

ОЛИГАРХИ И СУДЬИ: ПОЛИТИЧЕСКАЯ ЭКОНОМИЯ СУДОВ В ПОСТСОВЕТСКИХ НЕКОНСОЛИДИРОВАННЫХ ДЕМОКРАТИЯХ

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Аннотация. Начиная с 2014 года в ряде постсоветских стран произошло существенное усиление судебного вмешательства в распределение политической и экономической власти. Суды отменяли важные инициативы законодателей, принимали решения по формированию правительства и осуществляли надзор в ситуации революционных переходов власти. Вопреки распространенному в литературе мнению, что суды постсоветских государств подчинены исполнительной власти, можно отметить, что часто эти вмешательства со стороны судов противоречили интересам правящей группы. Речь не о том, что эти страны смогли выстроить «независимую» судебную власть в западном понимании, но и не о том, что эти судебные решения принимаются в интересах того, кто лучше заплатит. Анализ показывает, что при определенных обстоятельствах судьи способны принимать решения полуавтономно, руководствуясь комбинацией мотивов самосохранения, собственных интересов и неопатримониальных связей. Автор утверждает, что когда концентрация политической и экономической власти внутри правящей группы снижается, эти «полуавтономные» судебные вмешательства растут. Такие ослабления политической вертикали и последующие судебные вмешательства имели место в Армении, Молдове и Украине, начиная с 2014 года. При этом в Грузии, где сильная властная вертикаль была сохранена несмотря на переход исполнительной власти к другой группе, судебная власть остается в целом подчиненной и судебные вмешательства случаются редко.

Ключевые слова: суды, судебная власть, олигархи, политическая экономия, конституционная политика, постсоветское пространство

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**OLIGARCHS AND JUDGES:
THE POLITICAL ECONOMY OF THE COURTS
IN POST-SOVIET UNCONSOLIDATED DEMOCRACIES**

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Abstract. *Since 2014, there has been an explosion of judicial interference in the distribution of political and economic power in several post-Soviet countries. Courts have struck down major legislative initiatives, ruled on the formation of governments and overseen revolutionary transfers of power. Contrary to the literature, which suggests that post-Soviet courts are subservient to the executive, these interventions have often been contrary to the interests of the ruling group. This does not mean that these countries have developed 'independent' judiciaries in the Western legal understanding, nor does it mean that judicial rulings are available to the highest bidder. Instead, it indicates that under certain conditions judges are capable of semi-autonomous decision making based on some combination of self-preservation, self-interest, or neo-patrimonial ties. This article will argue that when the concentration of political and economic power in the ruling group weakens in unconsolidated democracies these 'semi-independent' judicial interventions increase. This weakening of the power vertical and consequent adverse judicial interventions have occurred in Armenia, Moldova, and Ukraine since 2014. Meanwhile in Georgia, where a strong power vertical has been maintained despite the handover of executive power, the judiciary remains essentially subservient and judicial interventions are rare.*

Key words: *Courts, Judiciary, Oligarchs, Political Economy, Constitutional Politics, post-Soviet*

Introduction

“I am for any kind of lawlessness in the judiciary”
“Do you doubt my political prostitution?”
“If they knew what processes we were behind, it would blow their fucking minds”
“Pasha, what are we going to do? How will we seize power?”
“Two courts already belong to us: the Constitutional Court and the District
Administrative Court”

These quotations are extracts from audio recordings released by the National Anti-Corruption Bureau of Ukraine (NABU) (Suprun 2020). The recordings show conversations among judges and the Chief Justice of the District Administrative Court of Kyiv (DACK) and reveal the shocking candidness with which judges appear to have arranged the outcomes of high-profile court cases and their willingness to openly discuss their interference in the political process.

It is often overlooked that even in countries which have struggled to develop the Rule of Law, the legal system and its enforcers—the judiciary—remain fundamental to their political economy. If law does not “rule”, then what role do courts and judges play in the distribution of political and economic power? The post-Soviet space contains many of the most empowered courts in the world. Courts at numerous levels can rule on highly sensitive political questions, such as the calling and outcome of elections, the formation of governments and amendments to constitutions. Yet, paradoxically, post-Soviet courts were largely docile and subservient to the executive for much of the past thirty years. This led scholars of post-Soviet judicial systems to conclude that these courts have been captured by ruling elites and play a very limited independent role in the distribution of power and resources (Mazmanyan 2015: 202). This in turn led to the conclusion that judges might be corrupt and frequently gave biased rulings in the interest of private parties, but in sensitive cases of national importance they always deferred to the executive to ensure their survival within the system. The only exception would occur at crisis moments when judges might be forced to choose whether to back the incumbent or ally themselves to whoever they expected would soon take power. This assessment made sense for most of recent history. However, since 2014, political upheaval in the region has created a new paradigm which has changed the role of the courts. In Armenia and Ukraine, the recent so-called “Color Revolutions” resulted in the handover of power to new ruling elites, while in Moldova a constitutional crisis led to the expulsion of the country's dominant oligarch and political player. In all three countries, courts did not immediately submit to the new rulers and what followed was substantial infighting between incumbents and the courts on a scale which is unprecedented in the region.

How do we explain this phenomenon? This article argues that all three countries experienced a severe weakening of the power vertical in both the political and economic spheres. In the political arena, new ruling elites came to power, but struggled to build strong or stable coalitions. In addition, in contrast to the previous regimes, which had

managed to bring almost all of the country's institutions and regional elites under the umbrella of the “party of power”, new incumbents struggled to create effective neo-patrimonial networks which could incorporate most key interest groups. Many key institutional players preferred either to sabotage the new elite, or to only engage with it on a transactional basis. One such institution is the judiciary, where judges have decided to openly oppose incumbents, or to be flexible in their allegiances.

The second, and more structural, explanation for this process is the shift in economic hegemony after the recent revolutions. All three countries are captured states with a high degree of interconnection between the political sphere and the business interests of oligarchs. The latter use their vast wealth to create, or sponsor, political parties to fight elections and use the political power these elections grant to further enrich themselves at the expense of society and the state (Huss 2017: 318). In Ukraine and Armenia, no hegemonic oligarch has ever emerged to take over the whole system of governance. Instead, at various times the majority of oligarchs were absorbed into the patrimonial network of the ruling party: the Party of Regions in Ukraine and the Republican Party in Armenia. In Moldova, a hegemonic oligarch—Vladimir Plahotniuc—emerged between 2010 and 2019, and captured the majority of institutions. However, after the revolutionary upheavals in each country, these networks were broken, and new elites were unable to unite the oligarchs into a new power vertical. Many oligarchs chose to find their own political vehicles to challenge the new incumbents. Thus, in the post-revolutionary era, judges now have multiple centers of gravity (patronage pyramids composed of politicians, oligarchs, and local political machines (Hale 2016: 133)) to which they can offer their allegiance. This does not mean that judges have become independent in the Western legal sense; instead, they have become semi-autonomous actors who can choose sides in political power games and in the distribution of economic resources. This stands in stark contrast to Georgia, where, despite a handover of power in 2012, the strong power vertical created during the Saakashvili era was swiftly reconstructed around a hegemonic oligarch—Bidzina Ivanishvili. As a result, the courts, alongside other institutions, remained subservient to the executive and the party of power.

The “Judicialization of Politics” in the Post-Soviet space:

It is widely acknowledged in the literature that the “judicialization of politics” operates considerably differently in unconsolidated democracies than in older, established democracies (Volcansek 2019: 69). In the scholarship on Western judicial systems, “judicialization” involves the growing “activism” of courts in ruling on political questions, and thereby enlarging the role of the judiciary as a political actor, which may conflict with the legislative and executive. A classic example would be the judicial activism of the Court of Justice of the European Union (CJEU), which over the past decades has dramatically expanded the competences of EU institutions through its case law (Alter 1998: 121). In unconsolidated democracies, as Armen Mazmanyanyan points out, if decision making shifts from the executive or legislative branch to the courts, but these courts are beholden to the will of political actors (most often the executive or ruling party), then the

courts become a proxy for the same elite contestation while bypassing the democratic process (Mazmanyán 2015: 201).

In consolidated democracies, it is assumed that political competition incentivizes incumbent politicians to maintain judicial independence to prevent their persecution after leaving office. However, Popova argues that in unconsolidated democracies, intense political competition makes it even more attractive to interfere with the courts. Since incumbents assume that whoever replaces them will use the courts to strip the old regime of power and resources, their time horizons are much shorter than in consolidated democracies (Popova 2012: 3). In addition, a widespread culture of impunity, where convictions for pressuring the judiciary (or for corruption offences in general) are extremely rare, considerably lowers the cost of interference (Trochev 2010: 124). As a result, incumbents apply “strategic pressure” to control the courts, while also using the facade of judicial review to enhance their legitimacy (Popova 2012: 8). As a result of systemic attempts by incumbents to control the courts, Mazmanyán concludes that although post-Soviet courts are granted considerable power by the constitution, incidents of judicial intervention “hardly represent any visible transfer of power from the political decision-maker to the judiciary” (Mazmanyán 2015: 218). Popova and Mazmanyán concur that judges may deploy an array of strategies of self-preservation, such as recusing themselves from politically sensitive cases and using collective judicial bodies, to protect themselves and their colleagues from being removed from office. However, neither credit the post-Soviet judiciary with a substantial role in resisting incumbents. They do however accept that in moments of intense political crisis combined with disputed elections judges might “jump ship” and rule in favor of the opposition, but only if they conclude that the incumbent is likely to lose power (Mazmanyán 2015: 210-211).

This article seeks to challenge the narrative of “judicial subservience” by analyzing periods of substantial judicial intervention and resistance in post-Soviet countries. This phenomenon has received limited attention partly because it has occurred most frequently only recently (Ukraine from 2014, Armenia from 2018 and Moldova from 2019). However, the judiciary played a crucial role in political battles in Ukraine after the Orange Revolution in 2004 (Trochev 2010: 122), while Russia experienced a period of constitutional court activism from 1990 to 1993 before it was suspended by President Yeltsin (Mazmanyán 2015: 212). Why then might judges in unconsolidated democracies choose to rebel against incumbents? The answer is connected to the structure of patrimonial networks in these countries. In his seminal book on “patronal politics”, Henry Hale argues that due to high degrees of informality, post-Soviet countries find themselves in a constant state of flux, with elites trying to work out who is the key power-holder at any given time. Formal arrangements such as the constitution work not to uphold the Rule of Law, but to signal who is the “patron-in-chief” at any given time, and to provide focal points for political competition (Hale 2014: 10).

In a similar vein, Thomas Carothers argues that many post-Soviet countries are not in transition to democracy but occupy a grey zone between democracy and autocracy where they oscillate between two “political syndromes”: “dominant power politics” and “feckless pluralism” (Carothers 2002: 10). “Dominant power politics” describes when

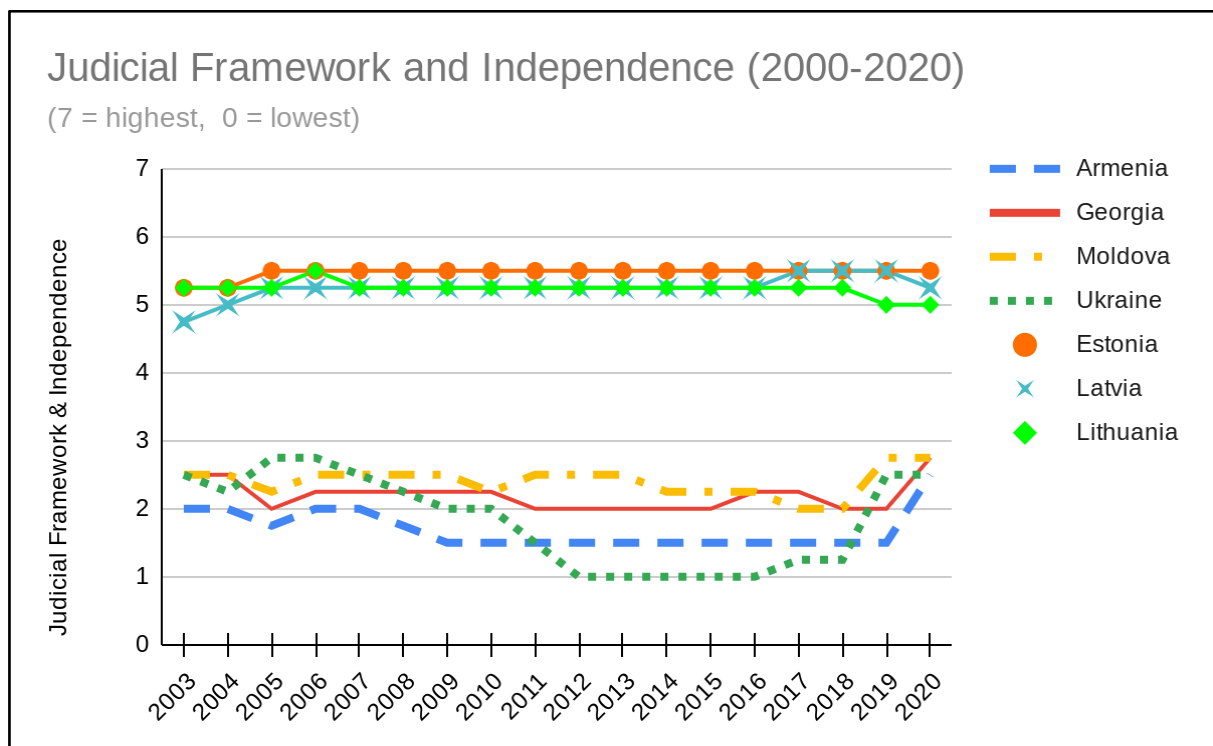
incumbents sit at the head of a patronage pyramid which incorporates almost the entire political and economic elite and other significant patronage networks are unable to emerge. This one group dominates the state and security apparatus and massively blurs the distinction between the state and the ruling party or group. Such regimes still have somewhat free elections and allow political participation, but the electoral playing field is so tilted that it is highly unlikely that they will lose power without a major crisis (Carothers 2002: 12). “Feckless pluralism” occurs when multiple patronage pyramids compete for power and resources. In “feckless pluralist” systems the incumbent may not control the most powerful pyramid, or may simply lack the power required to use the state apparatus to destroy other pyramids. This may involve two-party systems where the opposition constantly sabotages any initiatives of the incumbent, or systems where new parties led by charismatic individuals constantly emerge and win elections, but struggle to implement policies without accommodating a broad section of the elite (Carothers 2002: 11). In both cases elite decision making is divorced from citizens’ interests and government performance is weak, but for different reasons.

As Christopher Berglund points out, post-Soviet unconsolidated democracies tend to swing between these two states (Burglund 2014: 445). This tendency can be explained by the theory of “pluralism by default” developed by Lucan Way. Way argues that while certain countries may lack many of the features which scholars consider essential to democratic development (elite acceptance of democratic norms, strong civil society, stable institutions etc.), the weak nature of governance may also prevent the consolidation of autocratic regimes (Way 2016: 1–5). Those political systems that can be described as “pluralism by default” may have relatively free elections and respect some basic political rights and freedom of speech; however, these characteristics are not based on robust democratic safeguards and norms. Instead, the incumbents in such systems will endeavor to restrict the opposition, use state resources to fund their political ventures and impose a tight grip on the police, army, and security forces. Yet despite these measures such regimes usually lack either the private or state resources to entrench their rule, forcing them to grant a veneer of respect to the democratic process.

We argue that the ambiguous role of the judiciary plays a crucial role in the functioning of such “pluralist by default” states. During periods of “dominant-power politics”, judges are subservient to the incumbent. At most, they can use strategies of collective judicial autonomy to protect individual judges and force incumbents to cut deals with the judiciary. In periods of “feckless pluralism”, however, the high level of constitutional empowerment of post-Soviet judiciaries allows judges far more freedom of movement than any other group of public servants, making the judiciary a key determinant of the strength of incumbents in weak systems. This occurs either because judges are no longer subject to effective pressure from a “patron-in-chief”, or because they are able to seek out protection or patronage from an alternative patronage pyramid. Expectations also play a substantial role (Hale 2014: 12); if judges perceive that the current “patron-in-chief” will leave office (voluntarily or involuntarily), they may begin to make decisions which help them to curry favor with those whom they expect to take over.

Case Selection

The “unconsolidated democracies” of the Eastern Partnership—Armenia, Georgia, Moldova, and Ukraine—are ideal candidates for comparative research based on a Most Similar Systems Design. All four countries share a very similar time span of independence (and hence of the development of their legal systems), as well as inheriting Soviet legal traditions, practices, and mindsets. They also experienced a similar stunted transition from a command to a market economy after 1991 which saw the rise of oligarchs. All four countries developed “neo-patrimonial” systems where informal patron-client relations became crucial to amassing power and wealth, and where the modern rational-bureaucratic system and democratic institutions adapted to the patrimonial logic (Hale 2020: 111). They are also experiencing a highly contested process of legal transformation driven by the process of European integration. Despite the varying circumstances of the judiciary in each country, all four receive similarly low scores for “Judicial Framework and Independence” in Freedom House’s “Freedom in the World” report, with little improvement since 2003.



Source: Freedom House

Measuring Judicial Independence

It is methodologically difficult to prove that judges deviated from accepted legal reasoning in delivering a given judgement, or that this deviation was politicized. One option is to analyze instances where significant evidence of interference in the judicial process has emerged. For instance, judges admitting (either publicly or in secret) that they have been subject to political pressure, or (usually leaked) evidence of political actors or oligarchs pressuring judges. Another practice which can be analyzed is what we term

“vassal courts” – courts which consistently hear cases brought by a particular actor (even if these cases are arguably not within the court’s jurisdiction) and consistently deliver judgements in that actor’s favor. A third approach is to analyze reports in the media or produced by non-governmental watchdogs and investigative journalists concerning controversial court decisions, and then assess the veracity of claims that judges deviated from accepted legal reasoning. This can be supplemented with information from investigative reporting on the personal and business connections of selected judges.

Measuring Oligarchy

We define oligarch “clans” based on the criteria developed by Demid Chernenko. First, at least one member of the “clan” must be one of the largest private owners in the country. Secondly, at least one member should be actively involved in politics, either in the parliament, government or as the leader of a political party. Oligarch “clans” are distinct from the patronage pyramids described earlier. In the former, the business and political interests of members are unified and coordinated, even if their roles are diversified. In patronage pyramids, members may have competing interests, even if they temporarily attach themselves to the same political patron (Chernenko 2019: 393).

We recognize three main categories of oligarch (Andrusiv et al: 15). First, the “old” oligarchy, which have remained among the wealthiest oligarchs since the early 2000s, and have backed multiple political movements, sometimes at the same time. Secondly, there are the “new” oligarchs whose political connections to the incumbent propel them (often only temporarily) into the list of wealthiest businessmen. Finally, there are “petty” regional oligarchs who do not exert direct influence on national politics but play a crucial role at local level in building electoral support bases for national parties.

Measuring the wealth of oligarch “clans” is complicated by the secretive nature of oligarchal rent seeking activities. Oligarchs use a variety of methods to obscure their wealth and business ownership, the most common being shell companies and offshoring (Babinets 2016). In Ukraine, it is possible to measure the asset wealth of at least the top fifteen oligarchs since 2007 with reasonable accuracy. In Georgia only the wealth of the top two oligarchs over the past two decades can be measured. For Armenia and Moldova there are only snapshots which give indications of oligarch wealth distribution at particular moments in time. As a result of this uneven availability of data we use three indicators for economic hegemony where possible. First, the relative wealth of the top oligarch “clans” versus each other. Secondly, the wealth of the largest oligarch “clan” versus GDP and, thirdly, the distribution of media ownership among “clans”.

Case Studies

In the following section we will test our hypotheses on judicial politics using case studies of Ukraine, Moldova, Armenia, and Georgia. In each case, firstly we will examine the role of the judiciary over the past two decades, focusing on high profile cases of judicial intervention, reform attempts and strategies of collective resistance. Secondly, we will

examine the political economy of each country and how it has shaped wider processes which affect the judicial system.

Ukraine

“Take this judge, such a dirtbag, hang him by the balls, let him hang one night...” – This quotation is from leaked recordings from the office of President Kuchma in November 2000 (Leshchenko 2020). As Alexei Trochev has pointed out, every president of Ukraine has publicly criticised the judiciary, usually for interfering in some aspect of the executive’s political agenda (Trochev 2018: 666). Yet this does not mean that the nature of political pressure and judges’ response to it has been uniform under different incumbents. We can identify distinct phases of interference and resistance. Under presidents Kuchma (1994–2005) and Yanukovych (2010–2014), the executive and members of the ruling party held a monopoly of pressure on the judiciary in politically sensitive cases. As a result, judicial rulings almost always went in favor of the incumbent during these periods. Judicial resistance went little further than trying to protect their members from punishment. Under presidents Yushchenko (2004–2010), Poroshenko (2014–2019) and Zelenskiy (2019–), the incumbent lacked this monopoly of pressure on the judiciary. During these periods, judges not only aggressively resisted attempts to remove judges or reform the judiciary (Trochev 2018: 665), but also ruled against laws and government decisions in politically sensitive areas.

The first major act of judicial intervention in independent Ukraine came during the Orange Revolution in 2004. Run-off presidential elections marred by blatant voter fraud led to a standoff between Viktor Yanukovych (who had been declared the winner by the Central Election Committee) and Viktor Yushchenko. Lower courts heard thousands of cases of electoral violations, but lawyers from both sides agreed that Ukrainian courts did not have the power to cancel local or national elections (Trochev 2013: 79–80). The Supreme Court decided otherwise, and after a dramatic televised five-day trial, the court ruled that mass violations infringed on the constitutional principle of free elections and ordered a repeat second-round election in December 2004 (Wilson 2005: 147). This episode can be interpreted as a classic example of judicial defection in the face of a handover of power. Despite pressure from Yanukovych (Kuchma’s chosen successor) and the executive, judges may have felt that the tide was turning after numerous defections from the security services, MPs, business elites and the media, as well as mass protests in favor of Yushchenko (Trochev 2013: 81).

If Supreme Court judges initially decided to defect to the Yushchenko camp, this did not enable the new president to monopolize control of the judiciary. Due to the extreme fragmentation of politics after the revolution, judges came under pressure from (or were incorporated into) three competing power pyramids headed by Yushchenko, Yanukovych and Yulia Tymoshenko (Prime Minister in 2005 and 2007–2010). The contested state of judicial politics in this period is illustrated by two incidents. President Yushchenko dissolved the parliament in April 2007 and was immediately challenged in the Constitutional Court by MPs from Yanukovych’s Party of Regions (Deutsche Welle 2007). The court accepted the case, and Yushchenko responded by dismissing three judges. The

judges were able to get their dismissal overturned by three different courts and continued to attend sessions, but each time Yushchenko simply issued a new decree. Yushchenko's bodyguards even attempted to prevent judges from entering the chamber, but were blocked by MPs from Yanukovich's party. Ultimately, Yushchenko successfully appointed three loyal judges, after which he never lost a case in the Constitutional Court again during his presidency (Trochev 2010: 314-315).

The second incident also involved Yushchenko attempting to dissolve parliament in October 2008, but this time he was challenged by Prime Minister Tymoshenko, who successfully appealed to the District Administrative Court of Kyiv (DACK) to suspend the decree. Yushchenko argued that only the Constitutional Court had jurisdiction in such matters, and ordered the Prosecutor General to launch a criminal case against the judge responsible for the DACK decision. He also abolished the DACK and set up two new courts instead. However, MPs of the Yulia Tymoshenko Bloc occupied several court chambers to prevent a reversal of the DACK decision. The Pechersk District Court suspended the criminal case against the DACK judge, after which Yushchenko dismissed the Chairwoman of the court, only for her to be reinstated by the Council of Judges. After several more contested court cases, Yushchenko ultimately revoked his decree, and the DACK judge remained in his post (Trochev 2010: 135-136).

Although Yushchenko triumphed in his first battle to dissolve the parliament, his failure in the second attempt shows that after the Orange Revolution the president was unable to build a monopoly of judicial control, faced with a strong challenger from another branch of the executive—the Prime Minister. Judges came under pressure from different directions, but could also choose which patrons to look to for protection.

The political chaos and fragmentation of the Yushchenko era paved the way for Yanukovich's election as president in 2010. The next four years saw Yanukovich and his Party of Regions consolidate their control over the state apparatus and restrict the opposition. During this period, the incumbent's monopoly on judicial pressure was reestablished. Tymoshenko and several allies were charged with an array of criminal offences soon after Yanukovich assumed the presidency, and she was found guilty of abuse of power in October 2011 and imprisoned, drawing criticism from the EU High Commissioner (BBC 2011). Her conviction was upheld by several courts on appeal. Such convictions of opposition figures had been extremely rare under Yushchenko, since highly fragmented politics forced rival parties to constantly make and break pacts. Parties regularly accused each other of corruption and pressuring the judiciary, but instances of prosecution were rare (Trochev 2010: 140). According to Popova, only five high-ranking politicians or bureaucrats stood on trial for abuse of authority under Yushchenko, of whom only two were convicted. Meanwhile during the first two years of Yanukovich's presidency nine high-ranking politicians or bureaucrats stood on trial, of whom eight were convicted. A further five disappeared or fled the country before they could be put on trial (Popova 2013: 16–17). A further clear sign of Yanukovich's control of the judiciary was the remanding in custody of Euromaidan activists by lower courts, and then their sudden release on appeal once Yanukovich gave some guarantees that protesters would be freed (Popova 2015).

The crowning achievement of Yanukovich's judicial politics was the Constitutional Court decision to declare the 2004 constitutional amendments unconstitutional, thereby reverting Ukraine from a divided executive to a semi-presidential system (Trochev 2018: 614). The rapid packing of the court with compliant judges was instrumental in achieving this objective and was particularly impressive given Yushchenko's fierce battle to appoint loyal judges to the court only three years previously. The semi-presidential system also gave Yanukovich greater constitutional instruments to control the judiciary than Yushchenko had possessed.

However, Yanukovich's attempts to consolidate power were thwarted in 2014 when the Euromaidan Revolution forced him to flee to Russia and destroyed his Party of Regions as a political force. Ukraine returned to a state of political fragmentation, exacerbated dramatically by the War in Donbass and the resulting economic crisis. The courts did not contest the outcome of the revolution, nor the decision to reinstate the 2004 constitution by a simple majority vote in parliament even though it did not conform with the procedure for amending the constitution (Sindelar 2014).

The Maidan Revolution—despite the initial reluctance to intervene—ushered in a level of judicial resistance unprecedented even when compared to the Orange Revolution. There were initially high hopes for judicial reform, not merely because of the ideological shift to a pro-Western, anti-Russian incumbent. Given the fragility of President Poroshenko's coalition, the War in Donbass and the resulting economic crisis, the ruling group became highly susceptible to pressure from their Western partners. Ukraine became dependent on macro-financial assistance (MFA) from the EU, US, and the IMF, which was generally tied to certain structural reforms.

What resulted was a major legislative and institutional overhaul of the judiciary (Popova & Beers 2020: 121). Almost the entire senior judiciary was dismissed including court chairs, the HCJ and the HQCJ, and a commission set up to investigate judges who violated the rights of the accused during the Maidan Revolution. Power to appoint court chairs was transferred to the courts. The HCJ was rebooted with a majority of judge members (appointed by the Congress of Judges, Congress of the Bar and Congress of Law Professors) and increased powers including over court budgets. A Public Integrity Council (PIC) composed of anti-corruption activists was created to vet judges alongside the HQCJ, while a specialized High Anti-Corruption Court (HACC) was established (Popova & Beers 2020: 121). However, the Poroshenko administration consistently resisted demands of Western partners to reform the appointment procedure to the HCJ, HQCJ and HACC to include international experts.

Despite reforms granting substantial *de jure* insulation of the judiciary from political machinations, there was very limited impact on judicial independence. Judges continued to complain about "telephone justice": in a 2015 survey by the Center for Political and Legal Reforms 46% of judges stated that political pressure on judges was just as strong as under Yanukovich, while 29% declared that political pressure increased under Poroshenko (Popova & Beers 2020: 130). This suggests that while the new elite were prepared to enact formal changes to satisfy Western backers, there was little to no informal commitment to judicial independence. Meanwhile, the reforms did not seem to

emancipate or change attitudes within the judiciary. 80% of court chairs retained their positions following the reforms, including 60% of those parachuted in under Yanukovich (Popova & Beers 2020: 124).

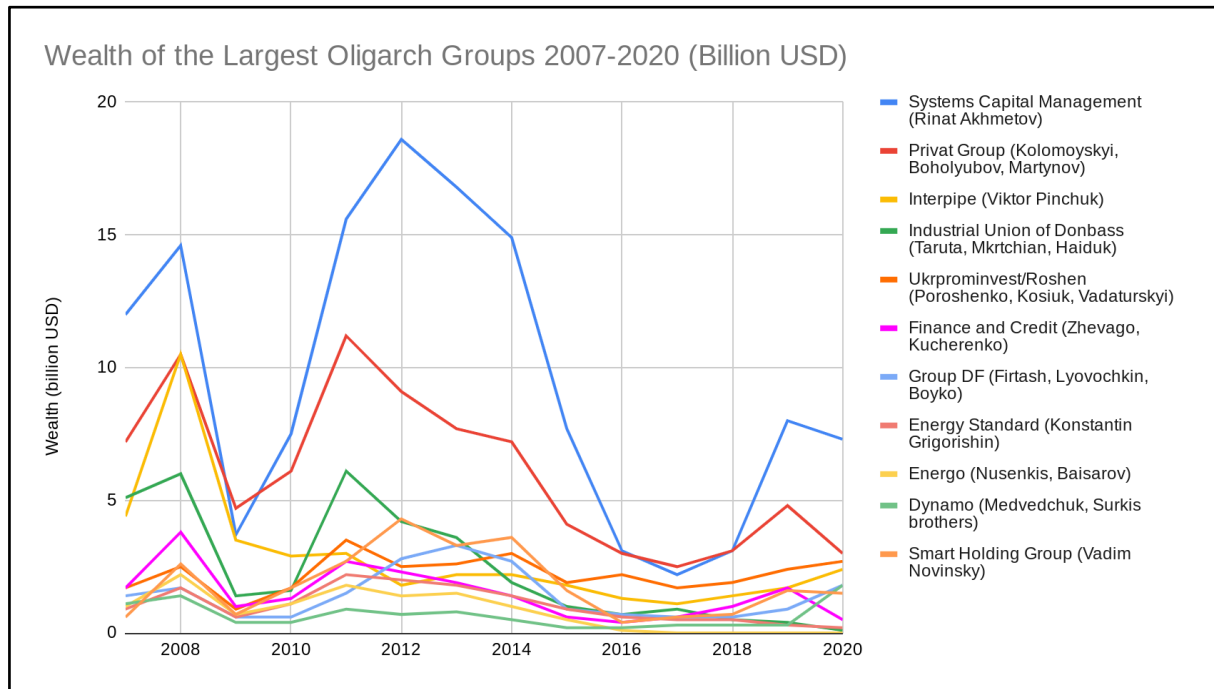
Moreover, both Presidents Poroshenko and Zelenskiy have encountered considerable resistance from the constitutional court, which previous presidents had been able to dominate. In 2019 the constitutional court controversially struck down a 2015 law establishing criminal liability for illicit enrichment, although it is possible that Poroshenko and his allies secretly applauded this decision. In 2020 judges tore a hole in Ukraine's post-Maidan anti-corruption legislation by declaring provisions of the law on the National Anti-Corruption Bureau (NABU) and the electronic asset declaration system unconstitutional (Nelles 2020). In response, Zelenskiy attempted to sack all the judges of the constitutional court, but was ultimately only able to remove the Chief Justice (controversially) by cancelling the decree on his appointment.

On coming to power in 2019, President Zelenskiy's "Servant of the People" party quickly passed legislation which they claimed would resurrect Poroshenko's failed reform of the supreme judicial bodies. However, the new selection procedures involving international experts were blocked once again, this time by the HCJ (DeJure 2020) until July 2021. What followed was the revelation of a huge conspiracy in the senior judiciary with NABU's release of the DACK wiretaps. The recordings revealed how OACK chairman Pavlo Vovk had secured the appointment of three loyal judges to the HQCJ (in order to protect DACK from vetting) by offering protection to the head of State Judicial Administration (SJA) (Chyzhyk 2020). The judges also discussed their political interference in several high-profile cases and their efforts to control other judicial organs. Following the revelations, the HCJ took no steps to discipline the DACK judges. The Prosecutor General Iryna Venediktova, appointed by Zelenskiy also refused to suspend the judges and consistently disrupted the Special Anti-Corruption Prosecutors Office (SAPO) investigation, while Zelenskiy stated publicly that there were no grounds to liquidate the court (Chyzhyk 2020). It is possible that Zelenskiy is not averse to the DACK's torpedoing of his judicial reform, since he can blame his failure to achieve Western-promoted reforms on the DACK, while maintaining a pliable judiciary. The DACK has indeed assisted Zelenskiy in other areas (such as the removal of the CC chair) (Ukrainska Pravda 2021). In any case, there is significant evidence to suggest that the judicial clan centered on the DACK has acquired substantial autonomy and strategic freedom.

Poroshenko removed the DACK from the list of courts to be liquidated at the last moment in 2017. The court then turned on Poroshenko and handed down many decisions against him when it was becoming clear that Zelenskiy would win the 2019 Presidential election (Chyzhyk 2020). Hence, we can conclude that in post-Maidan Ukraine, judges have achieved a far higher degree of autonomy from incumbents than previously, perhaps to the extent that incumbents are equally dependent on certain senior judicial clans than vice-versa. Zelenskiy's passivity towards the DACK begs the question: does the government tacitly accept the judiciary's sabotage of judicial reform to maintain a degree of executive control in the face of substantial pressure from the West?

Political Economy and Judicial Reform in Ukraine

Ukraine offers vastly superior opportunities for measuring the distribution of oligarchic power compared to the other three countries in our sample. The following data is based on the *Fokus* rankings which include visible assets of companies evaluated on the basis of official data, public information, consultations with experts and data provided by the owners (Fokus 2020). A breakdown of the *Fokus* data can be found in the annex.



Our data suggests that the fortunes of the top ten oligarch “clans” in Ukraine are more closely tied to economic crises than handover of political power. Oligarch wealth declined substantially after the 2008 financial crisis, and the economic crisis caused by the War in Donbass after 2014. Although the plummet in wealth of oligarchs connected to the Party of Regions (such as Akhmetov and Firtash) could be connected to the handover of power after the Maidan Revolution, it is more plausible that this was a result of the loss of *de facto* Ukrainian control of much of the Donbas industrial region where these clans were based.

This interpretation of the data supports the Heiko Pleines’ assessment that oligarchs are not the major power brokers in Ukrainian politics, but simply seek accommodation with those in power (Pleines 2016: 125). Pleines asserts that, rather like judges, oligarchs might switch political camps when they perceive that a handover of power (electoral or revolutionary) is imminent. This does not mean that oligarchs do not engage in Ukrainian politics. They play an essential role in generating electoral support for their political patrons by financing political parties and controlling of the media. In return, they expect that their business interests will be protected. As David Dalton has shown, they also build factional groups of their placemen inside the parliament, which consistently vote against bills which threaten their economic monopolies (Dalton 2021). In a highly competitive system like Ukraine, where election results are frequently hard to predict, this ability to accommodate is essential to these clans’ status as “old” oligarchs. They may support an

incumbent's attempt to consolidate their rule, but are well aware of the "pluralist by default" nature of Ukrainian politics, and therefore are constantly hedging their bets.

How do oligarchs respond to sudden handovers of power beyond their control? Heiko Pleines has analyzed the allegiances of oligarchs who obtained seats in the Ukrainian parliament from 2004 to 2015 (Pleines 2016: 115). He divides them into the "Blue" camp (connected to the patrimonial networks of Presidents Kuchma Yanukovich, and later Viktor Medvedchuk, leader of one of the successor parties to the Party of Regions) and the "Orange" camp (the patrimonial networks of Presidents Yushchenko and Poroshenko, and of Tymoshenko). He concludes that during periods of consolidation of power under Kuchma and Yanukovich, almost all oligarchs were integrated into the patrimonial networks of the incumbent. However, after the Orange and Maidan revolutions, not all oligarchs switched their allegiances to the new incumbents. Some oligarchs stayed in the "Blue" camp, presumably in anticipation of this network's return to power (Pleines 2016: 116).

These shifts in the number of patronage networks correspond with the distinct periods of judicial intervention outlined previously. In periods of power consolidation where almost all oligarchs are integrated into the patronage networks of the ruling party (2000-2004 and 2010-2014), judges are subservient to the will of the executive, and at most can engage in strategies of collective self-preservation. Meanwhile, during periods of competing patronage networks after the collapse of the party of power (2004-2010, 2014-) judges have engaged in strategic autonomy. This is partly because under such circumstances judges can look to different sources of protection and patronage. This is clear for the political battles after the Orange Revolution where judges involved in political battles had clear ties to Yushchenko, Tymoshenko or Yanukovich (Popova 2013: 13). However, it may also stem more from the weakness of new incumbents after revolutions to impose control, or judges' expectations of who are the primary power holders at a given time.

Armenia

Armenia rather suddenly and unexpectedly joined the ranks of post-"Color Revolution" countries in April 2018. Since 1999, the Republican Party had held both the presidential office and an effective majority in parliament. As well as controlling the executive and legislature, the patrimonial network of the Republican Party gained control over most state institutions, including the courts (Grigoryan 2021). Starting with the 1996 presidential election, the results of every subsequent presidential election (apart from in 1998) were challenged before the constitutional court. In every case, the court did not rule against the victorious Republican Party candidate (Sargsyan 2020b). After the disputed elections of 2003, the constitutional court ruled that electoral violations occurred at certain polling precincts, yet upheld the Central Electoral Commission's decision to declare Kocharyan the winner. The court tried to assuage tensions with a non-binding suggestion to hold a "Referendum of Confidence" on the president within a year (a mechanism not envisaged by the constitution) (Eurasianet 2003). A leaked cable from the US Embassy in Yerevan reports that one of the judges—Valery Poghosyan—

approached the embassy to recount how he and some of his colleagues had been pressured by the presidential office to rule against the complaint lodged by former President Ter-Petrosyan (Wikileaks 2008b). When another disputed presidential election occurred in 2008 (followed by mass protests and the death of 10 people in clashes with the police), the constitutional court once again ruled that specific violations could not call the whole result into question (BBC 2008).

The Republican Party seemed to have proved itself adept at suppressing mass mobilization after disputed elections over the course of almost two decades in power. Thus, it came as a shock when in late April 2018, protests against the nomination of Serzh Sargsyan as Prime Minister dramatically escalated, leading to Sargsyan's resignation, the calling of new elections and the effective collapse of the Republican Party. The "My Step" party, led by protest leader Nikol Pashinyan—a journalist and former member of parliament with no clear ties to any particular oligarch—won 70% of the vote and 88 out of 132 seats in the National Assembly. Pashinyan came to power on a strong anti-oligarch platform, as well as promising to bring corrupt members of the old regime to justice. Many criminal investigations and cases were brought against high profile figures (Sargsyan 2020a) (a list can be found in the Annex).

However, Pashinyan's revolutionary zeal quickly brought him into conflict with the courts. Pashinyan claimed that the courts were teeming with allies of the old regime, who were intent on sabotaging his efforts at transitional justice. The opposition accused Pashinyan of "telephone justice", citing wiretapped conversations from July 2018 where the Head of National Security Service (NSS) claimed he had ordered a judge to arrest former President Kocharyan (OC Media 2018). However, Pashinyan claimed that he refused to give orders to the judiciary, despite judges calling him to ask how they should rule on important cases.

Pashinyan's prime target was former President Kocharyan, who was arrested in July 2018 for "overthrowing the constitutional order of Armenia" in connection with the violence following the 2008 presidential election. What resulted was a round of judicial tennis. In August 2018 the Court of Appeal ordered Kocharyan's release, only to order his arrest in December, allegedly under strong government pressure (Reuters 2018). In May 2019 the Shengavit District Court in Yerevan froze Kocharyan's assets, only for the Avan and Nor Nork District Court to release him on bail later in the month (Armpop 2019). He was arrested for a third time in 2019, only for the constitutional court to declare that the article of the criminal code on "overthrowing the constitutional order" was unconstitutional in March 2021, after which he was promptly acquitted (Mejlumyan 2021).

Pashinyan declared that the various court decisions on the Kocharyan case were evidence that the courts were a bastion of support for the old regime, and vowed to clean up the courts. The government initially declared that judges would be vetted, with the removal of any judges who failed a "qualification test". This idea was later abandoned for a watered-down proposal of the Commission for the Prevention of Corruption (CPC) checking judges' asset declarations. However, the CPC only has the power to hand reports on violations to the Supreme Judicial Council (Armenia's equivalent of the Ukrainian High

Council of Justice) (Epress 2020). The “My Step” parliamentary majority appointed two new members of the SJC in January 2021 and in April 2021 the Council replaced its chairman with one of the new appointees after prosecutors opened a criminal case against him (Lazarian 2021). However, the loyalties of the SJC remain unclear.

The main thrust of Pashinyan’s judicial reform was an assault on the constitutional court, which he perceived as the greatest threat to the post-revolutionary government. Constitutional court judges were appointed with different tenures based on different versions of the constitution (detailed information can be found in the annexes). In 2015 the Republican Party passed amendments reducing the term of new judges to 12 years. However, they appointed one judge—Hrayr Tovmasyan, chairman from 2018 to 2020—shortly before the amendments came into force, allowing him to serve until 2035. In February 2020 Pashinyan announced a referendum on constitutional amendments which would apply the 12-year term limit all judges, essentially removing 7 out of 9 judges (Vasilyan 2020). However, the referendum was abandoned due to the Covid-19 pandemic. Instead, the “My Step” majority passed constitutional amendments removing only 3 judges and the termination of Tovmasyan’s chairmanship. Three new judges were appointed by the National Assembly, nominated by the government, president, and assembly of judges respectively. All three appointments proved controversial due to their service under Republican Party rule (Grigoryan 2021). The European Court of Human Rights refused to grant an interim measure requested by the removed judges calling on the Armenian authorities to freeze enforcement of the amendments (ECHR 2020). Meanwhile the Venice Commission issued an opinion approving aspects of the reform but advising against the immediate dismissal of judges in favour of a transition period (Venice Commission 2020).

Thus, despite his initial ambition, Pashinyan’s judicial reform got little further than replacing three judges of the CC and appointing two members of the SCJ. The acquittal of Kocharyan in March 2021 indicates that the constitutional court is clearly no longer subservient to the executive as it was under the Republican Party.

The Political Economy of Armenia

Rather like the Party of Regions in Ukraine, the Republican Party cannot be described as a tightly knit political organization united behind a charismatic leader (such as President Vladimir Putin’s United Russia party). Instead, the Republican Party acted as a power pyramid incorporating many oligarchic and regional patrimonial networks. Oligarch pyramids are extremely difficult to analyze in Armenia due to the murky nature of ownership structures. However, according to leaked documents from former US Ambassador to Armenia Marie Yovanovitch, before the Velvet Revolution the Party contained two main oligarch pyramids: one led by former President Kocharyan and the other by former President Sargsyan (Wikileaks 2009). These oligarchs’ fortunes mostly depended on informal monopolies in certain sectors granted by the Republican Party (a breakdown of key oligarchs and their main assets can be found in the annexes).

There was also a third pyramid outside the Republican Party headed by former President Levon Ter-Petrosyan, which was left alone in return for the President’s resignation in 1998 (Wikileaks 2009). This pact seemingly collapsed after Ter-Petrosyan

ran unsuccessfully against Sargsyan in the 2008 presidential election, after which the customs service consistently blocked imports and seized assets from the group's main oligarch—Khachatur Sukiasyan (Wikileaks 2008a).

The Velvet Revolution threw Armenia's political economy into disarray. Many "petty" oligarchs jumped ship to the new ruling group, but only one major oligarch—Gagik Tsarukyan—brought his "Prosperous Armenia" party into coalition with "My Step". However, he eventually had a falling out with Pashinyan and was arrested in June 2020. Many senior officials and oligarchs linked to the Republican Party were quickly subject to criminal investigations (Sargsyan 2020), although few were convicted. Pashinyan's rhetoric that "counter-revolutionaries" were scheming for the return of the old regime generated much speculation about the strength and resources of the former elite and how they might use it. However, for two years after the Revolution there was little sign of a major competing patronage pyramid. Other than recalcitrant courts, "My Step" seemed to have a firm grip on the state apparatus and almost free reign in the National Assembly.

This all changed with Armenia's defeat in the Second Karabakh War in September to November 2020. After the signing of a ceasefire agreement handing swathes of Nagorno-Karabakh over to Azerbaijani control, opposition protesters stormed the parliament and assaulted the speaker. The Chief of Staff of the armed forces called on Pashinyan to resign, which the latter described as an attempted coup (BBC 2021). He was eventually forced to call snap elections for June 2021. Only in the aftermath of the war did the old regime obviously begin to mobilise. All three former presidents of Armenia (Ter-Petrosyan, Kocharyan and Sargsyan) will contest the snap election (Luciano Cricchio 2021). Such a comeback by former incumbents ousted in a "Colour Revolution" is comparable only to Yanukovich's election in 2010 after having his 2004 presidential victory overturned by the Orange Revolution. Only time will tell whether the upcoming elections will erode Pashinyan's majority and plunge Armenia deeper into "feckless pluralism", or enable a new incumbent to usher in a period of "dominant power politics". In any case, it is clear that Pashinyan's failure to control the courts was a serious stumbling block for his revolutionary movement even before the disastrous war with Azerbaijan.

Georgia

Courts have played a far feebler role in Georgian politics since independence than the other countries in our sample. The only significant instances of "independent" judicial intervention occurred around the Rose Revolution of 2003. In the run up to parliamentary elections courts reviewed more than fifty election related complaints. Two weeks after the election, which was rife with allegations of malpractice, more than three dozen hearings concerning electoral violations were pending (Trochev 2013: 75–76). The constitutional court rejected a complaint that the election results should be found unconstitutional. The Supreme Court, meanwhile, cancelled the election results for the 150 seats elected by proportional representation due to widespread fraud committed by election officials, but stayed silent on the remaining 75 seats elected in single-district

votes. As Alexei Trochev points out, this was not a bold defection by the Supreme Court on par with the Ukrainian Supreme Court in 2004, because by the time judges gave their ruling the Rose Revolution was already a *fait accompli*. Opposition leader Mikhail Saakashvili and his supporters stormed the first session of the new parliament hastily convened by President Shevernadze, who swiftly fled the country. Many of Shevernadze's ministers and advisers had already defected to the opposition (Trochev 2013: 77).

If judges of the Supreme Court had hoped to curry favor with the victors with their ruling, they were sorely disappointed. Saakashvili lambasted the court for doing too little, since they failed to annul the results of the single-mandate elections. He wasted little time in purging the Supreme Court, reducing its size from forty-four to nineteen judges, and transferring jurisdiction over electoral disputes to the Tbilisi District Court without the possibility of appeal. He also forced the head of the constitutional court into honorary exile in Germany (Trochev 2013: 78).

This reflected Saakashvili's wider agenda of purging officials from the old regime and generally reducing the size of the state bureaucracy. Saakashvili's slashing of the bureaucracy and draconian punishments and property confiscation for corruption offences led to a dramatic decrease in petty corruption (Papava 2015). He also raised the salary of Supreme Court judges by 400 percent and lower court judges by 300 percent and tripled court budgets in the years following the revolution (Popjanevski 2015: 12). However, reducing petty corruption and improved court efficiency did not coincide with increasing independence. The judiciary was kept on a short leash both institutionally and informally. The President controlled the High Council of Justice (HCJ) until 2006. After constitutional amendments, nine judge members were appointed by a Conference of Judges, five non-judge members by the parliament and one non-judge member by the President (Popjanevski 2015: 14). The HCJ has, among other responsibilities, the power to appoint, promote and dismiss judges and court chairpersons, discipline judges, determine salary supplements and transfer judges between courts. This gave one semi-politicized body a dominant role in the judicial system, which created opportunities for political interference. The practice of political pressure on judges was widespread. Judges almost always ruled in favor of the prosecution, which was directly controlled by the Ministry of Justice (Popjanevski 2015: 16). In 2011, 98% of criminal cases resulted in guilty verdicts and over 80% were concluded with a plea bargain, while 85% of administrative cases were resolved in favor of the state (Article 42 2015). There was also a widespread practice of arresting Shevardnadze-era officials on corruption allegations without ever bringing official charges. Instead, the accused was asked to give a financial "reimbursement" to the state budget in exchange for freedom (Popjanevski 2015: 11). Transparency International cites a former judge, who stated that:

Almost 100% of all cases were being controlled [by the government], which eliminated cases of bribery almost entirely; however, there were other types of interference... For example, Court Chairpersons were selected for one purpose—to find "unauthorised" decisions and transfer them to Chinchaladze [then Deputy Chief of Justice], or other persons, who would then find a reason for the judge [to be punished], through the Prosecutor's Office or "exile" them to another court. (Sheradini & Kakhidze 2018: 12)

This claim is corroborated by the ruling of the European Court of Human Rights (ECHR) in the case of the murder of Sandro Girgvliani. Girgvliani died in mysterious circumstances after an incident in a bar where Interior Minister Vano Merabishvili and other senior officials were present. The investigation and subsequent trial generated immense controversy and allegations of a cover up. The ECtHR ruling stated that “the Court was struck by how the domestic courts together with different branches of state power acted in concert in preventing justice from being done in this gruesome homicide case” (Shermadini & Kakhidze 2018: 17).

The lack of judicial independence was one of the main sources of criticism of Saakashvili’s government by NGOs, international organizations and the opposition. There was also public dissatisfaction with widespread violations of property rights including the redistribution of private property with little or no right to appeal (Popjanovski 2015: 13). As a result, reform of the judiciary was a key promise of the opposition Georgian Dream during the 2012 parliamentary elections. After coming to power, the Georgian Dream continued to make public criticism of the judiciary. Prime Minister Bidzina Ivanishvili stated in an interview that “I have personally said that I plan to sue one of the judges, who during the pre-election period issued 60 illegal judgments against Georgian Dream representatives”. Meanwhile Minister of Justice Tea Tsulukiani urged judges who had made “shameful” decisions to “closely examine their conscience while there is still time”, and referred to the “dictatorship of the current leaders [of the judiciary]” (Shermadini & Kakhidze 2018: 17–19).

The Georgian Dream government’s attempts to reform the judiciary was met with fierce resistance. Although judges had shown themselves to be highly subservient under Saakashvili, they proved highly effective in protecting their members from the new government’s reforms. The main battleground was the composition of the HCJ. In 2013, the Conference of Judges had to elect seven judge members of the HCJ. This was especially important because many judges were coming close to the end of their ten-year tenure, and as a result of Georgian Dream’s judicial reform they faced a three-year probation period before they could be appointed for a life tenure by the HCJ (a decision criticised by NGOs and the Venice Commission) (Shermadini & Kakhidze 2018: 22). Judges who had drawn the ire of Georgian Dream therefore feared dismissal if government-friendly judges took over the HCJ. The government seriously miscalculated with its harsh rhetoric, such as declaring the creation of a temporary “Commission for Identifying Judicial Errors” which could discipline judges for their decisions. As a result, the pro-government “Unity of Judges” group failed to gather enough votes to elect a single member of the HCJ. Instead, the Conference of Judges chose to elect those judges whose decisions had been criticized by Georgian Dream, and who were critical of the government’s reforms (Shermadini & Kakhidze 2018: 19).

However, the effective self-preservation strategies of the senior judges did not lead to widespread judicial recalcitrance. Instead, the dominant group of judges in the HCJ and Georgian Dream quickly accommodated themselves to each other, returning to the practices of the Saakashvili era. Several components of the “Third Wave” of the government’s judicial reform were dropped, allowing the HCJ to maintain its hegemony.

Moreover, Georgian Dream appointed members of the HCJ supported a number of controversial appointments, including the appointment of a judge in the Girgvliani murder case to the Supreme Court (Shermadini & Kakhidze 2018: 25). The most controversial case of politicized justice under the Georgian Dream was the freezing of the property of opposition TV channel Rustavi 2, which was criticised by the ECHR, which warned the authorities to abstain from interfering in the editorial policy of the channel. (Shermadini & Kakhidze 2018: 27)

Why did Georgia not experience judicial rebellion?

Unlike the other three countries analyzed so far, Georgia did not develop a domestically grown “old” oligarchy. Instead, the most influential oligarchs made their fortunes in Russia during the rise of the Russian oligarchy in the 1990s. The first to make his way into Georgian politics—Badri Patarkatsishvili—initially supported Saakashvili’s rise to power during the Rose Revolution, but the two quickly became rivals. Patarkatsishvili owned one of Georgia’s most viewed TV channels—Imedi—and had an estimated net worth of \$12 billion in 2007 (Georgian Times 2007). After Patarkatsishvili’s rift with Saakashvili, the ruling elite surrounding the United National Movement did not contain any major “old oligarchs”.

Despite the lack of major oligarchs within the UNM, there was a tight nexus between money and power during the Saakashvili era. From 2003 to 2012, Georgia embarked on a radical transformation of its political economy masterminded by Saakashvili and the staunch libertarian Bendukidze. Regulations, workers’ rights and social services were slashed to the bone in pursuit of foreign investment driven growth, while officials from the Shevardnadze era were fired *en masse*, alongside a substantial reduction in the size of the civil service. While this move succeeded in massively reducing petty corruption (since interactions between officials and citizens were considerably reduced), paradoxically it strengthened the relationship between money and power. Deregulation encouraged businesses to engage in patronage capitalism and to seek favor and protection from the state, especially given the aggressiveness of Georgia’s tax police in pursuing businesses (Jones 2016: 7). Meanwhile the government developed informal ties with special business interests to strengthen its support base (Kupatadze 2018).

Moreover, Saakashvili’s radical reforms of the public service (including the judiciary) stopped short of granting any real independence from the executive. As Ketevan Bolkadze argues, Saakashvili sought to balance creating an uneven political playing field with maintaining popular support, meaning that his bureaucratic reforms reached a “saturation point” and were curbed when further reform would have jeopardized executive dominance over the state administration (Bolkvadze 2017: 751).

Using his strong grip on the levers of political and economic control, Saakashvili was able to face down the challenge from Patarkatsishvili in 2008, despite the latter’s vast wealth. At the 2012 elections however, he was unable to leverage the power of the state to defeat a stronger oligarchic challenger—Bidzina Ivanishvili—who had made his fortune in Russia and built a much more effective political vehicle in the Georgian Dream party than Patarkatsishvili had before him. Although the Georgian Dream benefitted from scandals such as the uncovering of systemic torture in the prison system (Mackay 2016),

nonetheless Ivanishvili's vast resources and ownership of key media was crucial in overcoming the UNM's control of the state apparatus. The *Forbes* "World Billionaires" list calculated Ivanishvili's wealth at \$6.4 billion in 2012 (Forbes 2012), the equivalent of 17.5% of Georgia's GDP for that year, and 3.4 times larger than total government expenditure.

The defeat of Saakashvili did not lead to the splintering of the power vertical into competing patronage pyramids. As Stephen Jones has pointed out, centralization was a hallmark of the Saakashvili era, with local government emasculated and power concentrated in a small governing cabal, with limited input from independent institutions (Jones 2016: 4). Even the transition from a semi-presidential to a parliamentary system passed in 2010 did little to reverse the weak role of parliament and dominance of the executive. As a result of inheriting a highly centralized system of governance, Ivanishvili and Georgian Dream were far more effectively able to capture the state, without a prolonged period of competing power pyramids. The more centralized and effective state apparatus enabled Ivanishvili to avoid a situation of "pluralism by default". As we have seen, the judiciary resisted reforms and attempts to remove its members. But there is no evidence that judges remained loyal to the old regime, or that the UNM was able to create a patronage network capable of dividing loyalties within the judiciary or public service at large.

With control of the state apparatus combined with Ivanishvili's vast fortune, Georgian Dream has managed to maintain its parliamentary majority and keep the opposition in a weak position. This is shown by the overwhelming superiority of Georgian Dream in terms of party financing: Georgian Dream received 54% of campaign donations in the 2020 parliamentary elections, 66% in 2016 and 88% in the 2017 local government elections. The United National Movement's electoral alliance received a mere 10% of donations in 2020, resulting in 36 out of 150 seats in parliament compared to Georgian Dream's 90 (Chikhladze & Kakhidze 2020). Before the 2018 presidential elections, the government announced 1.5 billion lari (around \$570 million) of debt relief, affecting around 600,000 citizens and backed by Ivanishvili's "Cartu Foundation" (OC Media 2018). Thus political and economic hegemony of the Georgian Dream prevented structural conditions which could encourage judicial autonomy. Senior judges engaged in self-preservation strategies in the early stage of Georgian Dream rule, but quickly accommodated themselves to the new incumbents.

Moldova

Moldova has largely experienced a lower executive dominance of the judiciary than the other countries in our sample due to a high level of "pluralism by default" (Way 2002: 127) (Hale 2016: 133). In the 1990s, presidents Mircea Snegur and Petru Lucinschi failed to consolidate their power vis-à-vis the parliament, culminating in a shift from a semi-presidential to a parliamentary system (Fruhstorfer 2016: 365). The judiciary was notoriously corrupt, with widespread instances of "corporate raiding" (the forcible transfer of property or business assets from one party to another based on a dubious court decision) (Nicu 2020). However, the executive was unable to establish central control

over the judiciary, and the appointment of key judicial bodies was left in the hands of the Conference of Judges.

This changed in 2001 with the coming to power of the Communist Party. Communist President Vladimir Voronin embarked on a policy of judicial reform which actually consisted of strengthening political control of the Supreme Council of Magistrates (SCM), responsible for appointing, removing and disciplining judges (International Commission of Jurists 2019). The President was granted the power to approve all members of the SCM and involvement in the selection procedure, while authority over appointments was transferred to the parliament. As a result of executive control of the SCM, the judiciary became increasingly compliant and “telephone justice” more pervasive. Reforms adopted in 2005 reduced the president’s role in judicial appointments, but given the Communist Party’s dominance in parliament and over institutions, this did not have an obvious effect on judicial independence (International Commission of Jurists 2004).

Communist Party hegemony collapsed in 2009 after allegedly rigged elections, repression of protesters and the failure to elect a president created rifts and defections within the party. Although the communists remained the largest party after the 2010 parliamentary elections, a coalition of three pro-Western parties called the Alliance for European Integration (AEI) was able to form a government. At first the AEI won much praise from the EU for putting Moldova on a pro-European reformist course (Wilson 2013).

However, the reality was much more complex. The AEI was torn between the interests of the three coalition partners, who each captured different parts of the state as their private fiefdoms. The Liberal Democratic Party led by Prime Minister Vlad Filat controlled the customs service, oligarch Vladimir Plahotniuc’s Democratic Party dominated the courts and prosecutor’s office, and the Liberal Party were in charge of railways and aviation (Wilson 2013). What followed was a long battle for supremacy between business and political rivals Filat and Plahotniuc, with the courts as a key weapon. Filat attempted to reduce Plahotniuc’s power by removing the Prosecutor General and dissolving the economic courts, while Plahotniuc fought back by launching corruption investigations against Filat’s loyalists. Both used *ad hoc* alliances with Communist Party MPs to attack the other in parliament, including a vote of no confidence in Filat. When the President tried to reappoint Filat as acting Prime Minister, the Constitutional Court declared the move unconstitutional (Tudoriu 2015: 663). What followed was a last-ditch attempt from Filat to take control of the courts from Plahotniuc by passing a bill allowing the parliament to dismiss judges of the Constitutional Court. This maneuver failed, partly under pressure from the EU High Representative (Tudoriu 2015: 663–664).

Plahotniuc ultimately secured Filat’s arrest on corruption charges in October 2015, and his replacement as Prime Minister with his ally Pavel Filip. A former judge of the Chisinau Court of Appeals, Ludmila Ous, alleged that she was subject to pressure and intimidation from the president of the court to rule against Filat (Rata & Tarna 2019: 65). Plahotniuc then set about expanding his grip on state institutions previously controlled by Filat, in particular the customs service. He secured the defection of many MPs from the Communist Party and the Liberal Democrats. Despite his hegemony over both the

state apparatus and financial flows, Plahotniuc struggled to garner electoral support, winning only 30 out of 101 seats in the 2019 elections. A 2015 poll showed that he was distrusted by 95% of the Moldovan public, due to the visibility of his capture of the state and allegations of his involvement in the scandalous theft of over \$1 billion from Moldovan banks in 2014 (Cațus 2016: 6).

With the collapse of Filat's Liberal Democrats and the Communist Party, two parties emerged to fill the gap—the pro-Russian Party of Socialists (PSRM) led by Igor Dodon and the pro-EU ACUM alliance led by Maia Sandu. The PSRM was widely seen as close to Plahotniuc, since the Democrats tacitly supported Dodon's successful bid for president in 2016 (the Plahotniuc-controlled Constitutional Court reintroduced direct presidential elections in 2016, since the Democrats lacked the three-fifth of MPs required to elect a new president) and voted together in parliament (Cațus 2016: 8).

However, Plahotniuc's hegemony suddenly and unexpectedly collapsed in June 2019, when the PSRM and ACUM came to a last-minute coalition agreement, catching Plahotniuc by surprise. The constitutional court struck down the coalition agreement, claiming it had missed the three-month deadline (because the court counted in 30-day intervals instead of using calendar months). The court suspended Dodon as President for failing to dissolve the parliament and appointed Prime Minister Pavel Filip as acting President (Nicu 2020). This led to a nerve-wracking standoff, with the offices of the president, prime minister and speaker of the parliament all being claimed by competing individuals. Filip refused to hand over power for more than a week, with the police, prosecutor's office, and constitutional court siding with the Democrats. Under pressure from popular mobilization and condemnation from the US, EU, and Russia, Plahotniuc's nerve eventually broke. He fled the country, while the constitutional court overturned its decision and all judges resigned (Barrett 2021).

With the sudden fall of Plahotniuc and the resignation of the constitutional court judges, it is unclear which party or institution is in control of Moldova's courts. ACUM's Maia Sandu won the 2020 presidential elections, while the PSRM holds the most seats in parliament. However, neither party has been able to form a government. The new constitutional court quickly became a battleground. Two of six judges were appointed by the ACUM-PSRM coalition government, two by the parliament and two by the SCM. Initially the court blocked Sandu's attempts to trigger fresh elections which the PSRM sought to delay (Barrett 2021). However, the court approved a third attempt by Sandu to propose a prime minister, and annulled a state of emergency passed by the PSRM-controlled parliament which would have delayed elections. In retaliation, the PSRM launched a legislative assault, including the dismissal and replacement of the court president—a move declared unconstitutional by ACUM, the US, the EU and the court itself (Necsutu 2021). The PSRM eventually backed down and agreed to new elections. Thus, it appears that—at least for now—the constitutional court is not clearly subservient to either ACUM or the PSRM. As for the rest of the judiciary, it is still too early to make any empirical judgement.

The Political Economy of Moldova

Moldova has experienced longer periods of “feckless pluralism” than the other countries in our sample, with only one period of dominant power politics under President Voronin and the Communist Party from 2001 to 2009. In addition, it is the only country which experienced substantial capture of the judiciary by an actor who did not control the executive. Vladimir Plahotniuc emerged as one of Moldova’s most powerful oligarchs under Communist Party rule. With the collapse of the Communist Party, he quickly became the hegemonic oligarch in the country. Estimates put his wealth at \$2 to \$2.5 billion dollars at the height of his power—around a third of Moldova’s GDP—although the true figure is obscure. Legislation passed in 2015 requiring media companies to publicly disclose their owners revealed that Plahotniuc owned four out of five national TV channels and three radio stations, amounting to 70% of Moldova’s audiovisual market.

Plahotniuc’s position as the dominant oligarch enabled him to capture many state institutions, in particular the courts and the prosecutor’s office, even while he was not in control of the executive. It is testament to the weakness of Moldova’s state apparatus that Prime Minister Filat was ultimately defeated by Plahotniuc, despite heading the government and controlling lucrative revenue streams from the customs service. It is also an indicator of the power of the courts as gatekeepers to power in unconsolidated democracies. By controlling the courts and prosecutors, Plahotniuc was able to intimidate and punish opponents. In a Freedom House Report on selectivity in criminal justice, 31% of defendants analyzed were affiliated with Filat’s Liberal Democratic Party, and only 7% with Plahotniuc’s Democrats, while several instances defendant who joined the Democratic Party during criminal proceedings saw investigations slow down or grind to a halt (Rata & Tarna 2019: 14–15). Moreover, he was able to defend his business empire and destroy competition. In 2014, a former director at the Ministry of Internal Affairs admitted that the Prosecutor General’s Office and the Ministry of Internal Affairs had special lists of companies owned or controlled by Plahotniuc which had to be protected (Cașus 2016: 5).

Despite his vast fortune and capture of almost the entire state apparatus and the media after the fall of Filat, Plahotniuc was unable to escape from Moldova’s trap of “pluralism by default”. While he initially avoided holding public office and remaining in the shadows, his political ambitions became increasingly visible, especially after the billion-dollar bank theft in 2014 and his unsuccessful attempt to become prime minister in 2015 (blocked by then-President Timofti) (Cașus 2016: 2–3). He was unable to garner sufficient electoral support to fully capture the legislature—the key institution in Moldova’s parliamentary system. His desire to avoid unfavorable early elections in 2019 ultimately sparked the crisis which led to his downfall.

It is too early to generalize about the status of the judiciary after Plahotniuc’s fall. Neither ACUM nor the PSRM are poised to take control of the parliament or the executive, and elections set for July 2021 are unlikely to change this. Moldova seems to have returned to the state of “feckless pluralism” which has characterized it since independence. Given the inability of any actor or party to dominate the system, control of the courts is likely to be a key battleground in attempts to shift the balance of power.

Conclusion

All four countries in our sample share certain patterns of political pressure and judicial response. Incumbents constantly attempt to subjugate the courts, mostly through control of supreme judicial bodies. So-called “judicial reform” largely focuses on purging these bodies or particular courts of disloyal elements. Incumbents have also successfully resisted pressure from Western partners to appoint new judges of integrity using transparent procedures. Even the most lauded example of successful reform—Ukraine’s creation of a High Anti-Corruption Court (composed with the involvement of international experts)—has struggled to achieve its ambitious aims due to sabotage by other branches of power (Francis 2020). They also deploy informal strategies of pressure such as “telephone justice”, intimidation and patronage. For their part, judges frequently submit to pressure from incumbents, since often the cost of refusing is higher than maintaining independence. However, when faced with reforms which threaten their impunity or risk their dismissal, judges have shown themselves highly effective at collective resistance.

Our cases differ, however, with respect to judicial interference in politics. Armenia, Moldova, and Ukraine have oscillated between periods of “dominant power politics” and “feckless pluralism”. During the former periods, incumbents with powerful patronage networks incorporating almost the entire elite have a monopoly on judicial pressure, and judicial resistance is limited to self-preservation. During periods of “feckless pluralism”, competing patronage networks exert pressure on the judiciary, and judges have some autonomy about where to place their loyalty. Under these conditions, judges play a crucial role in determining the balance of power and resources, since they can punish certain actors and rule on matters of vital economic and political importance. Georgia on the other hand has maintained a state of “dominant power politics” despite two handovers of power since 2003. The centralization and consolidation of the state apparatus under Saakashvili has led to the dominance of the executive, which was only strengthened by the coming to power of the country’s hegemonic oligarch Ivanishvili. As a result, Georgian judges have remained consistently subservient to the executive, apart from a brief resistance to reforms in 2012 which were concerned purely with self-preservation.

By focusing on the agency of judges and its interplay with political economy, it is possible to better understand the confusing nature of political battles in unconsolidated democracies. In particular, we can better understand why “Color Revolutions” have so far failed to result in significant improvements in judicial independence. While fewer convictions of opposition figures and rulings adverse to the incumbent’s interests may seem to indicate a more independent judiciary, it more often reflects the weakness of new incumbents and the replacement of a monopoly of judicial pressure with a competitive market for court decisions.

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Дополнения:

1. Judges of the Constitutional Court of Armenia (Sargsyan 2020)

| Judge | Appointed in | Appointed by | Version of Constitution | Term Ends | Notes |
|---------------------|--------------|--------------------------|-------------------------|-----------|--|
| Alvina Gyulumyan | 1996 & 2014 | Ter-Petrosyan & Sargsyan | 1995 & 2005 | 2021 | Judge at ECHR 2003-2013. Removed by the 2020 constitutional amendments |
| Hrant Nazaryan | 1996 | Ter-Petrosyan | 1995 | 2029 | Removed by the 2020 constitutional amendments |
| Feliks Tokhyan | 1997 | Ter-Petrosyan | 1995 | 2026 | Removed by the 2020 constitutional amendments |
| Ashot Khachatryan | 2010 | National Assembly | 2005 | 2037 | |
| Arevik Petrosyan | 2010 | Sargsyan | 2005 | 2037 | Deputy Minister of Justice 1999-2002. "Prosperous Armenia" MP 2007-2010 |
| Araik Tunyan | 2014 | National Assembly | 2005 | 2031 | |
| Hrayr Tovmasyan | 2018 | National Assembly | 2005* | 2035 | Minister of Justice 2003-2010, Republican Party MP 2017-2018. Chairman 2018-2020. Removed as Chairman by the 2020 constitutional amendments |
| Arman Dilanyan | 2018 | National Assembly | 2015 | 2030 | Administrative Court Judge 2013-2018. Chairman 2020- |
| Vahe Grigoryan | 2019 | National Assembly | 2015 | 2031 | Nominated by President Armen Sarkissian |
| Edgar Shatirian | 2020 | National Assembly | 2020 | 2032 | Nominated by Pashinyan government |
| Artur Vagharshian | 2020 | National Assembly | 2020 | 2032 | Nominated by President Armen Sarkissian |
| Yervand Khundkarian | 2020 | National Assembly | 2020 | 2032 | Nominated by the General Assembly of Judges. Court of Cassation Head 2018-2020 |

* Tovmasyan was appointed one month before the 2015 constitutional amendments came into force on April 9, 2018, allowing him to serve until age 65, rather than for a 12-year term.

2. Armenian Oligarchs before the Velvet Revolution (Wikileaks 2009)

| Oligarch | Pyramid | Main Assets | Notes |
|---------------------|---------------|---|--|
| Mikhail Baghdasarov | Sargsyan | Mika (fuel imports), Armaviam (airline), Mika Cement | |
| Nikolai Barsegh | Sargsyan | Flash (fuel imports), Ararat Bank | |
| Samvel Alexanyan | Sargsyan | Yerevan City (supermarket chain), food imports, pharmaceuticals | |
| Aghvan Hovsepyan | Sargsyan | Shant Television, Shant Dairy | Prosecutor General (1998-1999, 2004-2013) |
| Misha Minasyan | Sargsyan | Jazzve (cafe chain), Pares (tobacco distributor) | Son-in-law of President Sargsyan |
| Harutyun Pambukyan | Sargsyan | CPS (gas station chain) | |
| Aleksander Sargsyan | Sargsyan | various | Brother of President Sargsyan |
| Hrant Vartanyan | Sargsyan | Grand, Masis (tobacco), Grand Candy | |
| Gagik Tsarukyan | Kocharyan | Yerevan/Noy (alcohol), Ararat Cement | Founded "Prosperous Armenia" electoral alliance in 2017 |
| Sedrak Kocharyan | Kocharyan | Converse Bank, Ardshinvest Bank, mobile phone imports | Son of former President Kocharyan |
| Andranik Manukyan | Kocharyan | Car imports, Metropol Hotel, Vivacell | Former Minister of Transport and Communications |
| Hovik Abrahamyan | Kocharyan | ArtFood, agriculture | President of the National Assembly 2008-2011, MP 2012-2014, Prime Minister 2014-2016 |
| Khachatur Sukiasyan | Ter-Petrosyan | SIL Group, Pares (tobacco imports) | Stripped of Pares by the customs service |

3. Domestic Wealth of Ukrainian Oligarch Clans (2007-2020) (billion US dollars)

Figures taken from *Fokus* magazine, oligarch clans based on the analysis of Demid Chernenko (Chernenko 2019: 393).

| Oligarch Clan | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | Mean |
|--|------|------|------|------|------|------|------|------|------|------|------|------|------|------|-------------|
| Systems Capital Management (Akhmetov) | 12 | 14.6 | 3.7 | 7.5 | 15.6 | 18.6 | 16.8 | 14.9 | 7.7 | 3.1 | 2.2 | 3.1 | 8 | 7.3 | 9.7 |
| Privat Group (Kolomoyskyi, Boholyubov, Martynov) | 7.2 | 10.5 | 4.7 | 6.1 | 11.2 | 9.1 | 7.7 | 7.2 | 4.1 | 3 | 2.5 | 3.1 | 4.8 | 3 | 6.0 |
| Interpipe (Pinchuk) | 4.4 | 10.5 | 3.5 | 2.9 | 3 | 1.8 | 2.2 | 2.2 | 1.8 | 1.3 | 1.1 | 1.4 | 1.7 | 2.4 | 2.9 |
| Industrial Union of Donbass (Taruta, Mkrтчian, Haiduk) | 5.1 | 6 | 1.4 | 1.6 | 6.1 | 4.2 | 3.6 | 1.9 | 1 | 0.7 | 0.9 | 0.5 | 0.4 | 0.1 | 2.4 |
| Ukrprominvest / Roshen (Poroshenko, Kosiuk, Vadaturskyi) | 1.7 | 2.5 | 0.9 | 1.7 | 3.5 | 2.5 | 2.6 | 3 | 1.9 | 2.2 | 1.7 | 1.9 | 2.4 | 2.7 | 2.2 |
| Finance and Credit (Zhevago, Kucherenko) | 1.7 | 3.8 | 1 | 1.3 | 2.7 | 2.3 | 1.9 | 1.4 | 0.6 | 0.4 | 0.6 | 1 | 1.7 | 0.5 | 1.5 |
| Group DF (Firtash, Lyovochkin, Boyko) | 1.4 | 1.7 | 0.6 | 0.6 | 1.5 | 2.8 | 3.3 | 2.7 | 0.9 | 0.7 | 0.6 | 0.6 | 0.9 | 1.8 | 1.4 |
| Energy Standard (Grigorishin) | 0.9 | 1.7 | 0.6 | 1.1 | 2.2 | 2 | 1.8 | 1.4 | 0.9 | 0.6 | 0.5 | 0.5 | 0.3 | 0.2 | 1.1 |
| Energo (Nusenkis, Baisarov) | 1 | 2.2 | 0.7 | 1.1 | 1.8 | 1.4 | 1.5 | 1 | 0.5 | 0.1 | 0 | 0 | 0 | 0 | 0.8 |
| Dynamo (Medvedchuk, Surkis brothers) | 1.1 | 1.4 | 0.4 | 0.4 | 0.9 | 0.7 | 0.8 | 0.5 | 0.2 | 0.2 | 0.3 | 0.3 | 0.3 | 1.8 | 0.7 |
| Smart Holding Group (Novinsky) | 0.6 | 2.6 | 0.7 | 1.7 | 2.7 | 4.3 | 3.3 | 3.6 | 1.6 | 0.4 | 0.6 | 0.7 | 1.6 | 1.5 | 1.85 |