they are designed to be more competitive but also because of how the electoral process plays out. While the accumulated weaknesses and strengths of the regime matter, so do the shorter-term consequences of more effective challenges to its political monopoly. Such challenges, however, are the exception, not the rule—as indicated by the high rates of reelection of dictators in regimes that tolerate some, if only limited, political competition for office. Moreover, as in the cases of Azerbaijan, Armenia, and Belarus, vigilant leaders can keep themselves fully abreast of the threats posed by the successes of the electoral model in their neighborhood. This is a primary reason, for example, why the wave of electoral change may have ended in the post-Communist region, at least for the time being.

CHAPTER ELEVEN

Judicial Complexity Empowering Opposition?

Critical Elections in Armenia and Georgia

Bryon Moraski

Scholars and policymakers alike tend to agree on democracy's electoral components: elected officials, free and fair elections, inclusive suffrage, the right to compete for elected office, freedom of expression, freedom of association, and access to alternative sources of information (see Dahl 1989, 222). Yet, as many of the previous chapters in this volume suggest, the relationship between elections and democratization is more complicated. While casual observers may equate elections with democracy, the first part of this book emphasizes that the two are distinct. For example, Roessler and Howard depict the boundary between liberal democracy and electoral democracy as a "glass ceiling" for many states transitioning from authoritarian rule, even though both are characterized by regular, as well as free and fair elections. Lindberg, meanwhile, finds evidence to indicate that elections in Africa are themselves "a powerful force of political change," yielding direct improvements in the quality of political freedoms and civil rights. The generalizability of these conclusions remain in doubt, however. Not only do McCoy and Hartlyn find little evidence of such a "democratization by elections" dynamic in Latin America, but Teorell and Hadenius find that elections have relatively

small effects on democratization when the number of cases is expanded temporally as well as spatially. Rakner and van de Walle, in the second part of this volume, depict the viability of opposition parties as an essential element of democratic accountability. Yet, the absence of durable and competitive opposition parties in Africa reflects, among other things, political frameworks on the continent that concentrate significant power in the presidency while providing little opportunity for the opposition to groom politicians or gain policymaking experience.

Naturally, the contention that elections can spur democracy must confront a myriad of intervening variables. For neo-institutionalists (March and Olsen 1989), choosing among the plethora of institutional combinations could prove instrumental to democracy's prospects. Not surprisingly, though, a lack of consensus also exists as to how ancillary institutions assist "democratization by elections."[1] For example, O'Donnell (2004, 37) notes that in addition to electoral accountability, democracies must have societal accountability, in which groups, and possibly even individuals, can mobilize the legal system to place demands on the state or government.

Among the ancillary institutions that frame the backdrop of elections, courts stand out both for being prominently mentioned in the literature and for receiving relatively little attention. Political scientists have directed a substantial amount of energy toward understanding how electoral systems, executive-legislative arrangements, and federalism shape democratic politics (Amoretti and Bermeo 2004; Bunce 1999; Coppedge 1994; Cox 1997; Duverger 1954; Filippov, Ordeshook, and Shvetsova 2004; Fish 2006; Lijphart 1994; Linz 1990; Mainwaring 1993; Rae 1967; Taagepera and Shugart 1989). Comparativists have increasingly analyzed how the composition, organization, and operation of the judicial branch shape the rule of law in transitioning states (Eisenstadt 2004; Epstein, Knight, and Shvetsova 2001; Ginsburg 2003; Helmke 2002, 2005; Herron and Randazzo 2003; Staton 2006), but Shapiro and Stone Sweet (2002, 137) submit that social science scholarship on the judicial branch remains far behind the "global expansion of judicial power" identified by Tate and Vallinder (1995a).

Given the willingness of incumbents in the "gray zone" between democracy and dictatorship (see Carothers 2002b; Diamond 2002) to tilt the field of electoral politics in their favor while facing the strategic dilemma between the benefits and the costs of manipulation (see Schedler in this volume), it seems reasonable to assume that the judiciary may be critical both as an actor

and as a institutional structure in the struggle over whether elections should be allowed to have democratizing power. Accordingly, an investigation into how democracy's proponents utilize courts and judges in seeking to dislodge the incumbents of an entrenched illiberal regime represents a fruitful endeavor. This topic is conspicuously absent in the budding literature on electoral revolutions in the post-Communist countries (Anabele 2006; Beissinger 2007; Bunce and Wolchik 2006a; D'Anieri 2006; Kuzio 2005b; McFaul 2005; Mitchell 2004; Tucker 2007; Way 2005b). To address this topic, the chapter capitalizes on recent developments in the post-Soviet region to conduct a most-similar-systems analysis of the role that judicial design can play during electoral revolutions.[2] This chapter also supplements Bunce and Wolchik's contribution in this volume by highlighting a crucial factor in two of their cases: one found among their class of successes (Georgia) and one among their failures (Armenia).

I begin with a review of some of the key literature linking judicial activism and judicial independence. I then examine whether variations in judicial design and reform in Armenia and Georgia help account for the different outcomes in the two cases. There are two main findings. First, electoral revolutions take on a legal character in states with a surprisingly low level of judicial independence. Second, whether a judiciary is used effectively depends on aspects of institutional design rarely considered in the literature, such as the number of judicial access points available to those claiming fraud. I am not arguing that court action is the sole, or even the primary, explanation for regime change in places like Georgia, Kyrgyzstan, or Ukraine.[3] Rather, the goal is to determine whether certain judicial configurations provide better opportunities than others for those pursuing democratization by elections.

Mobilizing Courts

Even in the advanced industrialized countries of the West, the willingness of courts to act as defenders of individual rights is a relatively new phenomenon. For much of its history the U.S. Supreme Court focused on business disputes, often supporting property-rights claims of businesses and wealthy individuals. While the court emerged as a guardian of individual rights in the late 1960s, as late as the mid-1930s, "less than 10 percent of the Court's decisions involved individual rights other than property rights" (Epp 1998, 2). To a large extent, existing literature links the ability of courts to protect

individual rights to judicial autonomy and review. After 1949, as dozens of authoritarian and totalitarian states transitioned to democracy, the use of judicial review increased notably, and today, "the rights and review tandem is an essential, even obligatory component of any move toward constitutional democracy" (Shapiro and Stone Sweet 2002, 136).

Still, the spread of constitutional review is somewhat controversial and paradoxical. It is controversial because, as democratic theorists observe, the presence of a judiciary empowered and willing to strike down national policies adopted by popularly elected bodies—even in the name of preserving fundamental rights—smacks of quasi-guardianship (Dahl 1989, 188). It is paradoxical because, as Shapiro and Stone Sweet (2002, 142) point out, the decision to grant courts the power of judicial review comes from those whom it will constrain, raising questions such as why politicians would freely give the judiciary the authority to control their activities. Shapiro and Stone Sweet offer what they call a "naively straightforward" answer. When a constitution is designed, designers cannot negotiate rules that govern all possible contingencies. Since the interests of parties (and even the parties themselves) will evolve and change over time, review mechanisms ensure that constitutional bargains and commitments made during a constitution's founding stick. Thus, an independent judiciary with the power of judicial review resembles "a fierce dog kept confined during business hours and set loose to roam the junkyard all night attacking all and any interlopers" (164). But not all courts bite their "masters" should they venture into forbidden territory. So the relevant question for studies of countries in transition is what factors differentiate an obedient judiciary from one that is willing and able to take action against any and all violators?

Most accounts consider independent courts as those most likely to protect the constitution and the people from a ruling elite bent on overstepping its legal bounds. Although judicial independence is a slippery concept,[4] at its core judicial independence entails the resolution of conflicts by a neutral third party. By utilizing judges with no interest in the case and no bias toward the parties, all citizens—regardless of their wealth or position in society—stand on equal footing before the law and possess the opportunity to protect their rights and security. Similarly, when the government is a party to a dispute, courts can be entrusted to arrive at a principled position only if they are not biased in favor of the government. Therefore, judges should be shielded from threats, interference, or manipulation that could lead them

to rule unjustly in the state's favor. Larkins (1996) calls the former aspect of judicial independence, impartiality, and the latter, insularity. When elections become strategic processes of contested political reform, judicial autonomy can reasonably be assumed to be a critical factor determining when elections have democratizing effects, and when they do not.

Constitutional provisions promoting impartiality and insularity are common in transitioning states. Their quality and effectiveness, however, vary substantially. Russell (2001a, 13–23) divides encroachment upon judicial independence into four categories: structural, personnel, administrative, and direct. Structural encroachment occurs when governmental bodies outside the judiciary create, modify, or threaten to modify judicial institutions as a way to shape adjudicative outcomes. Examples include court packing, stripping courts of their jurisdiction, and altering judicial jurisdictions. Personnel encroachment happens when governmental bodies use appointment, remuneration and removal, as well as promotions, transfers, training, professional evaluations, and disciplinary action short of removal, to influence judicial decisions. Administrative encroachment entails manipulating the assignment of judges to cases and courtrooms, the sittings of courts, and court lists so as to attain favorable legal rulings. Finally, direct encroachment on judicial independence involves blatant attempts to influence judges. They range from death threats to bribery to personal meetings behind closed doors with the intent of swaying members of the judiciary.

Of course, judges may not behave independently even when the formal relationships that exist between the judiciary and other political institutions permit such behavior (Russell 2001b, 6–7). Likewise, judges may defy the odds and act independently even where the formal structures enabling such autonomy are absent (see especially Helmke 2002, 2005). Yet Russell (2001b, 8) submits that emerging democracies are better off making constitutional provisions for judicial independence than not: Since one has little influence over the minds and behavior of individual judges, scholars and policymakers should focus their efforts on institutional mechanisms that impede relational violations of judicial independence. Similarly, Dodson and Jackson (2001, 255) argue that where behavioral manifestations of judicial independence are rare, the reforms that are most likely to make a difference are structural ones.[5] Dodson and Jackson promote methods of selection that, as much as possible, limit partisan intrusion into judicial appointments; provide relatively long tenures with adequate remuneration and legal safeguards against

retaliation for unpopular decisions; set conditions for removal from office for misconduct that are well grounded in the procedures of due process; provide adequate court resources in the form of professional staff support, facilities, and finances; and establish a legal and political culture supportive of the rule of law, particularly the notion that all individuals and groups are under the law and will abide by judicial decisions (256–57).

As Dodson and Jackson's list suggests, the ability of institutional designers to empower or constrain the judiciary is multidimensional. Indeed, the final point—the existence of a legal and political culture supportive of the rule of law—highlights the degree to which manifestations of judicial independence depend upon state-societal relations. Epp (1998) makes this point more explicit. He argues that an overlooked component of the rights revolution in the United States was the support structure for legal mobilization. While constitutional guarantees of individual rights and judicial independence—as well as the existence of activist judges and increased rights consciousness—facilitated the rights revolution, "sustained judicial attention and approval for individual rights grew primarily out of pressure from below" (2). Pressure from rights-advocacy organizations, rights-advocacy lawyers, and new sources of litigation financing were instrumental in democratizing access to the U.S. Supreme Court and leveling the legal playing field. Likewise, McCann (1994) demonstrates how legal discourses and tactics act as crucial tools for social movements seeking to alter the practices of those in power.

While most existing studies on judicial power depict it either as being provided from above or as being expanded from below, Woods (2008) notes that these approaches, in isolation, fall short. She argues that levels of judicial power reflect both the *supply* of judicial tools and powers (like judicial review) from elected politicians as well as the *demand* for greater judicialization of politics, often thanks to the legal mobilization of social movements. Understanding judicial power and independence as a reflection of supply and demand meshes quite nicely with O'Donnell's (2004) view that higher-quality democracy requires both horizontal and societal accountability. The role of the courts in election disputes not only depends on whether constitutional provisions supply courts the power to oversee elections, but also on mobilized and assertive groups or individuals in society willing to take claims of election fraud to the courts.

O'Donnell and Schmitter (1986, 65–70) make this point clear when they compare political transitions to a multilayered chess game. While the analogy

is far from perfect, its limitations prove illustrative and instructive. Unlike chess, the rules structuring political transitions are in flux and are malleable. The players and teams not only seek to establish rules that work to their advantage, but at least in the short run, these actors may attempt to change the rules of the game as play continues, producing a "nested game" (Schedler 2002b). Also, while chess is a single game in which two players compete for complete domination, political transitions more closely resemble a tournament of matches and multiple boards played among multiple teams composed of multiple players who may cooperate, enjoy mutual victories, and even switch sides. While O'Donnell and Schmitter depict much of the game of transition politics as being played among elites, they acknowledge that resurrecting civil society can change the game's trajectory: A strong popular upsurge may introduce new, possibly impulsive players, thus complicating the carefully laid plans of the incumbents.[6] Meanwhile, Schedler (Chapter 7 in this volume) emphasizes that where transitions have given way to electoral authoritarian regimes, the incumbents face a strategic dilemma between benefits and costs of manipulation. Such strategic calculations should be significantly influenced by the existence of an autonomous and impartial judiciary.

To the extent that players in political transitions are willing to cheat whenever they can (O'Donnell and Schmitter 1986, 66) and that some willingness to cheat continues on at least until democracy is consolidated, one should not be surprised to see players asserting any leverage they possess over those empowered to enforce the rules of the electoral game. In other words, the prospects for democratic consolidation depends not only on consensus that elections should be used to distribute political power (i.e., electoral accountability) but also on the presence of electoral referees with enough power and independence to preserve the elections' integrity (horizontal accountability). And in the game of democratic politics these referees are often courts and judges. At the same time, society's willingness to utilize these referees (i.e., societal accountability) during election disputes may prove to be watershed moments in democracy's evolution. It is at these points in history that more authoritarian players may decide to (a) abide by the rules of the game, thus conveying legitimacy upon the democratic process; (b) exert undue pressure on the electoral referees, thus undermining the prospects for, or at least popular faith in, free and fair elections for the foreseeable future; or (c) kick over the chessboard(s) and reestablish a more authoritarian system of gov-

ernment. Recent electoral disputes in the post-Soviet region provide the opportunity to explore these dynamics more closely.

Courts in Post-Soviet Countries

While both McCann (1994) and Epp (1998) focus on the relationship between courts and rights in the common law states, the collapse of Communism in Europe led to a proliferation of civil law states. The difference between common law and civil law states is an important one. The emphasis of the former on precedent creates a political and legal culture that is more likely to spawn the judicialization of politics. On the other hand, those states that give pride of place to monolithic codes and stress norms of deference to legislative interpretation impede judicial intervention and creativity.[7] Yet, legal action, even in the most favorable of institutional settings, often depends on the existence of structures in civil society that support private-party litigation. Soviet annihilation of independent civil society (see among others, Bernard 1993; Di Palma 1991; Javeline 2003; Kubicek 1999; Skilling 1983) should be a major impediment to the judicialization of post-Soviet politics. Thus, an investigation of the judiciary's role in post-Soviet electoral disputes provides a novel opportunity to consider the relationship between judicial design and judicial activism. Any factors that can facilitate the judicialization of electoral politics in this rugged terrain should be of notable import to other countries around the globe.

Among the post-Soviet states, Georgia, Ukraine, and Kyrgyzstan are obvious candidates for analysis, as each of these three countries experienced so-called "colored revolutions." In addition, the judiciaries emerged as noteworthy players in the Rose, Orange, and Tulip Revolutions, respectively. The Supreme Court of Georgia nullified the results of the country's 2003 parliamentary elections; the Supreme Court of Ukraine ordered a repeat election for its country's 2004 presidential runoff; and the Kyrgyz Supreme Court declared its country's February to March 2005 parliamentary elections invalid. In each instance, nationwide protests accompanied claims of electoral fraud, with popular protests turning violent in Kyrgyzstan.

Among these three cases, I focus on Georgia's Rose Revolution because it was the first to reveal that an electoral revolution could produce regime change in the post-Soviet space. And while these electoral revolutions surely learned lessons from revolutions elsewhere—with the Rose Revolution benefiting from graduates of the 2000 Serbian election (Bunce and Wolchik 2006a, 12)—diffusion dynamics were arguably lower in Georgia than in Ukraine and Kyrgyzstan. Focusing on Georgia is also useful because it permits comparisons with a strikingly similar case with a different outcome, Armenia.

Armenia and Georgia are both former Soviet republics located in the Caucasus. They both are largely Christian and are of roughly similar size.[8] In addition, civil society and democracy had been developing at roughly the same pace in the two states. Both Armenia and Georgia scored the same—receiving aggregate scores of 4.2—on the 2002 NGO Sustainability Index for Central and Eastern Europe and Eurasia.[9] Meanwhile, Freedom House labeled both as "partly free" in 2002, giving each scores of 4 on both its civil liberties and political rights dimensions. Equally important, Armenia experienced a controversial election in the same year as Georgia. Widespread allegations of vote rigging followed the 2003 reelection of Armenian president Robert Kocharian. Calls for Kocharian's resignation led thousands of demonstrators to take to the streets. But, unlike in Georgia, the Armenian judiciary neither nullified the 2003 election nor did it call for a revote. And, in the end, claims of electoral fraud and mass protest did not produce a change of regime.

To what degree can the different outcomes in Armenia and Georgia be attributed to the design of the judicial branch? Based on preexisting research on post-Communist courts, one might conclude "not much." In fact, according to Smithey and Ishiyama's judicial power index (2000), Armenia possesses a much more powerful and independent judiciary than Georgia.[10] Armenia scores 0.83, while Georgia receives a 0.56 on a scale of 0 to 1.0, with 1.0 indicating a judiciary with all of the constitutional provisions identified by the authors needed to ensure power and independence. A detailed audit of the judiciaries in both states confirms this assessment.

The American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI) rates the institutional factors shaping judicial independence and judicial activism in Armenia and Georgia separately. In particular, the ABA/CEELI devised a judicial reform index (JRI) and has used the JRI to evaluate the judicial systems in the post-Communist region. The index is intended to assess aspects of judicial reform that should facilitate the development of an accountable, effective, and independent judiciary (ABA/CEELI 2002, ii). To evaluate these judicial systems, the ABA/CEELI presented 30 standardized statements to judges, lawyers, journalists, and outside observ-

ers with detailed knowledge of the system. After evaluating the responses, the organization gave each statement a score of positive, neutral, or negative. According to the ABA/CEELI: "Where the statement strongly corresponds to the [perceived] reality in a given country, the country is . . . given a score of 'positive' for that statement. However, if the statement is not at all representative of the conditions in that country, it is given a 'negative.' If the conditions . . . correspond in some ways but not in others, it [is] given a 'neutral'" (ABA/CEELI 2005, ii–iii).[11] Table 11.1 provides a summary of how the two states' judiciaries compare on 10 dimensions of judicial independence using 16 JRI statements that reflect the conditions commonly identified in the literature.[12]

As one can see from the table, judicial independence in both Armenia and Georgia is, at best, a mixed bag. Armenia's courts are neither sufficiently impartial, nor are they significantly insulated from external pressure. While the situation is better for Armenia's Constitutional Court, which is the key judicial actor in electoral disputes, even its independence suffers from areas of vulnerability. Neither the appointment process for Constitutional Court justices nor the existing judicial codes of conduct in Armenia ensures that the court will decide cases in an impartial manner. Thanks to the political situation at the time, however, there are at least reasons to believe that the court was not biased in favor of the Kocharian camp during the 2003 electoral dispute. Specifically, Kocharian's predecessor, Lev Ter-Petrosian, not Kocharian, appointed the court. However, the financial position of the Constitutional Court in Armenia raises questions about whether its members were adequately insulated from political pressure emanating from the incumbent president. By comparison, Georgian judges actually experienced greater financial and professional insecurity in 2003 than did Armenian judges at the time. At the same time, the incumbent appointed the justices on Georgia's high courts, which should have yielded courts more likely to favor the incumbent government.

Table 11.1 Comparison of institutional safeguards advancing judicial independence in Armenia and Georgia

Judicial characteristics	Armenia	Georgia
Impartiality of constitutional court selection	Questionable, but appointed by previous administration	Questionable, and appointed by incumbent administration
Criteria for constitutional court membership	Average qualifications	Minimal qualifications
Protection from external pressure	Medium to low	Medium to low
Code of ethics	Limited	Limited
Process for complaints against the judiciary	None	Exists but used improperly
Judicial transparency	Medium	Medium
Financial support	Underfunded	Underfunded
Judicial salaries for constitutional court justices	High relative to other public officials	Low relative to other public officials
Job security	Medium to high	Medium to high
Personal security	Low	Medium to low

Sources: ABA/CEELI 2002, 2005.

With this information in hand, then, the surprise does not appear to be why Armenia's judicial branch failed to contribute to regime change during Armenia's 2003 presidential elections but, rather, how Georgia's opposition was able to obtain a favorable ruling from the judiciary during its 2003 parliamentary election. Answering this question requires a detailed comparison of the legal maneuvers employed during these two disputed elections.

Contesting Elections in Court: Lessons from Armenia and Georgia

Schwartz (2000) finds that election issues are among the most common subjects on the docket of post-Communist constitutional courts. At the same time, he notes that in almost all of the countries of Eastern Europe, the constitutional courts are not given the discretion to refuse to issue a ruling on a case brought before them. The courts may devise ways to avoid a case, but in general they follow the Continental practice of deciding every question properly brought before them. And, in Eastern Europe, a large number of political actors possess the right to bring cases to their constitutional courts. In fact, actors with standing before Eastern Europe's constitutional courts are commonly "those with the greatest interest and best opportunity: members of the opposition, and other officials unhappy with the actions of other public officials, governments, or legislative majorities" (Schwartz 2000, 29).[13]

Armenia's 2003 Presidential Election

As in other post-Communist countries, in Armenia judicial review of the constitutionality of laws and government decrees operates separately. Ar-

menia's nine-member Constitutional Court alone possesses judicial review powers. Of these nine members, the president appoints four members and the parliament (or National Assembly) appoints the remaining five (Constitution of the Republic of Armenia 1995, art. 99). The Court's jurisdiction includes "matters related to the constitutionality of law, National Assembly, government resolutions, orders and decrees of the president, and international treaties" (ABA/CEELI 2002, 1). According to Article 100 of the Armenian constitution, the Constitutional Court also has the authority to "rule on disputes concerning referenda and the results of presidential and parliamentary elections."

Leading up to the 2003 presidential election, standing before Armenia's Constitutional Court was severely limited. Only the president or one-third of the deputies sitting in the National Assembly had free reign to initiate cases before the Constitutional Court that challenged the constitutionality of laws (Constitution of the Republic of Armenia 1995, art. 101).[14] Due to these restrictions on standing, the Constitutional Court was relatively inactive from its creation in 1996 to 2002, rendering only 350 decisions (ABA/CEELI 2002, 2).[15] However, both presidential and parliamentary candidates have the constitutional right to bring disputes over election results to the court (Constitution of the Republic of Armenia 1995, art. 101), which means not only that Armenia's Constitutional Court is responsible for resolving election disputes but also that the natural litigants in such a suit have access to the court.

On March 5, 2003, the runoff to Armenia's presidential ballot occurred. Official results listed incumbent president Robert Kocharian as winning 67.5% of the vote and his challenger Stepan Demirchian, 32.5%. Not only did Kocharian's vote total prove to be the highest that any presidential candidate in Armenia had recorded since independence, but Western observers from the Council of Europe and the Organization for Security and Cooperation in Europe stated that balloting "fell short of international standards" (Danielyan 2003). In particular, controversy marked the two-week period between the two rounds of the presidential election. Roughly 200 Demirchian campaign aides were arrested, and the OSCE's Office for Democratic Institutions and Human Rights noted that state-controlled mass media outlets heavily favored Kocharian. Following the runoff, the Demirchian camp claimed that roughly 400,000 votes were "falsified in favor of the incumbent president" (Eurasia Insight 2003). Meanwhile, a report published in the newspaper *Aykakan Sha-*

manak claimed that as many as 600,000 ballots had disappeared the day before the runoff election. The Central Election Commission denied receiving any reports of stolen ballots, however (Eurasia Insight 2003). In an attempt to oust President Kocharian, the Demirchian-led opposition challenged the results before the Constitutional Court. The challenge coincided with ongoing street protests, including a march of an estimated 12,000 to 15,000 people marking International Women's Day (Hakobyan 2003).

The first round of the 2003 presidential election also was not without controversy. On March 14, the court ruled on complaints from first-round presidential contender Artashes Geghamian (ARKA News Agency 2003a). On March 19, the court asked the Central Election Commission to inspect a number of polling stations over the course of three days (ARKA News Agency 2003b). By March 25, the Constitutional Court's chairman, Gagik Harutiunian, issued the verdict that the plaintiff's side did not have sufficient grounds for the court to declare the first-round results invalid. He also announced that the court would begin hearing Stepan Demirchian's suit regarding the second round the following day (ARKA News Agency 2003c).

The results of Demirchian's case differed notably from that of Geghamian's suit. On April 16, even while upholding the results of the 2003 presidential election, the court also questioned the election's legitimacy. Specifically, the court noted that violations "that are incompatible with the further development of democracy" had occurred at different polling stations, both during the vote as well as during its tabulation (Khachatrian 2003). Moreover, it suggested that the controversy could be seen as a potential violation of Armenia's obligations under international treaties, such as the Universal Declaration of Human Rights. However, the court also ruled that the number of proven violations was not sufficient to warrant voiding the election, since Demirchian and his supporters could only document irregularities in fewer than 300 of the 1,864 precincts. So, while anecdotal evidence and popular reports indicated violations throughout the country and echoed concerns expressed by monitors from the Council of Europe and the OSCE, the court ultimately upheld the Central Elections Commission's decision to declare Kocharian victorious. Still, in an attempt to address the opposition's grievances, the court issued a nonbinding recommendation that a popular referendum be held on the election results. Not surprisingly, this tactic annoyed the opposition as well as the Kocharian camp (Khachatrian 2003).[16]

The decision by Armenia's Constitutional Court to recommend that a ref-

erendum be held on the validity of the 2003 presidential runoff led some opposition groups to conclude that the court had conceded, even if indirectly, that Kocharian's reelection was illegitimate. Demirchian himself submits that, by proposing a referendum as part of its decision, the Constitutional Court demonstrated that "even under pressure from the authorities, [it] could not reject the complaint" (interview with the author, June 2, 2008). Others at the time, though, like the anti-Kocharian newspaper *Aravot*, reacted to the decision with hostility. Following the decision, in a headline *Avarot* denounced the Constitutional Court as a "puppet of Kocharain" (Khachatrian 2003). In other words, Armenia's 2003 election dispute provides a striking illustration of how the question of judicial impartiality can take center stage in an election dispute, as well as of the potential for political suspicions to overshadow debates about the legal appropriateness.[17]

Georgia's 2003 Parliamentary Elections

Georgia, like Armenia, declared its independence from the Soviet Union in 1991 and adopted a constitution in 1995. In another similarity to Armenia, Georgia has a nine-member Constitutional Court that alone possesses judicial review powers.[18] Of these nine members, the president appoints three, the parliament chooses three (by a three-fifths majority), and the Supreme Court appoints three (Constitution of the Republic of Georgia 1995, art. 88). To be a Constitutional Court judge in Georgia, one only need be 30 years of age and have a university degree in law. Neither the Law on the Constitutional Court nor the Constitution stipulates that appointees have any legal experience.

The Supreme Court's role in the selection of Georgia's Constitutional Court justices differs markedly from the Armenian case, where only the president and parliament appoint justices. Presumably, the Supreme Court will ensure that some well-qualified justices find their way onto the court. Members of Georgia's Supreme Court, on the other hand, are nominated by the president and confirmed by a majority vote of parliament. They must be at least 28 years of age, be able to speak the state language, and have a university degree in law with at least five years of experience (ABA/CEELI 2005, 9–12).

Georgia's Constitutional Court has the authority to determine the constitutionality of laws, international treaties, and governmental actions as well as the power to "consider disputes connected with the Constitutionality of referenda and elections" (Constitution of the Republic of Georgia 1995, art.

89). Specifically, issues related to the constitutionality of the elections include the right to vote (art. 28), the right to compete for office (art. 49), and the scheduling and time of the elections (art. 50). Constitutional issues can make their way to the Constitutional Court through various routes in Georgia. The president or no fewer than one-fifth of the members of parliament may bring a case before the court. However, common courts also may seek a ruling from the Constitutional Court if a court finds, during the course of a hearing, that there is ample reason to believe a law or normative act contravenes the Constitution. In addition, the Plenum of the Supreme Court may ask the Constitutional Court to rule on the constitutionality of a normative act. Finally, the Public Defender of Georgia, or anyone whose rights and freedoms are violated, may file a claim with the Constitutional Court (ABA/CEELI 2005, 18–20). Thus, a very important distinction is that there were many access roads to the Constitutional Court in Georgia whereas there was only one in Armenia in 2003. This aspect of judicial design later proved crucial to the divergent outcomes in these two disputes.

McFaul (2005, 6) points out that one remarkable aspect of post-Communist electoral revolutions is "how few analysts predicted them." As Georgia's 2003 parliamentary election approached, corruption was rampant, growth in the private sector as well as foreign investment had slowed, and many public officials enjoyed privilege and wealth thanks to years in office under President Shevardnadze. So, while the president enjoyed substantial prestige on the international stage—often by defying Russia—and many foreign policy makers and diplomats seemed to accept the flawed electoral process in Georgia, Shevarnadze's domestic support eroded significantly after his 2000 reelection. In fact, members of Shevardnadze's camp broke with the president, forming the core of the opposition during the 2003 election. These members included the former and acting speakers of parliament, Zurab Zhvania and Nino Burjanadze, respectively, and former justice minister Mikhail Saakashvili (Mitchell 2004, 343). Even under ripe conditions, however, revolutions require agency. And, the deciding factor in Georgia's Rose Revolution was how the agents of the opposition acted (see also Bunce and Wolchik in this volume).

During Georgia's November 2, 2003, parliamentary elections there was ballot stuffing, multiple voting, polls being held open late, ballots not being delivered to certain polling stations, and voter lists that included the dead and excluded the living. Since pro-government forces controlled the Central

Election Commission (CEC) as well as the local and district-level election commissions, the opposition used parallel vote and turnout counts (under the auspices of the International Society for Fair Elections and Democracy, a Georgian election monitoring organization) to combat election fraud. Data from the group suggested that the CEC inflated support for pro-government parties in the aggregation of precinct-level results. The opposition also contended that among opposition parties, Saakashvili's National Movement was the decisive winner even though Burjanadze's and Zhvania's party, the Burjanadze Democrats, did not perform as well as expected (Mitchell 2004, 343).

On November 4, 2003, the opposition took to the streets, holding vigil in front Georgia's parliament and calling for the president's resignation. In response, pro-government blocs warned that the protests were destabilizing the country. President Shevardnadze, meanwhile, belittled the protests, saying he would not resign because of "a few hundred kids" (Mitchell 2004, 344) On November 14, however, the demonstration that began with anywhere from 500 to 5,000 protestors had swelled to over 20,000 people.[19]

Armed with the evidence collected by voting monitors and exit polls, the opposition used the court system to challenge the results of the elections. Opposition groups began by contesting the results of the Bolnisi election district—a stronghold of the pro-government's political machine—as well as the count of absentee ballots for Georgian voters living abroad. The Tbilisi District Court overturned both sets of results (Zullo 2003). Meanwhile, a district court annulled elections in Kutaisi, Georgia's second-largest city (Radio Free Europe 2003a). By November 17, courts had ordered repeat elections in nine districts (*Turkish Daily News* 2003). These decisions were critical because the opposition used them to challenge the CEC's November 20 confirmation of the parliamentary election results. Specifically, the opposition argued that the CEC confirmed the election outcome based on district results that had already been legally overturned, which made the confirmation itself illegal (Zullo 2003). Georgia's Supreme Court affirmed the opposition's stance on November 25, annulling the proportional representation portion of the election, which was responsible for allocating 150 of the 235 seats in the new parliament (Radio Free Europe 2003b).

Many members of the opposition hailed the Supreme Court's ruling as a victory not just for democracy but also for the judiciary. Saakashvili, in particular, was quoted as saying the decision "proves that judicial reform was a

success. Of course there are still some problems, but it proves that we did the right thing in reforming the courts" (quoted in Zullo 2003). The fact that Saakashvili was intimately aware of how Georgia's judiciary operated prior to the Rose Revolution merits mentioning. Not only did he serve as a former justice minister under Shevardnadze, but he also helped initiate judicial reform in 1998 as a member of parliament (ABA/CEELI 2005, 38). Thus, the opposition's knowledge of the legal system helps explain its use at critical junctures in Georgia's Rose Revolution.[20]

Mitchell (2004, 344) describes Shevardnadze's attempt to seat the new parliament on November 22 as a vital turning point leading to his downfall. He points out that if Shevardnadze had succeeded, "the moment of opportunity would have passed because the new legislature would have immediately elected a new pro-government speaker," important because it is the speaker of parliament who becomes interim president in Georgia if the incumbent is incapacitated or resigns. Replacing the acting speaker of parliament, Nino Burjanadze, with a Shevardnadze supporter, then, would have made demands for the president's resignation following the flawed parliamentary election more or less meaningless. To preempt this, members of the opposition entered the parliamentary chamber and disrupted the first session. The opposition justified its entry, which otherwise might have been considered illegal, by citing their legal right to accompany the 65 opposition MPs who had just been elected. Similarly, the opposition's disruption of parliament prevented the ratification of a presidential decree issuing a state of emergency, which needed to be ratified within 48 hours to be considered valid.[21]

In sum, then, an easily overlooked aspect of Georgia's Rose Revolution is the opposition's reliance on court cases and legal maneuvers. The design of Georgia's judicial system and the opposition's knowledge of that system provided it with the opportunity to use legal tactics alongside populist ones. Still, given the sequence of events, it is difficult to argue that the Georgian Supreme Court itself played a decisive role in Rose Revolution: The Supreme Court's decision was issued only after the opposition's disruption of the first session of parliament and only after President Shevardnadze's November 23 resignation. When the events in Georgia are compared with those in the Armenian case, it appears that a genuine change in the political winds may be necessary before the judiciary—or at least, the members of its highest courts —feel at liberty to strike down election results. And, in these cases, it becomes difficult to distinguish judicial independence from political opportunism.

Conclusion

To what extent do judicial design, actors, and legal maneuvers matter in making elections a mode of transition? This chapter seeks to provide some preliminary answers by focusing on the role of the law and courts in two election disputes in the former Soviet Union. While the number of cases considered is small, their relevance to an understanding of the development and operation of contemporary democracy is significant. In the past few years alone, one can list several notable instances in which the judiciary emerged as a prominent player making critical rulings that shaped perceptions about, if not the outcome of, elections. These range from the unanimous ruling of Mexico's Federal Election Tribunal (TEPJF) denying Andres Manuel Lopez Obrador, the 2006 presidential candidate of the Party of the Democratic Revolution (PRD), a full recount of votes, to the May 2007 decision by Turkey's Constitutional Court to halt balloting for its country's president. In post-Soviet Ukraine, the Supreme Court continues to be a forum for resolving disputes among parties that had defined the Orange Revolution, while Armenia's Constitutional Court was again charged with evaluating election fraud during that country's 2007 parliamentary and 2008 presidential elections.

Reconsidering Armenia's 2003 presidential election and Georgia's 2003 parliamentary elections from the perspective of judicial design and judicial activism reveals that law and courts can matter even in places where they lack a history or tradition of influence. In both cases, the post-Soviet constitutions designed judiciaries with the power and opportunity to oversee elections. Thus, not only did the judiciary play the role of electoral referee in both cases, but also the referees' decisions proved to be critical junctures in the election disputes, even though the final outcomes differed. In Armenia, the Constitutional Court upheld the election but expressed its doubts about its legitimacy and the impact that such elections could have on Armenian democracy. This decision illustrates how political pressure may limit the degree to which judges in hybrid regimes are willing to play decisive roles in election disputes: even when courts acknowledge that fraud has occurred, they are rarely in a position vis-à-vis an incumbent government to annul elections. In Georgia, meanwhile, lower court rulings helped justify the opposition's cause while key legal maneuvers were critical in keeping the cause alive. Finally, the Supreme Court's decision overturning the election results granted the Rose Revolution legal legitimacy.

Still, some argue that, by overturning the 2003 parliamentary election results, Georgia's Supreme Court exceeded its authority. For example, despite being a member of the opposition at the time, Natelashvili of Georgia's Labor Party argued that the Georgian Supreme Court overstepped its jurisdiction in 2003, since Georgia's Constitution grants the Constitutional Court, not the Supreme Court, explicit powers to determine the constitutionality of elections and referenda (Chikhladze 2003). Yet, it is likely that critical institutional differences between Armenia's Constitutional Court and Georgia's Constitutional Court shaped the tactics that Georgia's opposition employed and determined the legality of the Supreme Court's actions. First, as discussed above, the selection process for Georgia's Supreme Court, and even for its lower courts, is more likely to produce a professional and qualified bench than the selection process for the country's Constitutional Court. As a result, Georgia's opposition had reason to believe that relying on common courts rather than the Constitutional Court would increase its chances of a fair hearing. Second, the electoral jurisdiction of Georgia's Constitutional Court is linked explicitly to the "constitutionality" of elections and most of the associated text in the Constitution focuses on the timing of elections. In fact, according to the Law on the Constitutional Court of Georgia (1995, art. 17), the court is responsible for breaches in individual rights and freedoms only "if the decision of the dispute is not within the competence of any other court." In other words, those issues with which one could challenge the legality of election results are *not* the sole jurisdiction of Georgia's Constitutional Court. With the right legal argument, cases regarding election fraud could be brought before common courts, for which the Supreme Court is the highest court of appeals.

While Armenia's common courts also rule on cases related to civil rights and civil liberties, the constitutional provision outlining the electoral jurisdiction of its Constitutional Court is more encompassing and specific: the Court "shall rule on disputes concerning referenda and the results of presidential and parliamentary elections" (Constitution of the Republic of Armenia 1995, 100). At the same time, the main parties in any election dispute—the candidates in the presidential and parliamentary elections—are expected to file suits directly with the Constitutional Court (art. 101). Moreover, Armenia's opposition was well aware of this limitation.[22]

Ultimately, then, Armenia's constitution is written so that Armenia possesses just one electoral referee, the Constitutional Court. That is, Armenia's formal

institutions create a single-shot game for the opposition, and its prospects for emerging victorious depended on the decision that these justices reached. Georgia's constitution is more ambiguous, and in 2003 the Georgian opposition capitalized on the multiplicity of options available—that is, the opposition turned the election dispute into a multi-shot game. In terms of strategic games, then, the judicial structure made for multiple series of parallel games in which victory in a few games at the lower level, where the incumbent's control of the rules is less evident, could undermine the games at higher levels and assist the opposition's victory. In such a situation of multiple games with uncertain significance and uncertain outcomes, it becomes hard for the incumbent to have enough information and leverage to control all games simultaneously.

Drawing policy implications from this analysis, which relies on a comparative study of these two similar systems, is a risky proposition. Most-similar-systems approaches allow one to isolate theoretical relationships while controlling for other, possibly intervening factors at the expense of generalizability. Thus, it is never clear how findings from two cases with similar degrees of democratic development or comparable levels of civil society, for example, might be altered when such *ceteris paribus* assumptions are relaxed. At a minimum, however, my analysis suggests that the electoral model of democratization (see Bunce and Wolchik in this volume) may benefit greatly from engaging the courts. Judicial design matters, however. Where electoral jurisdiction is narrowly circumscribed, the legal options available to the opposition will be circumscribed as well. However, where many courts are empowered to resolve election disputes, locating and utilizing sympathetic venues to challenge election results could be a critical step toward legitimizing opposition demands and forcing the hand of the incumbent rulers. Of course, it remains to be seen whether the 2003 judicial rulings in favor of Georgia's opposition actually advance the cause of democratic consolidation there. Certainly, such instances reveal a commitment to institutionalized mechanisms of conflict resolution, which is a boon for democracy. Yet scholars and policymakers alike must remember that regime change is not the same thing as democratization, and much depends on the inclinations of the opposition.

PART III / Reflections and Conclusions