skubi.net/ukraine/findings.html and in Ukrainian, here: http://www.scourt.gov.ua/clients/vs.nsf/0/2A1C4C7D8C6241CBC3256F9D00228DA5?OpenDocument

Russia and abroad share this opinion, and Khodorkovsky has become Russia's most visible modern-day political prisoner. Indeed, the selective prosecution of disloyal oligarchs, who defied the Putin administration's informal ban on meddling in politics, has generated talk about Russia's catastrophic failure at building a rule-of-law-based postcommunist state.

These rulings showcase the involvement of post-Soviet courts in the political process. However, does the contrast between Russia and Ukraine hold if we move beyond these high-profile cases? Has the Russian judiciary consistently been more dependent on incumbent politicians than the Ukrainian judiciary? Has judicial decision making been more politicized in Russia than in Ukraine? Have Ukrainian litigants consistently enjoyed greater equality under the law than Russian litigants? Has Ukraine indeed gone unambiguously further in establishing the rule of law than Russia? Apart from testing the theories on judicial independence, the book provides answers to important empirical questions about the nature of the Russian and the Ukrainian post-Soviet regimes in the period under study. Have Russian or Ukrainian parliamentary elections been fairer or, perhaps more accurately put, less manipulated? Are the Russian or the Ukrainian courts more vulnerable to pressure from politically powerful actors? Are the Russian or the Ukrainian media more often subjected to legal harassment?

To solve these empirical puzzles, this book presents a systematic examination of a large set of politically salient cases, decided by Russian and Ukrainian district courts during the 1998–2004 period. During this period, although both Russia and Ukraine routinely held elections, they had yet to consolidate either a democratic or an authoritarian regime. The analysis presented in this book argues that contrary to journalistic coverage and popular expectations, Ukraine fared worse than Russia at judicial independence. This is not to say that Russia had effectively implemented the rule of law by developing an independent judiciary. Rather, the evidence emphasizes that the rule-of-law project only suffered rather than benefited from the intense political competition that has been the norm in post-Soviet Ukraine.

The empirical chapters on electoral and defamation cases also aim to make a methodological contribution to the comparative study of courts. Currently, the literature uses three main measures – reputational indices, structural measures, and government batting averages at the Supreme Court. Reputational indices are useful for conducting large-*N* tests on the universe of countries, but the large standard errors associated with each country estimate make it hard to compare similar countries to each other. For example, the most that the reputational indices show is that the Western European democracies have more independent judiciaries than their Eastern European neighbors. In fact,