



Department of Law

FINDING OPTIMAL DESIGN FOR CONSTITUTIONAL COURTS

THE PERSPECTIVE OF DEMOCRATIZATION IN POST-SOVIET COUNTRIES

Armen Mazmanyan

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, February 2009

EUROPEAN UNIVERSITY INSTITUTE
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INTRODUCTION

The new Millennium closing its first decade, the talk of democratization in what formerly was Soviet Union is still highly relevant. The discourse of the Cold War now luckily outdated, that of democratic development in the majority of the Soviet-successor countries stays in the center of attention: politicians and other policy makers, journalists, consultants, human rights organizations and activists around the world devote plenty of their time and effort discussing, analyzing, advising and criticizing the democratic processes in post-Soviet countries, and academics do not give up on producing hundreds of volumes by doing the same.

In its contemporary expression, this rich debate rarely involves constitutional courts that were once paid a somewhat special attention in the context of post-communist transitions. The general approval of the constitutional courts' role in democratic transition- definitely based on merit- has largely overshadowed the discussion on the ways in which this function could be improved, made even more effective. The discussion on the institutional design of the post-Soviet constitutional courts, in this context, has largely fallen victim of the praise paid to the institution of constitutional review in general, while the political virtues of the larger function of constitutional review have been, by inertia, attributed to the accepted, almost standard institutional form that it took in the post-communist world. In other words, voicing our endorsement of constitutional courts as "flagships" of constitutionalism and the rule of law,¹ we have intuitively taken for granted the goodness of their institutional construction which, needless to mention, has seen "remarkably little experimentation in constitutional design"² all over the post-communist world and has basically submitted to a common model in all its incarnations. This unfortunate fallacy has probably distracted us from subjecting the courts to review on the subject of their inner structure and mechanism that enable them to efficiently perform their important tasks in regime transition.

Rethinking the mentioned stereotype and having observed considerable potential for improving the capacity of constitutional courts, this work suggests opening a discussion on the redesign of these tribunals in post-Soviet countries. The existing institutional settings of post-Soviet constitutional courts are subject to scrutiny from the point of view of these courts' democratic contributions. Against the variety of settings of institutional architecture of constitutional review tribunals discussed throughout the text, the work primarily concentrates on two fundamental questions of their design: 1. "political empowerment" or whether or not constitutional tribunals should have responsibilities of conflict resolving nature which de-facto involve them in partisan-type politics (such as the review of elections, jurisdictional conflicts between the separated branches of the government, impeachment cases, etc.);

¹ Patricia Wald (formerly the Chief Judge at the US Court of Appeals for the District of Columbia), Foreword: Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, University of Chicago Press (2000).

² Sadurski, Wojciech, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005), p. 1 of the Preface.

2. the question of a separate tribunal or the problem whether or not the Kelsenian design of constitutional courts is optimal given the specific local challenges facing democracy and the rule of law. These two subjects are of particular interest from the considerations of democracy-building, and this is the major reason why this work pays a special attention to them. Still, it is also worth mentioning that the proposed items have been traditionally overlooked by the academic community, while the issues with the other institutional settings, especially access, tenure, appointment, and the mode of review, have been previously paid somewhat more attention.

The study and its focus are area and time specific. The research is done strictly on the formerly Soviet states and the proposals for the institutions' redesign are projected exclusively on these countries' needs and for their use. For the purposes of this research, the term "post-Soviet region" or equivalent terms ("post-Soviet countries", etc.) include all former republics of the Soviet Union except Lithuania, Latvia, and Estonia. These are Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. Interchangeably, then, the term "CIS", standing for the Commonwealth of Independent States, will be sometimes used.³ Hardly any bias or prejudice can be suspected in this choice as the spatial focus in the study is not formal but rather considers the "geography" of democratic development in the post-communist world. As the title of the study perfectly indicates, this research's inquiries into the design of constitutional institutions are solely aimed at and guided by the rationale of promoting constitutional democracies in the countries of the region. In this light, the study targets those former constituencies of the Soviet Union which still have a lot to accomplish on their way towards building constitutional democracies. This approach justifies the exclusion from the scope of the review of three formerly Soviet countries in the Baltics which by the time of the inception of this study had shown considerable achievements in democratization and were considered as consolidated democracies.⁴

All this said, both the Baltic republics and the other Central and Eastern European post-communist countries and especially their experiences with democratic development and constitutional justice serve as a tremendous resource and often as inspiration for this work. The comparative method embraced by this study engages the Central and East European (including Baltic) paradigms and experiences and often heavily relies on them. Some of these paradigms have long ago become well-known models of how courts contribute to democratization,⁵ often through ways and manners which raise essential

³ Created in December 1991, the Commonwealth of Independent States included all formerly Soviet republics except Lithuania, Latvia and Estonia. These last three never participated in this Soviet-successor organization. As of January 2009, all 12 countries of this study remained members of the CIS, including Georgia, which has filed an official withdrawal application in August 2008, after its brief Ossetian conflict with Russia, but will formally remain a member of the organization until its withdrawal becomes effective a year after the application.

⁴ For the assessment of the democratic credentials of different countries, this work relies on the regular surveys by Freedom House (found at www.freedomhouse.org), as well as various studies and expert opinions. For more details on the post-Soviet states and a comparative survey of their democratic indicators, see Chapter 2.

⁵ Especially Hungary's experience with constitutional justice has become a famous case-study, acquiring a widespread attention due to the very generous empowerment and activism of its Constitutional Court in the 90-ies. For only some studies, see Scheppele, Kim Lane, "Constitutional Negotiations: Political Context of Judicial

normative questions,⁶ through ups and downs, conflict and deadlock, which is inherent to the political process.⁷ Some other paradigms, such as Estonia's deviation from the otherwise unanimous subscription to the Kelsenian architecture of constitutional review, have been peculiar and appealing, but have nevertheless acquired little attention, while, as this work will argue about the transplantative potential of the Estonian design, they might serve as a perfect comparative model and should have been paid particular attention. However, deriving much insight from the Central and East European experiences, the recommendations made by this research may not be exactly relevant for the countries west of the CIS borders.

The area focus of this study, meanwhile, has to be perceived with caution. Among the twelve target countries, Turkmenistan has never created a constitutional court or a substitute body to implement constitutional review, and hence its case largely falls out of the scope of this research as far as the empirical work is concerned. The other countries have been paid uneven attention by this work, though this has not been an arbitrary or discriminatory choice of the author at all. The case-studies of this research were selected based "on merits", rather than in a formal observation of a balanced, proportionate representation of each country. The well-recognized "political neutrality" and the subservient status of constitutional courts in such countries as Azerbaijan, Tajikistan or Uzbekistan⁸ is the obvious reason why the activity of these courts' was not taken as an example to demonstrate the patterns of activist struggle for constitutional democracy. On the other side, the courts in Armenia, Kyrgyzstan, Ukraine and Russia have at different times and modes appeared at the center of important political developments affecting the state of democratic governance in their respective countries, and hence due to these cases the mentioned countries were paid more attention throughout this study. As this work will show, the degree of independence allowed to constitutional courts and hence also their potential for democratic contributions is directly dependent on the extent of democratic pluralism within a country. The most striking case-studies referred in this work, therefore, originated in political environments which ever allowed opposition to the government and which witnessed a healthy contest and pluralism in politics. Nonetheless, not a single country is excluded from the scope of this research;

Activism in Post-Soviet Europe", 18 *International Sociology* (2003); Schwartz, Herman, *The Struggle for Constitutional Justice in Post-Communist Europe*, University of Chicago Press (2000); Solyom, Laszlo and Brunner, George, (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, University of Michigan Press (2000). Via frequent references to the CEE paradigms discussed in these and other studies, this thesis factually considers them in the comparative light, even though there may be no specific direct reference to a particular CEE case or country.

⁶ Sadurski, Wojciech, *supra* note 2, pp. 27-63; SAJÓ, András, "Reading the Invisible Constitution: Judicial Review in Hungary," 15 *Oxford Journal of Legal Studies* 253 (1995), pp. 266-267; Scheppele, Kim Lane, "Democracy by Judiciary (Or Why Court Can Sometimes Be More Democratic than Parliaments)", in Wojciech Sadurski, Martin Krygier and Adam Czarnota (eds.), *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses*, (Central European University Press, 2005).

⁷ The democratic effect of constitutional justice in CEE transitions is widely recognized despite the controversies. For one, Susan Rose-Ackerman writes that although the constitutional courts in Hungary and Poland have experienced different limitations, whether statutory/regulatory or informal, both courts "have been essential to the process of democratic consolidation." See Rose-Ackerman, Susan, *From Elections to Democracy, Building Accountable Government in Hungary and Poland*, Cambridge University Press (2005), p. 70.

⁸ For some evidence of this, see Erik Herron and Kirk Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts", 65 *Journal of Politics* 422 (May), 2003.

notwithstanding what was previously said, the countries in the post-Soviet space have a lot in common both in terms of the general features of political regimes and practices, and in terms of the characteristics of constitutional justice and review. The case-studies in this work, in this light, may equally well represent the patterns of political processes which may still arise in any of the target countries, given the change in the political practices and dynamics of democratic development. Therefore, the recommendations of the research are thought to be equally relevant for each country in the region, including Turkmenistan, supposing that this Central Asian country may one day choose to create a body of constitutional review.

We can conclude that the area focus in this work is not on particular countries within the former Soviet Union, but on the post-Soviet region as an idiosyncratic entity, a special species. The typology of political regimes in the region is the principal macro-criterion which allows speaking of the post-Soviet region as such. Despite some substantial variations in political regime types, this work will show the particular commonalities which justify this generalization. These commonalities (mostly to be discussed in Chapter 2, but also to get exposed in all the other parts of the thesis) relate both to the general characteristics of the political regime performance and to the role of constitutional courts within these political contexts. These include first of all the basic patterns of governance, in which all of the countries of this study have a lot in common. Shared by these countries are also the general characteristics of constitutional mentality and the vision of constitutionalism within both the societies and the ruling elites, as well as the status of constitutional courts in the power-structures, the degree of legitimacy and public support earned by them, and even the general contours of their institutional design. Understandably, in this light, the countries share virtually the same trajectory of democratic development and hence their needs for change and development are largely similar too.

The special focus of this study on democratic development reasonably predetermines the time-specific nature of the inquiry. The recommendations of this work are made strictly for the consumption for the transition to democracy, the analysis of the “political ingredients” is based on the current status of democracy in the region, and the conclusions are similarly fit for now. But this hardly means that the scope of inquiry is unduly narrowed to the extent that the entire value of the research may be lost in a matter of a few years. The “current status of democracy” in the region proved to be quite enduring and long-lasting and the democratic transition never appeared complete. Being limited to the paradigm of the democratic transition, the practical value of the work is thus not limited to a particular short period of time. The post-Soviet transition to democracy has already seen many long and difficult years of struggle, controversy, encouragement and disappointment, but it seems to be requiring still a long way to pass. This forecast, pretty much shared by the greater part of the expert community,⁹ promises considerable prospect for the recommendations made by this work both in terms of geographic and

⁹ For one, see Larry Diamond, *The Spirit of Democracy: the Struggle to Build Free Societies throughout the World*, Times Books, 2008, pp. 190-207, as well as the discussion in Chapter 2.

temporal latitude. Needless to mention, the study in its particular propositions may, in general, appear of value for democratic transitions throughout the world.

Constitutional courts in Soviet-successor states started coming to the fore following the major turn in the political regime, the collapse of the Soviet Union and building of initial constitutional institutions in the newly independent entities beginning in 1991. Already by 1993-1994, a number of countries in the CIS had created constitutional tribunals, almost all of them being generously empowered.¹⁰ This study explores the emerging experiences with constitutional justice from the very beginning of the transition, though from the considerations of fitting the analysis into the context of the existing and inherent patterns of political practices throughout the region, the post-1993 period is rather taken as the start of the “modern era” reflecting the current state of affairs in the field of concern. This divide is related with the events in Russia in October 1993, which resulted in the first matter-of-fact in-house violent political conflict after the transformation, bringing among other things to suspension of the Constitutional Court, and which marked the beginning of a new epoch in democratic politics throughout the region.¹¹ The observation of the post-1993 constitutional courts in the region is undertaken with a consideration of the significant informal constraint which the courts experience from the side of incumbent power-holders. With various inconsiderable digressions, this phenomenon characterized the status of the constitutional courts and the entire political context in which they were put to operate. By the beginning of 2009, this status has not changed dramatically, though the extent of limits on the constitutional courts differs from one country to another. In this light, this particular political reality has been taken by this work as the long-standing and inherent political-cultural context on which to focus when making suggestions for constitutional reconstruction.

As it may be obvious from the preceding introductory comments, this research contains an embedded presumption that the democratic development is the key target aimed by the countries included in its scope. This presumption, carrying in a way an axiomatic status, at some point may seem to be misleading as the discussion will expose that it is not in all of our countries that democratization is considered to be the priority, aside the official declarations properly endorsed by all of their constitutions. Two arguments can be drawn in reply to such critique.

Firstly, the disappointment with the democratic ideals in the post-Soviet region, although largely observed also by this work, cannot be exaggerated and, moreover, presented as an entrenched, irreversible and universal tendency in the entire region. In many countries and, fairly enough, in Russia itself, democracy seems to have passed its golden age of widespread inspiration and now rather looks to be somewhat out of favor, if not as a concept and a value system, then at least as a political priority for

¹⁰ See Table 1 in Chapter 2.

¹¹ This study attempts to call this epoch an era of “post-romanticism” or “neo-rationalism” in post-Soviet politics. This particular discussion is a subject of a lengthy deliberation in Chapter 2.

a country at this time.¹² With all this in mind, though, generalizations, as well as categorical, definitive statements, would be unjustified.¹³ The ideal of democracy is in decline in a number of countries, but it is enjoying a new momentum in some others in our days. Meanwhile, it is believed by this work that the decline in support for democracy is in a major part a product of earlier failures and disappointments with the first democratic practices that all post-Soviet nations experienced. If so, democracy may be treated with pessimism as far as the interim practices are concerned, but it may well be sincerely believed and desired by all, even the most autocratic leaders and the least consolidated nations, as the ultimate goal to reach.

Secondly, a response should be given from the point of view of this work's largely normative character. From this perspective, the propositions of this research essentially rely upon the normative presumption that there exists a devoted and decent institutional designer, collective or personalized, who is guided by the rationale of democratization and justice. As the text will demonstrate furthermore, this perspective should not seem too naïve since the determinants of political decision-making and institutional design are believed to include not only mere egoistic, rationalistic motivations but also a range of other ones, which allow space and force to considerations of public good, law, values and morals. In this regard, this work heavily relies on the insights from the latest neo-institutional revolution in social sciences,¹⁴ and while behaviorist arguments do often find a place in this study, the sort of balanced and comprehensive approach offered by the new-institutionalist science is thought to prevail.

The ample references to politics may speak of the inter-disciplinary focus of this study. Indeed, the subject of this research is traditionally shared by law and political science. The influence of the latter may be seen especially in the parts dominated by institutional theories and transitology (see Chapter 1), as well as in the assessments of constitutional courts' performance in politics, of which this work is also amply full (Chapter 3). Meanwhile, the legal analysis and long-established legal-theoretical debates dominate the discussion. The study of courts, including constitutional courts, has traditionally been the domain of the legal science, though inter-disciplinarity has cut across the subject.¹⁵ In a matter of principal methodological choice, this work has chosen empirical research (in the meaning of "field studies") and the analysis of the practice and political experience as one of the key sources of argumentation, often in contrast with the conventional normative dogmas. The empirical study presents a series of cases from the recent practice of constitutional courts in the region.

¹² See, for example, McFaul, Michael, "A Mixed Record, an Uncertain Future", *Journal of Democracy* 12.4 (2001), as well as the discussion in Chapter 2.

¹³ For a fine although subtle critique of the political science literature which categorically reports on the failure of the democratic development in Russia, see Sakwa, Richard, "Two Camps? The Struggle to Understand Contemporary Russia", *Comparative Politics*, July 2008.

¹⁴ James March and Johan Olsen, *Rediscovering Institutions: The Organizational Basis of Politics*, Free Press, 1989.

¹⁵ Smith, Rogers M., "Political Jurisprudence, the New Institutionalism, and the Future of Public Law", *1 American Political Science Review* 88 (1988).

The work is also essentially comparative. The comparative method is in effect the principal way in which this work evaluates the different institutional models as alternatives to the existing post-Soviet ones. The comparative evaluation of the major constitutional review systems- the diffuse (American) and concentrated (continental European or Kelsenian) models- is an important, albeit only one example. This work considers a range of models of constitutional courts (Kelsenian or not) and a number of specific settings within each of them. In the meantime, it does not shy away from inviting attention to so far overlooked, or hybrid, or sometimes hypothetical, experimental models.

The discussion proceeds in the following order. Chapter 1 develops a concept of “optimal institutional design” based on its review of the latest feedbacks from the studies of constitutional design, new institutionalism and transitology. The concept of optimal design is central for this work, as the main propositions defining it guide us further into the details of suggested alternatives to the existing institutional architecture, in the way as they are supposed to guide the institutional architects while in the process of institution-designing. New institutionalism,¹⁶ as already mentioned, is the key scientific tool applied in this work which helps to discover the proper role of institutions and the subtle ways in which they influence societies, actors and inherited habits of social interaction. The science of transitology, or perhaps “consolidology”,¹⁷ and the latest inquiries in democratic transitions in the post-communist world help to define the real needs of the societies and targeted countries in order to better identify the specific designer strategies intended at overcoming the complex challenges of democratization.

Chapter 2 presents facts and analyses about the post-Soviet countries of this research on their way to building constitutional democracies, their path towards democracy and their democratic credentials, the constitutional courts, their emergence, legitimacy and institutional characteristics, etc. This is a largely descriptive section which serves as a detailed introduction to the political regimes and constitutional frameworks emerged in the post-Soviet region and to the dynamics and peculiarities of political and constitutional developments in target countries, in historical and comparative light. This background is necessary for understanding the specific social and political environment behind the scene, and hence, for perceiving the specific needs and challenges facing the respective countries, as well as the differences which place the countries of the region in a special category vis-à-vis the other transitional entities. Following this, Chapter 2 collects and summarizes some rather technical data on institutional settings of constitutional courts in the region, outlining the institutional profile of these bodies since their inception and over time. This information depicts the existing architecture of courts which is to be

¹⁶ March and Olsen, *supra* note 14, as well as Clayton, Cornell and Gillman, Howard (ed.), *Supreme-Court Decision-Making: New Institutional Approaches*, University of Chicago Press (1999); North, Douglas, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press (1990); Peters, Guy B., *Institutional Theory in Political Science: The New Institutionalism* (London: Continuum, 2005); Smith, Rogers M., “Political Jurisprudence, the New Institutionalism, and the Future of Public Law”, 1 *American Political Science Review* 88 (1988), etc.

¹⁷ Schmitter, Philippe, “Transitology: The Science or the Art of Democratization?” in J. S. Tulchin (ed.), *The Consolidation of Democracy in Latin America*, Boulder, Lynne Rienner (1995).

taken as a point of departure in projecting the expected changes. The two charts, to be found at the end of the Chapter, summarize the institutional settings of concerned constitutional courts and provide for the first time a systemized collection of such information about post-Soviet constitutional courts.

Chapter 3 proceeds by defending the political empowerment of constitutional courts. It is running into an empirical analysis of higher courts' involvement into politics and concludes by supporting these courts' political role in democratic development. The reader in this part is warned against approaching the problem from the purely normative perspective as the questions of judicial activism and political involvement of courts are among the most controversial topics within the discipline. This work's approach is rather utilitarian, and the political empowerment of courts is praised and encouraged by this work strictly from the considerations of the practical dividends gained by the prospect of democratic development from each and any case of constitutional review against the arbitrary rule of autocratic governments.¹⁸

Chapter 4 discusses the weaknesses and the dangers of the current institutional settings and attempts to propose an "optimal" design for political empowerment of constitutional courts. The projection of the optimal design builds on the propositions on restructuring of the entire logic of constitutional construction from the one based on rules and procedures to one based on concepts and principles. This proposed "new" model of constitutional mentality serves as a basis for devising the key milestones of the alternative institutional construction of the constitutional review courts.

Finally, Chapter 5 proposes a criticism of the Kelsenian transplant. It suggests that while the creation of a special tribunal has undermined the consolidation of the judiciary and has in this way contributed to the fragmentation and eventual weakening of the judiciary, there are institutional design alternatives that would better uphold emergence of a consolidated, powerful judiciary as the foremost guarantor of the rule of law. Although the proposed alternatives envisage elimination of the separate constitutional courts, this should not raise concerns with the proponents of a strong body of constitutional review in countries in transition to democracy.

The idea behind the proposed reforms is exactly to strengthen and empower the function of constitutional review, and this work does not make any attempt whatsoever to consider elimination of this important function. This work rather challenges the habitual albeit often intuitive attitude, sometimes strongly carved in the minds of policy-makers or academics, that the option of the separate tribunal is the best, if not the only, reasonable and sustainable structure in which effective judicial review can be implemented over constitutional issues in Europe and in the post-communist countries in Europe or its immediate neighborhood. One very illustrative manifestation of this attitude is contained

¹⁸ This approach is largely influenced by Ronald Dworkin's position according to which courts acquire their legitimacy not from any conventional normative constructions, but from their institutional virtue to contribute to the democratic conditions; see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (Harvard University Press 1996), p. 34.

in “Models of Constitutional Jurisdiction”- a study¹⁹ which brings together the Council of Europe’s “standards” on the design of constitutional review in Europe: “In conclusion of what the Draft Report discussed under the sub-heading “Principal Types of Constitutional Jurisdiction- Possible Advantages of a Special Constitutional Court”, it is recommended to have constitutional jurisdiction exercised by a permanent special constitutional court.”²⁰

This “template” recommendation authored and promoted by the Venice Commission of the Council of Europe- an organization famously known for its persuasive influence on constitutional reforms all over Europe, but especially in the new democracies- self-speaks of the state of the discourse on the matter. This discourse reflects an embedded perception that the mere existence of constitutional courts is strictly indispensable for constitutional democracies, especially the new, struggling ones- a viewpoint which probably owes to the still widely accepted deduction of Mauro Cappelletti about the “genetic” links between the continental legal traditions and the Kelsenian design²¹ as much as to the widespread and mostly rewarding reference to constitutional courts in the new democracies of the Central and Eastern Europe after the fall of the former regime. Chapter 5 puts this long-accepted convention on trial by a detailed analysis and deliberation where the above-mentioned positions, supporting the exceptionality of the separate tribunal, meet with opposition from different perspectives in the context of actual alternatives to the Kelsenian model.

¹⁹ Herman Schwartz says that this study is basic to any discussions on European constitutional courts, Schwartz, supra note 5 , Footnote 6 to Chapter 2, p. 253.

²⁰ Steinberger, Helmut, “Models of Constitutional Jurisdiction”, Science and Technique of Democracy N 2, Council of Europe Publishing (1993), p. 3.

²¹ See Cappelletti, Mauro, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989), as well as the discussion in Chapter 5 of this thesis.

CHAPTER 1

DEFINING “OPTIMAL INSTITUTIONAL DESIGN”

A. “Optimal institutional design”: insights from new institutionalism

The objective of this chapter is to develop a normative concept of the optimal design of constitutional institutions in post-Soviet countries. This notion is to be elaborated based on the premises that the key objectives which are to be pursued by the societies and governments in these countries are democratization and rule of law. The concept will be later applied for the assessment of ex-Soviet constitutional judicial review models and their relative merits and drawbacks in view of the role of judicial review in fostering constitutional democracy. At the end of the day, this instrument is intended for making respective conclusions and recommendations for the (re)design of constitutional courts. In a sense, the mentioned task is plain and straightforward: to analyze a variety of existing and hypothetical models and configurations of institutional settings of judicial review- variations ranging between the variants with different disposition of the courts in the political system and the key option whether or not to designate a special tribunal for the purposes of constitutional review, political empowerment, jurisdiction, mandate, as well as, to some extent, the issues of access, mode of review, etc. In fact, the main discussion of this work will proceed exactly in this mode.

By and large, the majority of studies of the design of political institutions begin and proceed by the elaboration of the “perils” and the “merits” of this or that architecture and a consideration of their “fit” with the particular social and political environment without any underlying references to the basic insights from the sciences of institutional theory and institutional design, even when they are perfectly in line with them. Not even assuming any deficits on the part of these types of works, this work chooses to advance by a groundwork examination of the larger scholarly discussions on social and political institutions simply because it undertakes to come up with a conceptual scheme or a framework of principles which should guide the design through a challenging process of identifying, comparing, assessing, and opting for one or the other model.

Initially, the reactions of the pretty numerous and often controversial institutional theories are not certainly expected to be without their portion of criticism towards such efforts as this chapter represents. The very term “optimal design” may raise a fair bulk of controversies and opposition: by and large, the principal suggestions of the institutional theory are that institutions can hardly be chosen and that intentional interference into institutional dynamics has never proved to be effective, optimal, or determining.²² The emergence and evolvement of institutions is not solely a product of human

²² James March and Johan Olsen, *Rediscovering Institutions*, supra note 14.

interference: institutions may arise and change by accident or they may follow the inherent logic of evolution. To the extent that these dynamics prevail, the design theories may seem to be inadequate. Institutions can also be argued never to be perfect or optimal; since the rise of new institutionalism, the theories of “the efficiency of history” are now out of favor, while the new wisdom suggests that institutions, in line with the logic of historical development, are rather inefficient.²³

Then, even if we skip through such “grand theories” and simply concentrate on the architecture of formal institutions, different perspectives may open about the “optimal” and about the different attitudes, motivations and interests shaping the process of institutional construction. At the end of the day, even to the extent that institutions are shaped by rational actors, the rationalist paradigm, backed by conflicts of interest among different actors, would heavily predetermine the form of the institutions and their particular configuration. “Do institutions matter after all?” might be the other reaction to the effort in this work- a way of argumentation which is quite popular in the scholarship.²⁴

To proceed and succeed, this work has to face and respond to such potential criticism to pave its way. To start, the term “optimal design” is not as naïve and unprofessional as it may seem. In fact, the modern theories of institutional design do not even shy away from using the term in exactly the same combination as it is attempted here.²⁵ As such, the application of the word “optimal” with the word “design” (whether it is of institutions or policy or anything else) in the most functional definition of the latter- let us say *creation of an actionable form to promote valued outcomes in a particular context*²⁶ - is as normal, as the appropriateness of using “optimal” in relation to any situation of intentional rational intervention involving multiple alternatives.

It is rather the lack of proper comprehension of the intentions of those who use the term or the lack of clearness in the way the users of the term explain the designation of this instrument and the exact logical link between each component of the term that may lead to the controversy over its meaning. To put it simply, the term “optimal design of institutions” is not an attempt to challenge the massive supra-rational nature of institutions- rather it is applied in regard to perhaps the formal element of the institutional foundation, the one which is subject to intentional interference in the very material sense of this expression. In a sense, this approach may be labeled as “empirical institutionalism”²⁷- a term which is largely associated with the study of government structures and their impact on politics. However, an important warning needs to be made that although mostly devoted to discussion of the routine

²³ James March and Johan Olsen, “The New Institutionalism: Organization Factors in Political Life”, 78 *American Political Science Review* 3.

²⁴ For only a few, see Weaver, Kent, and Rockman, Bert (editors), *Do Institutions Matter?: Government Capabilities in the United States and Abroad*, The Brookings Institution, 1993; Steinmo, Sven and Tolbert, Caroline, “Do Institutions Really Matter? Taxation in Industrialized Democracies”, *Comparative Political Studies*, Vol. 31 No. 2, April 1998 165-187; Norris, Pippa, *Democratic Phoenix: Reinventing Political Activism*, Cambridge University Press, 2002.

²⁵ Robert Goodin in *The Theory of Institutional Design*, edited by Robert Goodin, Cambridge University Press (1996), at 34.

²⁶ Davis Bobrow and John Dryzek, *Policy Analysis by Design*, University of Pittsburg Press, 1987.

²⁷ B. Guy Peters, *Institutional Theory in Political Science*, supra note 16.

performance of government structures, this research will pay a somewhat greater attention to the interaction between formal political institutions and the other social phenomena shaping the socio-political behavior of the societies and nations. Hence, this study will perhaps differ from the mentioned academic style (empirical institutionalism) to the extent that the mainstream “empirical-institutionalist” works assume “unidirectionality of influences” by somewhat ignoring the mutual influence of different determinants,²⁸ or to the extent that these works expressly abstain from discussing the institutions and social structures in the full, comprehensive meaning.²⁹

The term “optimal design”, despite the apparent intuitive suggestion contained in its meaning, is not assuming either optimality or pure intentionality of real-world institutions. It is hardly contestable that institutions are not necessarily products of the human mind and much less it is likely that they are optimal or effective as such. One should recognize that there is a lot of misleading potential in the very terms that we appeal to, unless the meaning and the subject of each of the terms in this sequence is made clear. Perhaps it is this troubling combination of potentially controversial words in the foundation of the theory that may raise the major part of opposition to its very core concept. It might be this consideration that first led to the proposition about framing the phenomenon as “designing schemes for designing institutions”³⁰. Indeed, the actual shape of a social institution is hardly subject to the designers’ command. But even having this fact recognized, the main status of institutions still keeps being considerably contingent on intentional activities, not necessarily the rational or correct ones and not necessarily the ones which particularly intended the factually emerged form, and likely not single in their nature but diverse in their form and goals. Intentionality plays a much more important role in the emergence and dynamics of institutions than it is assumed even in those cases when the key driving force in place is supra-human, natural as such: neither the accidents and contingencies are so “purely stochastic”, nor the “selection forms” in the theory of evolution are so exempt of intentionality that one could ignore the importance of human action in the process of institutional change.³¹ After all, the hypothetical designer creates “schemes” rather than desired ideal forms- a proposition calling for due regard to the multiplicity of “localized attempts at partial design cutting across one another”.³²

To avoid being ambiguous and misleading, one should just warn that it is not the institutions that should be portrayed or should be conceived as optimal but their design. The design of institutions is simply a rational intervention on the level of the “institutional hardware” that is the “rules, rights, operating procedures, customs, and principles”, while the very core of the institutions- their “software”- has its somewhat autonomous dynamic which is dependent on multiple “discourses surrounding any complex

²⁸ Id. at 93.

²⁹ Robert Elgie, “From Linz to Tsebelis: Three Waves of Presidential/parliamentary Studies”, 12 *Democratization* 1, 2005.

³⁰ Robert Goodin, *supra* note 25, at 28.

³¹ Id., at 25.

³² Id.

institutional setting.”³³ The lessons to be learnt from the logic of this framework are telling the institutional designers, among other things, that although instrumentally taking place on the level of the hardware, the sophisticated intervention, or the intervention following the “informal logic” of institutional design, should necessarily consider the “discursive software” if there is any ambition for the success of the project.

As a reference to this subtle proposition, this work offers a conceptual distinction between “ideal(istic)” and “optimal” designs of political institutions. While the “ideal design” is a hypothetically desired configuration of the projected institution- a category largely relying on the neutrality of the multiple factors which in reality impact the actual configuration of the institution, the category of “optimal design” refers to the institutional architecture which is rather largely responsive to the influence of these factors. Meanwhile, this distinction is also the tool which allows distancing from idealistic perceptions of institutional dynamics based on over-praising of the role of formal institutions and, at the same time, from categorical claims about the determining role of other factors- cultural dependency or the human agency. It is exactly the recognition of autonomous and self-reinforcing nature of institutions that defines the core idea behind this concept. Without an appreciation of this important aspect, the task of the social engineers would be simply to pick up ideal-looking institutions which have an evidence of success in a different setting or are endowed with a mathematically well-calculated physical characteristic. And although one can notice some signs of such simplistic attempts in social sciences of largely economic origin, it is fairly evident in fact that the social phenomena are much more complex and multi-faceted than is assumed by the theories which over-emphasize the role of any one determining source of institutional dynamics.

The behavioralist-rationalist opposition to this would proceed from the position of stressing the human agency’s strategic role in institutional architecture. In reality, the emerging form and the contents of social institutions are immensely dependent on the preferences of different political actors and groups each of whom promote their own self-interest in social relations, eventually shaping the respective institution. This framework hardly avoids propositions that in real life and politics there is barely any situation which does not involve a conflict of interests and that the designing of binding political procedures is unavoidably a product of these conflicts, whereas the proposition of a solution based on rather an abstract normative notion of a “public good” is idealistic, unrealistic and is not compatible with real-life politics.³⁴

³³ John Dryzek in *The Theory of Institutional Design*, supra note 25, at 104-105.

³⁴ It is perhaps appropriate to note here that the mentioned “behavioralist” fashion in social science has been quite influential also in the studies of courts and politics, most noticeably represented by “political jurisprudence”, of which Martin Shapiro has been one of the starkest figures. The conflict of this previously dominant tendency with the then dynamically growing science of new institutionalism has been once strongly debated by the political scientists: see Smith, Rogers M., “Political Jurisprudence, the New Institutionalism, and the Future of Public Law”, supra note 15. The two conflicting trends have been then reconciled in a way that nowadays Martin Shapiro is considered as the “progenitor” of the new institutionalism in the field of studies on courts, politics and public law as such: Gillman, Howard, “Martin Shapiro and the Movement from “Old” to “New” Institutional Studies in Public

There may be more than one way of responding to this opposition. The first should definitely argue from the positions of the constantly fast growing discipline of neo-institutionalism which convincingly keeps taking over the somewhat deficient and one-sided claims of “individualist” science.³⁵ Called reductionist, the above described behaviorist-rationalist tendency in the theory of politics portrays political phenomena as a mere aggregation of individual action, while much of it should be attributed to organizational structures and rules of behavior.³⁶ Institutions impose their own logic on the individual political behavior through norms and values; they shape the interests, actions and even the resources of political actors. However, although this “new institutional” approach stresses the importance of structural constraints, the individual and attitudinal factors are not out of its scope. It is rather a call for a comprehensive analysis of the factors and for due regard of the multiplicity of factors and their interaction, though based principally on a key proposition that in the presence of any combination of multiple determinants, institutions and organization rules provide for the underlying framework of political choices.

At the same time as the study of such individualized decision-makers as presidents is to a large extent a scrutiny of the personal, attitudinal and psychological characteristics of individual holders of presidential positions, the more inclusive studies concentrate on the range of organizational determinants (various bureaucratic agencies, as well as formal and informal rules and procedures of decision-making). This makes the study of the institution of presidency to be more competent for describing the activities of chief political executives than the study of individual presidents.³⁷ Similar shall be the treatment of any other political and social actors and functions: legislatures, courts, and obviously the various types of (other) institution or policy designers. In conclusion, no comprehensive study of individual political behavior can successfully address the entire spectrum of relevant phenomena and factors without an “overt and tacit reference to the institutional arrangements and cultural contexts that give it shape, direction and meaning.”³⁸ Similarly, no any analysis of institutional design can thrive without a due respect of these factors.

The designing of post-Soviet political institutions at the beginning of the 1990-ies, although largely subjected to banal human intervention, was not a province of anyone dominant paradigm of strategic considerations and their conflicts. Even though it may sound somewhat naïve, the early 90-ies institutional construction was rather a “romantic” designing by democratically inspired patriots of the

Law Scholarship”, *Annual Review of Political Science*, Vol. 7: 363-382 (2004). Throughout this thesis, especially in Chapter 3, I am also looking at the ways for reconciling these tendencies, trying to arrive to a balanced account where both the force of human agency and that of institutions themselves is paid due attention.

³⁵ For an overview of the rational choice stream within the new-institutional science itself, see Weingast, Barry R, “Rational Choice Institutionalism”, in *Political Science: The State of the Discipline*, ed. Ira Katznelson and Helen V. Milner, New York: W.W. Norton (2002); Shepsle, Kenneth, “Studying Institutions: Some Lessons from the Rational Choice Approach”, *Journal of Theoretical Politics*, Vol. 1, No. 2, 131-147 (1989).

³⁶ March and Olsen, *supra* note 23, at 735.

³⁷ *Researching the Presidency: Vital Questions, New Approaches*, by George Edwards, John Kessel, and Bert Rockman (editors), University of Pittsburgh Press (1993).

³⁸ Cornell Clayton and Howard Gillman, *supra* note 16, at 3.

new political conviction driven by the invisible force of the “new” values, expectations, and ultimately the new formal principles of the game. It is rather the next generation of institutional design and re-designs, often led by the same political leadership- the previous “romantics” but already quite experienced politicians- that carried the first visible and consolidated signs of rational calculations of their interests in the process of constitution-making.³⁹ What was said about “romantic designing” is even less relevant to the modern re-design of the post-Soviet political institutions, which, it is worth mentioning, is the very subject of my work. The modern institutional re-design can hardly be similar to the democratically inspired and largely idealistic designing of the immediate after-collapse period. In the “post-romantic period”, the institutional design of constitutional review courts has been largely shaped and still continues to be so according to the preferences of dominant political actors.⁴⁰

However, even with this quite strong presence of outcomes provoked by rational choice, the modern political-institutional re-design is exactly a process with multiple determinants, sources and influences, not the least of which is the inner imperatives of the organizational rules and procedures. Insofar, the considerable impact of rational actors on the modern institutional designing is hardly a valid ground for undermining the merits of identifying better fitted institutional models for our days- an effort which, as it will be clarified later, has to be of clearly theoretical and methodological value as much as it assumes identification of “optimal designs” for the sake of the best public interest.

Hence, another response to the rationalists shall be drawn from methodological perspectives. It should be clarified from the beginning that the objective of this particular undertaking is rather normative in nature. It is obvious that regardless the certain values underlying the particular choice of design or policy, the eventual outcome of the institutional architecture is not likely to be the one exactly intended by the designer, but rather a hybrid of different predetermining factors, including the conflicting interests of rational actors and their groups. In line with this, the propositions of this research in large part proceed from the perspective of a principally hypothetical situation in which there is a major consensus on the basic political value system at a time on which to ground the future institutions (here: democracy and rule of law) or where a hypothetical neutral and devoted “designer” is in place to materialize the best possible efforts of a democratically-inspired government in stipulating new democratic institutions. “If so, the work acquires a considerably theoretical importance”- should be the reaction.

Theoretical or not, I believe this exercise is of value. As a point of departure, my position exactly takes the proposition that “the ideal can be a good guide to the real”⁴¹ which just makes the connection between the normative and empirical in any “institutional design projects”. It is to be argued that although the eventual institution is not likely to emerge exactly as supposed by the designer, the virtue

³⁹ For a more detailed analysis, see Chapter 2.

⁴⁰ See, for example, Pedro Magalhaes, “The Politics of Judicial Reform in Eastern Europe”, 32 *Comparative Politics* 43-62, October 1999.

⁴¹ Robert Goodin, *supra* note 25, at 34.

of the social architecture will be precisely in taking into account the factors which would resist this hypothetical match and to propose a design that will result in the best possible variation or alternative of the ideal one. If so, there is a lot of sense in construction of such theoretical models at least from methodological perspective because the “ideal” and then its more realistic but still hypothetical improvement- the “optimal”, become necessary methodological tools for working out the “real”. From this perspective, the “optimal design” is *the best possible mode of intentional intervention available at the disposal of institutional designers, which is intended at the most possible presence of the elements of the hypothetical “ideal” institutional shape in the real institution to emerge.*

The comprehensive attack on the attitudinal and, eventually, rational choice models by the new-institutionalist analysis, as basically outlined above, shall also be part of the reply to the largely rhetorical question “Do institutions matter at all?”⁴² This question, in one of its perspectives, precisely assumes the central role of the agency and rational considerations and the secondary importance of the core elements of the very institutions: the rules, procedures, and frameworks. But the other interpretation of this controversial but well-liked claim may advance from a completely different angle, and this is the radical structuralist tradition which often underestimates the role of formal institutions vis-à-vis the other strongest factors in social life- the cultural background, historical heritage, inherited patterns of social interaction, etc.⁴³ The analysis of the role of these factors is one of the central inquiries in this work, and the interrelationship between the force of these factors and the institutional factors embraces the essential core of the “conceptual framework” on which this particular chapter relies. But while the main propositions of this work also take the assumption about strong cultural dependency in the target countries as a point of departure, the core idea behind the applied framework advances from the belief in the reciprocated interaction between the determinants and their comprehensive contribution to each others’ status. And from this perspective already, the “optimal design” eventually appears as *a compromise in the rational designers’ efforts in reconciling the different sources of influence.*

The necessity of paying a due regard to the factors outlined in the previous paragraph makes it essential to develop a particular theory of optimality based on the variety of local factors. In fact, this refers to what is generally considered to be the “fundamental notion of design”- the “goodness of fit” of the to-be-shaped institution with the general environment in which it is set to function.⁴⁴ This account is the other crucial component of the present assessment of “optimal design”. But the environments vary.

⁴² Supra note 24.

⁴³ The tradition of cultural determinism, in its modern sociological propositions, owes to Max Weber’s seminal thesis about the role of protestant ethic on the development of capitalist relations: Weber, Max, *The Protestant Ethic and the Spirit of Capitalism*, London: Allen & Unwin (1976). The contemporary proponents of cultural determinism in political science insist on the crucial role of cultural factors in political arrangements. Related with the concerned region, cultural determinism is noticed to be inherent to authors and analysts such as Zbigniew Brzezinski or Richard Pipes: see Alexander Lukin, “Forcing the Pace of Democratization”, *Journal of Democracy* 10.2 (1999), 35-40, at 39. For a critique of excessive emphases on cultural factors with respect to democratization in Russia, for example, see McFaul, Michael, “The Perils of Protracted Transition”, *Journal of Democracy* 10.2 (1999), 4-18.

⁴⁴ Robert Goodin, supra note 25., at 37.

What is optimal for one country, nation or polity may be not so good for the other. In the same token, something that is good today is not necessarily going to be good tomorrow. The concept of optimal design in this work is both area and time specific. Defining the concrete area of its expertise, this work distinguishes between the different (post-communist) countries based on their current actual achievements in the key dependent variables of this inquiry: democracy/democratization/democratic consolidation and the state of the rule of law. Then, the scope of this work is going to be confined strictly within the political regimes in the former Soviet system where these regimes are characterized by weaker civic participation and traditions, non-consolidated democratic institutions, concentrated presidential or otherwise executive governments, and non-independent judiciaries.⁴⁵ Despite the considerable variation among the target countries in terms of these variables, this work considers that it is possible to generalize about the relatively steady dominance of these trends in all of the post-Soviet countries that allow us to think of a concept of optimal design which will generally fit these countries in its main propositions at least. And from this perspective, *the “optimal design” in this work is an institutional reform agenda which is at most sensitive to time and country specific constraints.*

Finally, what are then the particular sources of influences which prevent the idyllic, mechanism-like functioning of newly created formal institutions of constitutional democracy? To answer such a question, one should necessarily start by studying the multiple determinants of the consolidation of the institutions of constitutional democracy. Hence, this chapter proceeds further by looking at these determinants. This will be followed by elaborations about the “conceptual framework”, as described above, then by proposition of a “theory” for designing optimal institutions and by definition of “optimal design” based on already the particular target values and particular social and political environments.

B. The determinants of democratization: lessons for institutional design

The issue of determinants of democratic consolidation is perhaps one of the central inquiries in transitology. The remarkable variation of reactions to the apparently identical challenges of political transition across the globe has provoked a permanently vibrant and continuously topical debate on the problem. What makes some countries build democracy effectively and others not?

The theories of development and democratization have thought for answers from a number of explanatory perspectives. The determinants of successful democratic transformation are numerous and complex. The variety of the factors which enable effective environment for democratic development has stipulated a need for their classification. The most influential schools of academic

⁴⁵ This discussion is undertaken in Chapter 2.

literature have explained the success of democratic transformation by cultural, socio-economic, institutional, and other factors. All of these traditions of thought, or at least most of them, have their origins in the earliest political-philosophical schools as old as the works of Plato and Aristotle, but meanwhile, all of them have got their new birth and inspiration in the twentieth century which witnessed the most massive movement to regime transformation, development and democratization in the world.

The cultural tradition of the modern studies of determinants starts probably with the “all times classic” of Alexis de Tocqueville and his insightful analysis of civic traditions in the United States.⁴⁶ In the more recent past, the cultural tradition was given renewed attention by very insightful studies of civic capital⁴⁷, the studies of political culture,⁴⁸ religion,⁴⁹ national identities, etc.

The other group of determinants emphasizes the role of social-economic factors. The newest insights of this school come from the works of Dahl,⁵⁰ Lipset,⁵¹ Huntington,⁵² etc. These works emphasize the importance of economic development and its companions- such as the level of industrialization, urbanization, and education- on the quality of democracy. However, the peculiarity of these last seminal works is rather in their tendency to a more balanced approach. Seymour Lipset, for example, tended to consider two major features of society as “bearing heavily on the problem of stable democracy”: economic development and legitimacy, where the later is characterized as the “degree to which institutions are valued themselves and considered right and proper.”⁵³

The third major trend in the study of democratization, represented by different traditions of institutionalisms, pays increased attention to formal institutions and their design. The institutionalist traditions, in their different forms- old and new- are mentioned throughout this work.

The success of democratic reforms has been also often thought to be conditioned by factors external to the society in change. The various explanations ascribe the success of the transformations to the international environment, regional geopolitics, and the preferences and actions of international actors, as well as international and regional assistance. Robert Dahl, for example, among the essential conditions for democracy mentions the ability of elected officials to control military and police and

⁴⁶ Alexis de Tocqueville, *Democracy in America* (London: David Campbell 1994).

⁴⁷ See Gabriel Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations*, Princeton University Press (1963); Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton University Press (1993).

⁴⁸ See, for example, *Political Culture and Developing Countries*, edited by Larry Diamond, Lynne Rienner Publishers (1993).

⁴⁹ For one, see Kenneth Bollen, “Political Democracy and the Timing of Development”, 44 *American Sociological Review* 4 (1979).

⁵⁰ Robert Dahl, *Polyarchy: Participation and Opposition*, Yale University Press, 1971.

⁵¹ See Seymour Lipset, *Political Man: The Social Bases of Politics*, Johns Hopkins University Press, 1981, pp. 27-58.

⁵² Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman: University of Oklahoma Press (1991).

⁵³ Seymour Lipset, “Some Social Requisites of Democracy: Economic Development and Legitimacy”, *American Political Science Review* 54, at 46.

the absence of a foreign control and influence which is hostile to democracy.⁵⁴ Last but not least, the success of democratic reforms has been also greatly conditioned by the choice of competent policies and the making of correct decisions by those in charge of the reforms.⁵⁵

The tremendous change brought about by the collapse of the communist block has been the newest and one of the best opportunities for testing the competence of the above-mentioned theories. Since the collapse of the Soviet block, the post-communist transformation has become a tremendous treasure for social scientists. The determinants of successful transformation in post-communist world have become a theme for numerous studies, starting at the earliest time of the transition where no sufficient empirical evidence could yet be obtained in support of this or that proposition. As early as 1991, Samuel Huntington's work on third-wave democracies attempted an overview of the paradigms of regime change of post-communist countries in his comprehensive study of transitional dynamics across the world.⁵⁶ Referring to the determinants of democratization, Huntington starts with prior democratic experience as a favoring condition for the consolidation of new democracies. This is then followed by a range of other factors: economic development and industrialization, international environment and foreign actors, the time of a country's transition, the mode of transition itself, and finally, the so-called contextual problems (these are problems "endemic to individual countries"⁵⁷) and the way "political elites and publics responded to those problems."⁵⁸ The factor of formal democratic institutions and their choice in Huntington's list takes its place out of this primary framework: the importance of this authority seems to be only slightly hinted upon, and the impact of the choice of macro-political institutions appears accompanied by a question mark in his analysis.⁵⁹

These observations of the series of factors which enable effective environment for democratic development have stipulated a need for conceptualizing the study of determinants. The new generation of "determinants' studies" departs from mere classification of numerous individual determinants and basically arrives at an abstract framework whereby the different factors are conceptualized rather by the "temporal structure of determination and the degree of intentionality" and where their interaction is paid greater attention.⁶⁰ In these frameworks of determinants and their interaction, the institutional impact comes as one of the major variables, coupled and often opposed to what is commonly called the "legacies" perspective. Crawford and Lijphart insightfully address each of these factors as "ideal types" to underline the contrast for the purposes of academic analysis and for "generating hypotheses about diverse trajectories of East European countries after the collapse of

⁵⁴ Robert Dahl, *On Democracy*, Yale University Press, 1998.

⁵⁵ See, e.g. John Elster, Claus Offe, and Ulrich Preuss, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea*, Cambridge University Press (1998).

⁵⁶ *Supra* note 52, at 20.

⁵⁷ *Id.* at 253.

⁵⁸ *Id.*

⁵⁹ *Id.* at 277-278.

⁶⁰ Elster et al, *supra* note 55.

communism.”⁶¹ In the study by Elster, Offe and Preuss, “the burden of explanation” is put on three central variables: legacies, institutions and decisions.⁶² Legacies are the constraints which stem from the past and which are fairly immune from intentional intervention due to path-dependent qualities of their settings. Institutions, in the meaning of Elster et al, are characterized rather by the intentionality of a set of rules which are put into operation for reaching certain effects. Decisions are the direct products of the actors’ actions. Accordingly, the first group of “transition outcomes” is attributed to the variety of cultural and institutional structures (hence the term- *structuralist approach*) which are inherited from the earlier periods of history. The second group concentrates on the “institutionalized agency”- the configuration of actors, rules and procedures which emerged from the very process of change. The last group of outcomes is predetermined by the quality of decisions and policies of decision-makers.

The “most significant variable”

Having classified and conceptualized the variety of determinants, the challenge is to extract a valid proposition from the pool of numerous theories and explanations. For this, a scrupulous look at the mode of causality, through which the numerous mentioned factors impact the transformation, becomes necessary. Let us start by the premise that democratization is a matter of earning the fundamental support of democratic institutions by the basic constituency, the society in case, rather than a matter of sheer proclamations, intentions, and institutional approximation at the level of formal procedures, rules, etc. The process of democratic transformation, if genuine, is largely shaped by the process of democratic consolidation which is an artifact of the mental appreciation of the values of this regime. Larry Diamond calls the beliefs about “democratic legitimacy”- the public support of democracy- as the best possible form of government and the appreciation of its moral ideals as the “central factor” and the “defining feature” of democratic consolidation.⁶³ The need for democratic consolidation is, generally speaking, absent in societies where the inner appreciation of its values and prospects is in place, whereas we long for democratic consolidation in those societies where exactly this sort of mental or moral appreciation by the local constituency is in deficit. While the appreciation of the legitimacy in consolidated democracies is internalized and deeply rooted, that is the sort of legitimacy at stake is *intrinsic*, in societies on their way to democratic consolidation the legitimacy of democracy is often largely conditional on the appreciation of the functional credentials of the democratic system and its effective performance- the so-called *instrumental belief in democratic legitimacy*, which is not the kind of legitimacy that leads to consolidation, as Diamond believes.⁶⁴

⁶¹ Beverly Crawford and Arend Lijphart, *Liberalization and Leninist Legacies: Comparative Perspectives on Democratic Transitions*, University of California at Berkeley (1997) at 3.

⁶² Elster et al, supra note 55, at 293.

⁶³ Larry Diamond, “Political Culture and Democratic Consolidation”, *Estudio Working Paper*, 1998/118.

⁶⁴ Id.

Hence, the prospect of “real” democratic legitimacy, democratic consolidation, and democratization is chiefly a function of intrinsic beliefs and appreciation. Now, a number of individual factors, which we described in the previous section, do matter insofar as they support or discourage either the emergence or the maintenance of this state of appreciation among aspiring democracies. For example, economic success and industrialization contribute to the process of democratization to a large extent by the contribution to the society’s overall approval of the regime change for which the success of the economic reform is essential. On the other hand, economic success, in a more long-term perspective, might have contributed to democracy through the fruits of modernization: education, access to information, openness to the world and appreciation of humanistic values, as well as through civic virtues: tolerance, trust, efficacy, etc., which would result in the appreciation of “intrinsic legitimacy”. Both these modes of the influence of economic factors are indicative of the “cultural” elements of causality: the role of modernization (prior urbanization, industrialization and education) in fact can be integrated into the function of cultural capital in general together with a range of other individual determinants which are genetically the properties of the cultural domain: the political culture, prior democratic experiences, the civic background, and so forth. The element of functional appreciation is present in many explanations of the external factors as well: for example, the prospect of imminent accession to the European Union has probably largely predetermined the “loyalty” to democracy via appreciation of the concrete economic and political dividends of the accession. These types of determinants do not amount to intrinsic democratic consolidation but they do support democratic consolidation *instrumentally*, which however does not depreciate the importance of them.

The sort of mental appreciation which builds “intrinsic legitimacy” has its inner structure. This structure is the institutional embodiment of the inherent norms of behavior, patterns of socialization and self-government, or in other words, the local culture of communal co-existence which the democratic form of government has in its core. The relationship between the civic culture and democratic government is like that of essence and form. In his very insightful comparison of civic traditions in different parts of modern Italy, Robert Putnam develops a theory of social capital as the key factor that “makes democracy work.”⁶⁵ The study concentrates on the “civic virtues” of a society, such as civic engagement and participation, egalitarian patterns of politics, solidarity and trust, social structures of cooperation as the main features of civic community. The conclusions for this study go much farther than the borders of Italy: “virtually without exception, the more civic the context, the better the government.” In reference to institutional reform, which he advocates as an instrument of political change, Putnam highlights the constraints posed on institutional performance by the social context and history, which “profoundly condition the effectiveness of institutions” – so he defines his first lesson from the Italian experiment.⁶⁶

⁶⁵ Putnam, *supra* note 47, at 182.

⁶⁶ *Id.*, at 181.

The role of social capital is re-visited by Elster, Offe and Preuss in relation to post-communist transformations.⁶⁷ Following on their in-depth analysis of institutional patterns in four post-communist countries- the Czech Republic, Slovakia, Hungary and Bulgaria, these authors' final conclusion seems to leave not much doubt about their position on the determinants of successful transitions: "we submit that *the most significant variable* for the success of transformation is the degree of compatibility of the inherited world views, patterns of behavior and basic social and political concepts with the functional necessities of a modern, partly industrial, partly already post-industrial society."⁶⁸ And as if reaffirming their point in reply to the most frequently asked question about the force of determinants, they conclude: "Thus, what matters most is the social and cultural capital and its potential for adjusting the legacies of the past to the requirements of the present."⁶⁹

Institutions in context: how they matter?

How and in which way formal institutions matter? On the visible and functional level (or on the level of *instrumental belief in democratic legitimacy*), for a nation in transition the success of the institutional reforms constitutes a positive investment in the overall appreciation of the image of the new system, in the same way as the economic success is a good image-maker for the larger socio-political reform. On a more essential level, however, institutions matter insofar as they contribute to the "inner appreciation" of the system, that is insofar as they transform the formal transplanted rules of democracy into internally accepted practices. In other words, institutions matter to the extent that they are received by their constituency, and this means that it is only through becoming part of local culture that institutions make change.

If so, one might say that the ranking of institutions among the "central variables" is an overstatement of their role. The answer might be that the conceptualizations which identify the macro-variables are by themselves largely conditional and abstract. It is the relative rather than the absolute autonomy of the institutions, one should note, that places them in the macro-framework. This taxonomy, not to be a surprise, has provoked plenty of controversy. The institutions' indirect classification as a major determinant of successful development in general has never been incontestable. The popular query "*do institutions matter?*" has with time grown to a well-liked academic orthodoxy despite its largely rhetoric nature and its failure to represent a narrowly defined line of argumentation. In this respect, the claim stands for the rather unrelated academic assertions which question the role of institutions from whichever perspective. This trend could not avoid the study of democratic transitions as well. While the analyses of different settings and combinations of political institutions proceeding from the methodological positions of "empirical institutionalism" have implicitly accepted the importance of

⁶⁷ See Elster et al, supra note 55.

⁶⁸ Id. at 307-308.

⁶⁹ Id., at 308.

institutional design in the context of political regime change, the academic opposition to this conventional style has not hesitated to disagree even to the extent of rejecting the importance of institutions and their design in the process of transition.

For example, in an article with a self-speaking title “The Structural Determinants of Democratic Consolidation”, political scientists Mark Gasiorowski and Timothy Power, having undertaken an empirical analysis of a number of variables of democratic consolidation, conclude that the choice of institutional design (such as the choice of presidential versus parliamentary regimes and the party fragmentation systems) has not been seminal for the outcomes of the consolidation in any significant way.⁷⁰ Instead, their study identifies three other structural variables that affect the process of democratic consolidation which together have a “success rate of between 93-97% in predicting which democratic transitions resulted in consolidation and which resulted in breakdown”: these are (1) the socio-economic factors, (2) the inflation, and (3) the “contagion effect of democratic neighbors”. Skipping through the basic method of analysis of this article, which is clearly beyond the scope of our work, a reservation should be made about the overall style of such “empiric” studies which in principal overpass the main conceptual insights about the institutional impact.

At the conceptual level, the style of analysis presented above neglects the comprehensiveness of institutional intervention by highlighting only the formal impact of institutions, for example the choice of a particular macro-political design (presidential v. parliamentary) which is an important but not a self-sufficient part of the overall reform as I will try to clarify further in this work. At the same time, the work in a way fails to acknowledge that the institutional context is the underlying framework in which the assumed determinants operate and through which they impact the consolidation of new democratic institutions. Most importantly, this conventional trend in empirical institutionalism misrepresents the mode of institutional influence and the conceptual context of causality which is the core framework underneath the processes of institutional consolidation—something that forms the subject matter of the subsequent discussion in this chapter.

If we abstain from expecting the kind of mechanical and “visual” effect of institutional reforms on the quality of democratization, which is supposed in such studies as the one of Gasiorowski and Power, the wisdom of institutional theories seems to be clear-cut: institutions do matter. Yet, it is now important to answer the question about the interaction of institutions with the other key variables and a variable’s relative prevalence at a specific place and a specific time, as well as to find out “to what extent, in what respects, through what processes, under what conditions, and why institutions make a difference”⁷¹, rather than to address such banal clichés about whether institutions matter or not. This complex interaction of determinants and the particular status of institutional factors in this context

⁷⁰ Mark Gasiorowski and Timothy Power, “The Structural Determinants of Democratic Consolidation”, *Comparative Political Studies* 31/6 (1998).

⁷¹ James March and Johan Olsen, “Elaborating the “New Institutionalism”, University of Oslo/Arena Working Paper Series 11 (2005), at 9.

with a heavy emphasis on “how, through what processes and under what conditions” institutions matter is the theme of the next section and the following discussion.

The “conceptual framework”

If I could afford to make an experiment and could borrow the constitutional model of a developing democracy with a weak civic background to function in a developed democracy with a highly civic tradition and the constitutional framework of the latter to function in the first country, I would expect that the democratic processes in both countries would not change in any substantial way. The main resource for the successful democratic performance is the society itself, its internal capacity of self-organization and its patterns of social organization in general. Where the society is “gifted” with civic virtues, any experiments with “alien” or defective formal institutions will not result in a major deviation from its habitual way of social organization. Similarly, no ideal institutional design of a democratic constitution would likely produce an immediate effect on a non-civic ground.

A similar suggestion is made by Putnam: “The president of Basilicata cannot move his government to Emilia, and the prime-minister of Azerbaijan cannot move his country to the Baltic.”⁷² Despite the commonplace simplicity behind such references, these imaginary experiments help us to see the critical differences between nations with and without a basic civic background on their way to democratic consolidation. Indeed, the overall impact of the civic background and social and cultural legacies is hard to underestimate.

The basic features of the community strongly predetermine the way in which it reacts to major challenges of the transitional time, whether this is an imperative for fair elections, political participation, internal mechanisms of accountability, etc. Putnam’s comparison of Italy’s more civic north and less civic south offers a brilliant analogy with the post-communist world: through time, we can now follow the logic of the assorted reactions of particular countries and groups of countries to the largely identical political challenges of transformation. While the countries in Central Europe and the Baltic states have managed since the collapse of communism to demonstrate considerable achievements in almost all areas of political transformation, the majority of post-Soviet countries still “chronically” suffers from typical ills, such as the failure to hold fair and equal elections, corruption, weak judiciaries and a strong concentration of power with survived useless bureaucracy all over the public apparatus. It is no surprise, in this light, that the study of civic capital in the context of economic and democratic transition has been paid plenty of attention, supported and stimulated in part by surveys sponsored by the World Bank and the European Bank for Reconstruction and

⁷² Putnam, *supra* note 47, at 183.

Development.⁷³ This larger tendency of relying on the analysis of civic traditions and virtues is noticed in the most recent studies of post-communist countries where the account of the cultural capital is considered for “generating insights into the prospects for democratic development and institutional change.”⁷⁴

But would this exposed tribute to the cultural factors not be a very strange preface to a study of the role of institutional design such as this work? Being sincerely convinced of the overwhelming impact of the social and cultural factors, I should still take a further step to keep away from accounts to cultural path-dependence of a deterministic sort. Indeed, cultural determinism, like any other form of determinism, is not my intention at all. Attributing a critical role to civic virtues and therefore ranking the democratic responsiveness of the social and cultural capital as the prime determinant in post-Soviet societies, I am very far from “granting” any static quality to this phenomenon. Moreover, I appreciate that the capacity of the formal institutions to change the culture represents the principal opportunity for the aspiring democracies. It is largely relevant to the cultural context in general what Larry Diamond assigns to its very crucial component, the political culture: “The cognitive, attitudinal, and evolutionary dimensions of political culture are fairly “plastic” and can change quite dramatically in response to regime performance, historical experience, and political socialization.”⁷⁵ Douglas North mentions that steady institutional developments create *path dependencies* which are becoming self-reinforcing.⁷⁶ Putnam defines his second major lesson from the Italian experiment in this way: “changing formal institutions can change political practice.”⁷⁷

I borrow from Elster et al⁷⁸ a conceptual framework where the mutual linkages between the determinants play a decisive role in the process of democratic development. This framework offers a major contribution to the inquiry through its synthetic approach to the interplay between the variables and by persuasive argumentation and support for this account. It implies a harmonic and rational evaluation of each of legacies, institutions, and decisions in close interaction rather than separately. The excellent reference to backward and forward linkages explains the main logic of such interactions. Forward linkages spell out the impact of structural elements (e.g., culture and traditions) on institutions, and furthermore on decisions and policies. Backward linkages, in contrast, bring to motion the reverse dynamic from decisions and policies to institutions, and finally to structures. This framework enables identification of the principal interaction and interrelation between the elements involved that becomes crucial for a conceptual and realistic vision of the processes and is so far

⁷³ Among these are the 1990 and 1995 World Values Surveys (WVS), New Democracy Barometer (NDB), and the EBRD’s Business Environment Survey (BEEPS) which attempted at measurement and conceptualization of a range of civic phenomena such as societies’ moral attitudes, trust, participation, etc.

⁷⁴ John Dryzek and Leslie Holmes, *Post-communist Democratization: Political Discourses across Thirteen Countries*, Cambridge University Press (2002).

⁷⁵ Larry Diamond, “Political Culture and Democracy” in *Political Culture and Developing Countries*, supra note 48, at 9.

⁷⁶ Douglas North, *Institutions, Institutional Change and Economic Performance*, supra note 16, 93-94.

⁷⁷ Putnam, supra note 47, at 184.

⁷⁸ Elster et al, supra note 55.

crucial for the more narrow inquiry of this analytical undertaking: it is the force of backward and forward linkages that gives the utmost value to institutional arrangements by virtue of their capacity to “relativize the force of legacies” and “reverse the temporal structure of causality” which are possible (but not necessary) outcomes of institutional innovations.⁷⁹ The considerations behind this framework are more than far-reaching. Among other virtues, it provides a conceptual guide to the science and practice of institutional engineering, something which I will try to explore further on.

The framework of mutual interrelation and interaction between the determinants is critical to my inquiry. Without this, my account would remain a vulnerable tribute to determinism that does not fit my convictions. I anchor this analysis on the conceptual conclusion arrived at by Elster, Offe, and Preuss: “It appears that it is the formative impact of new institutions- i.e. their capacity to shape the frames, habits, routines, and expectations (and even memories) of citizens in convergent ways and thereby to render inherited fears, hostilities, and suspicions groundless- that is the critical determinant of consolidation.”⁸⁰ This statement, more than any other, lucidly explains the crucial role of formal institutions from exactly the viewpoint of the structuralist approach.

The cross-dependent link between the culture and formal institutions thus becomes my main argument for the importance of identifying optimal institutional choices since the chosen institutions will be crucial for bringing the political transitions to the stage of genuine democratic consolidation. The challenge for institution-makers is to identify ways how to break with the older legacies and create the right new institutions that would promote the type of social relationships which are friendly to democracy.

C. Defining the concept of optimal institutional design for a post-Soviet country

The fallacy in the core interpretation of the role of determinants and the lack of competency among the post-Soviet designers and policy-makers has brought two types of common misrepresentation of these roles and their interaction during the process of institution-building in the formerly communist countries of the former Soviet Union. One of them concerns the over-estimation of the role of formal institutions, which has resulted in praising of “ideal types”. This has paved a way for “idealistic design”.⁸¹ These designers have perhaps not taken enough consideration of the force of the key constraining factors: the importance of legacies and the interests of individual and collective players.

⁷⁹ Id., at 296.

⁸⁰ Id.

⁸¹ As it will be argued further on in Chapter 2, this style of designing largely characterized the constitutional-building process of post-Soviet countries in the very beginning of the transition (1991-1993-4), resulting, among other things, in the emergence of strongly empowered constitutional courts.

Their designs have therefore portrayed ideal types. By this, the institutional designers of this conviction have neglected the essential principle of institutional design- the criteria of “fit”⁸²- by ignoring the enormous authority of the local capital.

The other popular misconception of the determinants and their interaction has over-emphasized the role of legacies and has attributed deterministic qualities to their power. The designers and policy-makers of this “school” have declined introduction of proper institutional reforms by distrusting the capacity of new structures to produce change. Their main trust and faith has thus been rather in the evolutionary nature of the transformation.⁸³ By this, the designers have neglected the core promise of transitional institutional design- the capacity of institutions to “relativize”⁸⁴ the force of legacies and to start building new social and political capital.

The core principle of transitional institutional design

Where cultural constraints are still very strong and where they appear to be the main obstacle on the way to the proper functioning of the institutions of the new generation, as it is the case in the post-Soviet Eurasia, institutional engineering should first of all consider the formation and promotion of institutions which can best break with the destructive legacies and facilitate the development of new patterns within societies in a longer term strategic perspective. I consider this the first and primary rule that an institutional designer should bear in mind. This suggestion spells out the basic axiom of the new-institutionalist wisdom in social science that political institutions not only reflect the environmental context but also create them.⁸⁵

The classics of institutional theory by March and Olsen also provide in part that political institutions’ major activity is “educating individuals into knowledgeable citizens.”⁸⁶ This is an enormously important guide for institutional designing that aims at the production of *intrinsic* support for the democratic values. This role of institutions represents their fundamental responsibility in the regime change, in contrast to the “mechanical” impact of institutions on the level of political hardware. The virtue of institutions is in the ability to shape the “plastic” properties of the political culture through a long and routine process when institutions prove to get the support of the political constituency by providing it with the necessary legitimacy for consolidation. Respectively, the virtue of the institutional design is in giving the stage to the institutional programs that will guide the long routine of cultural transformation in the designated direction. The kind of software-oriented strategy, given

⁸² Goodin, *supra* note 25, p. 37.

⁸³ It is from these considerations, to a considerable extent, that the constitutional fathers in Turkmenistan have rejected creation of a constitutional court.

⁸⁴ Elster et al, *supra* note 55, p. 296.

⁸⁵ March and Olsen, *supra* note 14, at 162.

⁸⁶ *Id.*, at 161.

that it is receivable by the local context and proves to be efficient by its hardware, will enable a quality change in the learning of democratic institutions and values.

In relation to the political organization of government- and this may sound very familiar- such logic is most likely to result in the preference of the parliamentary form of the government over the presidential simply because the former in a long-time perspective is more supportive to breaking with the embedded mentality of praising a strong authoritarian leadership and will help the creation of a party-based pluralist political culture which is essential to the consolidation of democratic institutions. This particular argument for preferring the parliamentary form over the presidential, elaborated by Juan Linz in his famous “anti-presidential campaign”,⁸⁷ exactly stands for the kind of sustainable cultural change by the institutional performance that is advocated in this work. This runs in contrast with some other explanations of Linz which instead speak about the functional “perils” of the presidential government (such as the danger of the tension between the two elected bodies- the president and the legislature).⁸⁸ The implied suggestion that the authoritarian tendencies are more likely to be preserved by strong presidential settings is confirmed by the earliest evidence from the post-Soviet political performance. One observer of the relationship between presidential government and democratic consolidation, for example, finds that the deficit of political freedoms and human rights in the post-communist countries in the period between 1993 and 1998 is associated with the existence of presidential power.⁸⁹

The basic implications of such “software-oriented” strategies for the construction of the constitutional review courts shall lead to a consideration of the typical ills of the political culture that the institution of judicial review could have cured. The particular configuration of the institutional settings of the constitutional review can have an impact on the patterns of political performance, which eventually flow from the legacies of the past institutional traditions. In the dimension of constitutional separation and balancing of powers, the configuration of judicial review can in one or another way affect the distribution of the political power and the tendencies towards concentration of the power in the hands of traditionally favored executives. Although not entirely conditioned by only the institutional design, the distribution and the balancing of powers is to a large extent dependent also on the power of the courts to check on the political branches. For example, the capacity of constitutional courts in this respect can be activated or deactivated, empowered or disempowered by such design alternatives as granting of the mandate to review disputes on the constitutional competencies of state bodies, electoral controversies, etc. Hence, in general, it can have a considerable effect on the status of constitutionalism in the concerned country.

⁸⁷ Juan Linz, “The Perils of Presidentialism”, *Journal of Democracy*, 1(1), 1990, 51-69.

⁸⁸ Id.

⁸⁹ Mikhail V. Beliaev, “Presidential Powers and Consolidation of New Postcommunist Democracies,” *Comparative Political Studies* 39 (2006).

Then, in the dimension of the rule of law, the institutional design of the judicial review can at some, often large extent predetermine the institutional capacity for building a rule of law-based political culture. In particular, the design of the institutions of judicial review can have this impact through its different dispositions towards strengthening or weakening the basic agencies concerned with the rule of law, first of all the general judiciary.⁹⁰ As this work will argue, such an important aspect for the institutional capacity for rule of law building as the consolidation of the judiciary may be primarily affected by the choice of the model of judicial review. Furthermore, the choice of this or that institutional setting of the constitutional review court can have an impact on the development of constitutional political culture. The latter is largely predetermined by the institutional competency to deal with constitutional human rights cases at constitutional courts.

In sum, the competency of constitutional review courts with respect to these opportunities for democratic contributions seems greatly conditioned by the particular design of judicial review and its association with such design options as the choice of the concentrated or diffuse systems, the political empowerment of constitutional courts, the scope of standing and access, and so on. These considerations and the deliberations on the variety of institutional settings of judicial review will proceed throughout the course of this work. Meanwhile, the issues of the political empowerment and the separation of the constitutional court will be the key subjects of the specific discussions in the subsequent chapters of this work.

The hazards of idealistic design

Having outlined the key features of the “core principle of transitional institutional design”, a warning about the danger of proposing “idealistic designs”- *institutional interventions which derive the main inspiration from the respective ideal types*- should be made. If only guided by the sole mission of introducing arrangements which correspond to the ideal forms, the institutional designer may arrive at proposing apparently perfect transplants with a perfect “record” of functional excellence elsewhere without a due regard of the range of factors which will resist the expected ideal performance on the new soil. In fact, the effect of institutions on culture, as well as on actors does not evolve in only one direction. The optimally worked-out design should consider the preexisting social and cultural capital, and only in this way it can expressly constitute a perfect design strategy as “the most promising starting point of a bottom-up process of institution founding.”⁹¹ The problem for a designer is in the potential controversy between the two essential standards which are advocated: the need for coming up with institutional models which are friendly to the democratic consolidation and the need to consider the constraints imposed by the existing capital in place. This potential hostility is, in fact,

⁹⁰ This argument is made explicit in Chapter 5.

⁹¹ Claus Offe, “Designing Institutions in East European Transitions”, in *The Theory of Institutional Design*, edited by Robert Goodin, Cambridge University Press (1996), at 212.

the biggest challenge for the transition while the reconciliation with such hostility is the biggest challenge for the institutional designer. The virtue of an optimal design of institutions consequently is in finding the most workable compromise between the two important standards, and that is to say a compromise between ideal forms, represented by the very core ideal of the institution and its pure value system, and a number of considerations of local knowledge and culture which may constrain the emergence of ideal types.

The evidence of idealistic designing is ample in the short history of post-Soviet regime transformation. By itself, this style of designing involves a widespread reliance on imitating, importing and transplanting available models.⁹² In a sense, the practice of transplanting by itself is not a ground for criticism since institutional borrowing and replication, given they have been worked out to fit in the local environments, provide for considerably better chances of producing optimal institutional design than the “invention” of new arrangements, which contains more dangers than opportunities. The troubles of replication and copying stem from rather different patterns which often accompany institutional transplanting and which definitely characterized institutional design in so many cases in post-Soviet countries.

The first of such problems relates to the very choice of the transplant and the particular combination of institutional settings which are selected. The introduction of jury trials in several post-Soviet countries may serve as an appropriate illustration. This is not even because of the frequently discussed issues with the so to say common-law properties of the juries and the talks about fairly unclear prospects of juries in civil law traditions.⁹³ This is rather because of the absolute reliance of the institution of jury trials on civic traditions, based on the social sense of public trust, fairness, impartiality and responsibility in the society, as Putnam describes the civic virtues.⁹⁴ Whilst probably largely appropriate to especially the American society with its long-standing reputation of civiness,⁹⁵ this institution’s prospects seem more than vague in a country with very weak civic traditions, with a prevalence of informal networks, with a high level of distrust and with rampant corruption.⁹⁶

The defenders of juries in Russia may counter-argue that that the introduction of juries in post-Soviet Russia has been intended exactly at promotion of civic participation and civic virtues- a kind of rationale which relies on the strategic impact of the new institutions on collective attitudes- apparently a perfect consideration of the “core principle of institutional design” in the meaning of this theory. To what extent, though, this strategy has been sensitive to the local circumstances and how good a compromise it has been between the “core principle” and the other principles of institutional design? A number of recent court cases involving charges against xenophobia and crimes committed

⁹² Id., at 210.

⁹³ See, for example, Stephen Thaman, “Europe’s New Jury Systems: The Cases of Spain and Russia”, 62 *Law and Contemporary Problems* 2 (1999).

⁹⁴ Putnam, *supra* note 47.

⁹⁵ Tocqueville, *supra* note 46.

⁹⁶ See further in this Chapter.

on the ground of national hatred may lead us to an answer. In a series of such cases, the defendants were either acquitted or were charged with minor offences in opposition to the judges' positions and thanks to the juries' verdicts.⁹⁷ A number of trials, where Russian nationalists were charged with racially motivated crimes, have resulted in acquittals by juries composed of ethnic Russians whereas similarly composed juries have consistently convicted Muslim defendants charged with the crimes of terrorism during the Chechen war.⁹⁸

Given the two propositions (1) about the highly civic context required for juries' appropriate functioning and (2) about the quite low civic credentials of the post-Soviet societies, both of which seem to me pretty obvious, the prospects of juries' success on the ex-Soviet ground do not show any strategic promise whatsoever in quite a long-time perspective unless one can "reeducate people so as to make them fit for their roles in the new institutions."⁹⁹ But the last possibility apparently can hardly be achieved in any close proximity insofar such deeply rooted social patterns are concerned. The conclusions about the failures of the jury in Russia may be similarly true about other post-Soviet republics which "experiment" with juries, such as Georgia. In Georgia, in addition to the Russian-type standard weaknesses of civic traditions, the local society is better known for its even closer networks between relatives, neighbors and similar informal groups. The small number of the population in this country makes the likelihood of avoiding the impact of these networks almost impossible. In all this light, the experiment with juries seems perfectly to fall under the paradigm of "idealistic design" due to its remarkably underlined mismatch with the social background in place.

By exactly the same token, other highly "Western" transplants, such as plea bargaining and alternative criminal sanctions might have good prospects due to their "proximity" to the local social capital and the Soviet legacies. For one, the institution of plea bargaining,¹⁰⁰ which permits bargaining between criminal offenders and prosecutors, may be thought as having a perfect supporting capital in place in the post-Soviet societies where the informal bargaining between criminal offenders and law enforcement, prosecutorial and judicial officials has long been a common practice.¹⁰¹ Thus, the informal institution of plea bargaining, we may say, has long been the local tradition and should hardly encounter the problem of receptiveness while its formalization on the

⁹⁷ The list of recent acquittals by juries include those of Captain Eduard Ulman, who ordered the shooting of Chechen civilians, as well as of the alleged murderers of a nine-year-old Tajik girl and of a Congolese student: see Russian News & Information Agency "RIA Novosti" report, available online at <http://en.rian.ru/analysis/20060803/52236722.html>. Interestingly enough, the pre-Bolshevik Russian experience with the juries is likewise greatly associated with "troubled" acquittals of this kind: in 1878, for example, Vera Zasulich who had murdered the Governor of Saint Petersburg has been acquitted by the jury despite the *prima facie* evidence of the crime. Then it was widely believed that the acquittal owed to the strongly negative reputation of the murdered within the public. Similarly, in another very famous case, a ritual murderer was acquitted in 1913. These cases come as the first associations with the past legacies of the jury system in Russia.

⁹⁸ Nikolay Kovalev, "Ethnic Tensions and Trial by Jury in Russia," paper presented at the Annual Meeting of the Law and Society Association (Berlin, July 2007).

⁹⁹ Claus Offe, *supra* note 91, at 212.

¹⁰⁰ See Alschuler, Albert, "Plea Bargaining and Its History," *Columbia Law Review* (1979) 79:1.

¹⁰¹ For more on informal practices and corruption in the judiciary and law enforcement in post-Soviet countries, see especially Marina Kurkchyan, "The Illegitimacy of Law in Post-Soviet Societies", in Galligan and Kurkchyan (eds), *Law and Informal Practices: The Post-Communist Experience*, Oxford University Press (2003).

highly sophisticated grounds of the Western model may be well a positive institutional improvement. Similarly, the introduction of some sound economic criminal penalties such as the *day fines*¹⁰² and an increased reliance on fines as major criminal sanctions might be a rational way of legitimate reproduction of the informal practices of paying bribes against criminal offenses which is the common practice in almost all post-Soviet countries.¹⁰³ In sharp contrast with the experimentation with juries, these reforms would rather constitute “institutional design excellence” in the meaning of this work, as here the transplanted institutions would be perfectly supported by the local culture on one hand, and the new institutions would strongly “enforce” civic patterns on the other.

From among the inquiries about the basic choice of the transplant concerning the design of constitutional review, the alternative between the two classical models- the concentrated form with a separated tribunal (the Kelsenian model) and the diffuse (American) model with the function of constitutional review delivered among the entire judiciary- is the most popular and probably the most important one. The choice of one or the other model and the particular dispositions of institutional settings related to the concentration of the function of judicial review or its alternatives has been one of the major discussions in the academic literature on constitutional review in post-communist countries.¹⁰⁴ Strictly in line with the basic propositions of this particular section and the larger premises of this chapter, my position stands for the considerably “ideal-type” properties of both the Kelsenian and the American models, if the designer transplanted the “classical” models of either one or the other into the constitutional framework of our new democracies. Pretty much in the same way, this work stresses the idealistic form of the political empowerment¹⁰⁵ of constitutional courts in the countries of this study due to the drastic mismatch between the very ideals of politically-responsive independent courts and the irresistible tendency to concentration of executive power in virtually all these countries- something that is soon to be discussed in the succeeding paragraphs and then to be elaborated at length in the following chapters.

The other problem associated with copying and replicating institutions is rather in the mode of transplanting or the “technique” of institutional design. It is not enough only to pick up a capable institutional idea or a principle and have it function in a new environment, even when the institution shows a promise of being “accepted” by the local constituency. The institutional design should aim at a comprehensive intervention for making the transplantation a good fit by providing for the necessary sub-mechanisms to work out the core mechanism of the transplant. The failure to properly introduce and properly enforce the new institution is often of greater concern than the choice of a wrong institution. As the research on transplants of legal institutions from either the common or the civil law

¹⁰² See, for example, “Structured Fines: Day Fines as Fair and Collectable Punishment in American Courts”, published by the Vera Institute of Justice (January 1995), available online at www.vera.org.

¹⁰³ More insights on this can be offered by Alena Ledeneva, *Russia's Economy of Favors: Blat, Networking and Informal Exchange*, Cambridge University Press (1998).

¹⁰⁴ Schwartz, *supra* note 5, p. 22; Sadurski, *supra* note 2, p. 1; Steinberger, *supra* note 20. See more in Chapter 5.

¹⁰⁵ For more on “political empowerment”, see Chapter 3.

families shows, for example, the “way the law was initially transplanted and received” is more important than the supply of law from any of the mentioned legal traditions.¹⁰⁶

The implementation of fundamental neo-liberal economic reforms in Russia is a perfect example of this paradigm. That reform, not being supported by necessary co-reforms of the bureaucracy, the judiciary, law enforcement and other arrangements required to maintain the rule of law, has resulted in an irreversible conversion of the intended capitalist economy into a concentrated and highly criminalized system that is “anything but a market order”.¹⁰⁷ Idealistic institutional interventions of this kind have produced many other recognizable examples, such as the transplanting of western corporate governance models without a proper allocation of “lawmaking and law enforcement functions,”¹⁰⁸ or- more related to the subject of this work- the introduction of separate constitutional tribunals without a due care of the supporting co-reforms that would clearly define the provinces of the constitutional and general judiciaries¹⁰⁹ and the reforms providing working linkages between the two separated segments of the judiciary¹¹⁰.

Except the disturbing need for institutional re-engineering and for reeducating the society, which Claus Offe mentions as the painful consequences of “imitating-importing-transplanting” of the alien institutions which are not fairly supported by the local capital,¹¹¹ the described style of naïve institutional designing may be also suspected of another “evil”. That mode of institutional engineering may cause an abrupt counter-reaction on the part of the legacies and the political agents with their mentalities embedded in the cultures carrying the heavy influences of those legacies. Such reactions can take place in reply to both “macro-institutional” reforms, which involve a series of institutional interventions within the larger reform of the economic and political systems, and “micro-institutional” reforms which concern a particular single political institution.

Currently the extremely low credentials of the western-type liberal market economy and the democratic political system in modern Russia is perhaps a good example of a “macro-institutional” counter-reaction against the overall failure of the comprehensive reform agenda of the early and mid 90-ies, which had factually resulted in an extremely concentrated proportion of wealth distribution, a completely criminalized economic system and a public order of a quasi-anarchic type. These reforms, distinguished especially by abrupt denunciation of existing formal institutions and an instantaneous shift to institutional arrangements of the new regime type in both the economic (quick privatization,

¹⁰⁶ Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, “Economic development, legality and the transplant effect,” *European Economic Review* 47: 165-195 (2003).

¹⁰⁷ Laszlo Bruszt, “Heterarchies and Development Traps”, in *Kontingenz und Krise: Institutionenpolitik in kapitalistischen und postsozialistischen Gesellschaften*, edited by Karl Hinrichs, Herbert Kitschelt, and Helmut Wiesenhal, Campus 2000).

¹⁰⁸ Katharina Pistor and Chenggang Xu, “Fiduciary Duty in Transitional Civil Law Jurisdictions: Lessons from the Incomplete Law Theory”, ECGI - Law Working Paper No. 01/2002.

¹⁰⁹ See Chapter 5.

¹¹⁰ See Chapters 4 and 5.

¹¹¹ Claus Offe, *supra* note 91, p. 212.

shock-therapy) and political (banning of the Communist party, significant decentralization of regional power) spheres, being implemented without much concern for the existing social capital in place and with no due care of supporting sub-reforms (rule of law and judicial reforms, for example), have produced destructive effects ranging from a series of counter-reactions against a number of individual “micro-institutional” reforms to a major counter-reaction against the very regime change in general. As a result, a major destruction of basic elements of democratic solidarity, as Elster, Offe and Preuss¹¹² frame this political consequence of reforms of the “shock therapy kind”, took place. Not surprisingly, the described counter-reaction to the liberal and democratic changes which were accompanied by ill-advised institutional reforms, has spontaneously resorted to the most inherent “instinct” of the existing social capital- the tendency to the concentration of political power. I strongly believe that this phenomenon has been among the most important causes of the overall failure of the democratic development and entailing concentration of the power in the number of countries of the post-Soviet area, in particular in Russia.

This inherent tendency to the concentration of power, having its fairly different modes of manifestation, can be observed also in the cases of informal collective counter-reaction against the micro-institutional reform, where the tendency to the concentration of the power emerges as a reply to the “non-satisfactory” performance of a single (but not necessarily minor) institutional innovation. In my view, for example, the premature experimentation with the parliamentary system in post-Soviet Belarus might have an effect on producing a counter-democratic reaction in society, made use by Lukashenka. By the same token, the tragic fate of the first Russian constitutional court, dissolved by Boris Yeltzin in 1993, might well be a product of the excessively generous political empowerment of this institution that resulted in suicidal interferences of the Constitutional Court into unregulated political battles of the early 90-ies.¹¹³ In a sense, both the failure of the parliamentary system in Belarus, and the attack on the Constitutional Court in Russia have to be, in some extent at least, attributed to the inherent tendency to the concentration of power, which is, noticeably, a deep-rooted cultural phenomenon that has been demonstrated all over the post-Soviet area. While it is hard to say that the institutional design of late 80-ies and early 90-ies could have ever predicted this tendency at all, the recognition of these typical “local legacies” should have been a guide for the next generation of institutional architecture and, obviously so, for the modern re-design of political institutions.

Inviolability of the democratic standard

The last propositions are obviously not intended to argue for the unsuitability of democratic institutions to post-communist or post-Soviet countries that might bring to conclusions about the

¹¹² Elster et al, supra note 26, at 272.

¹¹³ See Chapter 3.

optimality of authoritarian or semi-authoritarian institutions.¹¹⁴ This is rather an argument for democratic but ultimately realistic institutions. For me, the inviolability of the democratic standard in institution-building is without substitutes; the diversity of the institutional options within this standard is rich enough to allow a reasonable variety of alternatives to be considered without unnecessary deviations from it. This richness of alternatives would obviously allow one to come up with a rational design of a democratic nature other than naive reproductions of ideal types. Meanwhile, it is not solely the wrong institutional choices that are to be blamed for the overall failure of the reform but rather the lack of comprehensive intervention in a range of dimensions for supporting the adopted institution. Democratic institutions, obviously enough, can hardly be enforced by a non-democratic bureaucracy and old-style procedures, routines, and policies. The supporting intervention on the level of sub-reforms and policies should also be essentially democratic, or the entire process is threatened to fail. The entire change should also essentially rely and be based on mechanisms of good governance and accountability which would seek to involve the public input into both the decision-making and oversight processes: in this way only a full democracy can be attained.¹¹⁵

In fact, the determinacy of local circumstances is often used as a handy argument for the justification of non-democratic institutions and policies. Template justifications stating that generation(s) have to change before democratic elections can become the common practice, or corruption is exterminated, or judges are independent, normally accompanying the failures to introduce proper institutional reforms, often lead to neglecting of the very strategic role which democratic institutions play- their gradual re-shaping of the existing mental capital and of the unfriendly cultural heritage of the past, which would itself be the most essential investment in the coming generation. If so, transformation and institution-designing inspired by cultural determinism,¹¹⁶ similar to the idealistic designing, is another extreme orthodoxy that substantially misinterprets the logic of institutional dynamics. This fallacy has in great part contributed to the legitimacy of existing non-democratic regimes, which in a highly significant way frustrates the process of democratic consolidation.

The strategic way in which institutions can produce the desired change has a lot to do with persistence: stability and pervasiveness should be the main attributes of intention, if a consistent change is to be reached.¹¹⁷ Stability and pervasiveness of the democratic standard is quite obviously the unbreakable principle during the consolidation of democratic institutions, and while this chapter will later advocate the virtues of flexibility, revisability, and adaptability of designed institutions, the recognition that those features of institutional design should be persistently confined within the

¹¹⁴ Such ideas were present in, for example, John Gray, "From Post-Communism to Civil Society: The Reemergence of History and the Decline of the Western Model", *Social Philosophy and Policy* 10, 26- 50 (1993).

¹¹⁵ Rose-Ackerman, Susan, *From Elections to Democracy, Building Accountable Government in Hungary and Poland*, supra note 7, at 1.

¹¹⁶ See supra note 43.

¹¹⁷ March and Olsen, supra note 14, at 66.

boundaries of the democratic standard seems to be fairly without alternatives, if the prospect of sustainable democratic development is to be the goal.

The importance of local circumstances

As was fairly obvious from what was discussed above, this account of optimal design necessarily rests on the consideration of the variety of local circumstances. What do these local circumstances look like in the post-Soviet area and is it possible to arrive to any valid generalization of local factors in a fairly diverse and multi-cultural region such as the former Soviet Union?

These special circumstances are to large extent legacies of the past which still strongly program the upcoming agenda in almost all the spheres of transformation. These legacies stem from both communist, pre-communist and already fairly enough- the post-communist experiences, and they are strongly conditioned by a variety of factors. The local factors have multiple sources: beyond the cultural properties which are common to the nations in the region, these are traits that may be attributed to strictly the local sources- ethnicity and confession, identity and ambitions, geopolitics and wars, resourcefulness and isolation. This work's account of "local circumstances" is obviously a call for a due care of any factors which appear to perform as a constraint on the institutional change. These factors, obviously, make all and each of the respective countries and societies to be distinguished by a fairly unique cultural heritage and local context.

However, what brings the post-Soviet countries together is probably the considerable sharing of the similar social capital which is in place due to the substantial likeness of both pre-communist and communist legacies. The social capital here, in spite of its inner diversity, can generally be characterized by the elements of a "vertical" social relationship which Putnam observes in the case of the Italian south and which he contrasts with the type of social capital which is most friendly to the democratic governance- the civic capital.¹¹⁸ Being itself a product of the centuries-long experience of authoritarian government which might have allowed only a very little stock of social capital to emerge before the Bolshevik revolution and then even this shallow capital to be abused by the totalitarian communist rule,¹¹⁹ the type of social capital has with time developed a strong cultural environment of hierarchical political organization and individualistic provincial mentality of social interaction based on the "patron-client" relationship. Insofar, the kind of relationship is long of the

¹¹⁸ The under-developed status of civic capital in post-Soviet countries (in particular in Russia) has been the theme of a number of studies. See, e.g., David O'Brien and Valeri Patsiorkovsky, *Measuring Social and Economic Change in Rural Russia: Surveys from 1991 to 2003*, Lanham, Maryland: Lexington Books (2006); David O'Brien, "Social Capital and Community Development in Rural Russia", The World Bank, Working Papers (1998); Kathrin Stoner-Weiss, *Local Heroes: The Political Economy of Russian Regional Governance*, Princeton University Press (1997); Thomas Nichols, "Russian Democracy and Social Capital, *Social Science Information*" 35, 629-642 (1996); Christopher Marsh, "Social Capital and Democracy in Russia" 33 *Communist and Post-Communist Studies* 2 (2000).

¹¹⁹ Putnam, *supra* note 47, at 183

intrinsic pattern of equality which is the central feature of the civic community, while the other inherent features of the civic capital- active engagement in public life, norms of reciprocity and mutual trust- are likewise weak in these societies. Not surprisingly, the lack of these virtues at the local communities' level has heavily predetermined the dispositions on the "macro" level of the central government: almost without exceptions, all the ex-Soviet countries under scrutiny in this work are distinguished by concentrated executive governments ranging from "moderately" semi-democratic/semi-authoritarian systems to clearly patrimonial systems resembling sultanic regimes¹²⁰ with even a growing tendency towards further concentration of power in many of them.¹²¹ This is indicative of the "vertical" political culture distinguished by informal networks of often criminalized associations which dominate the elites in both the political and economic spheres,¹²² by widespread corruption in virtually all the spheres of public life- properly reminiscent of Putnam's astute prediction about Palermo representing the future of Moscow¹²³- and finally by stringent failures of the rule of law that expressly spell out the dominance of non-civic attitudes and "amoral familism, clientalism, and lawlessness" which was so typical to the Putnamian Mezzogiorno.

The implications of political cultures based on vertical patron-client scheme (to mention only these) are considerable for design of the political institutions and the consideration of institutional interventions which need to cope with the kind of local capital based on such properties. This political culture is the major source of particular institutional capital with which one is to cope while designing the institutional change. Almost all and each of the social institutions emerged are in one way or another impacted by the heritage of this culture: beyond concentrated executives and corrupted public officials, these are non-functioning local self-government settings (lack of cooperation in the society), ineffective capital markets (lack of trust), and finally, what refers to the judiciary- the deficiency of independence and political abuse of the judicial office, the continuing practices of "telephone justice", distrust of the judiciary, and so on- all products of the social capital based on the trust in the charisma of the political leaders, on the inherent patterns of clientalism, individualism, and legal nihilism.

On this account, one should accept a fair portion of generalization behind the "regional" focus of this work. Fairly enough, institutional design is happening in a particular setting which is characterized by the mentioned patterns in general but is meanwhile fairly unique on the basis of the variety of other factors. But for our normative accounts and for our rather theoretical purposes, these generalizations may prove to be justified to the same (I should say- quite significant) extent to which the previously mentioned properties of political regimes are shared by these countries. It is exactly this conceptualization that enables a theoretical elaboration of "optimal design" based on characteristics

¹²⁰ Richard Sakwa, *Postcommunism*, Open University Press (1999), at 51.

¹²¹ See further in Ch. 2.

¹²² Alena Ledeneva, *Russia's Economy of Favors: Blat, Networking and Informal Exchange*, Cambridge University Press (1998).

¹²³ Robert Putnam, *supra* note 47.

typical to a number of countries rather than a particular single local community- a design strategy which may be optimal for a particular country only as much as it has its sharing of the common heritage of a post-Soviet republic.

Institutional design and dynamics of change

The concept of the institutional design in the post-Soviet area should abstain from operating by such terms as “transition period” without a rational account of its own dynamics. The major terms and the observed patterns to which this study applies do not stay static during the time. While still strongly dependent on both pre-communist and communist legacies after more than 15 years of transition, the post-Soviet societies of 2008 are not the same as these of 1991 in any sense. To what extent, for example, it is justified today to preserve the institutional settings of the judiciary built on the considerations of strong distrust towards the Soviet-fashion courts? To what extent is it now correct, from the same considerations, to oppose the ordinary courts’ “political empowerment” (e.g., the courts’ mandate to review the results of elections, the processes of political impeachments, etc.)?¹²⁴ Obviously enough, the modern judiciaries, whether or not still carrying the influences of communist legacies, whether or not still corrupt, are not the same as 20 years ago, and this is an important factor for designers of judicial institutions to take into consideration. Hence, the optimal design of today may not be the same as that of yesterday, while the design for tomorrow may need to be absolutely different from that of today.

This is obviously not to advocate a constitutional construction of considerable flexibility that would undermine one of the key values vested in constitutions- their stability. It is rather a tribute to the specific circumstances of a particular period, which need to be taken into consideration at whatever time a chance for institutional reconstruction is given. Thus, the challenge of the institutional design is in bringing together and finding a working compromise between the two often conflicting virtues: the “durability” of institutions and their capacity to adapt to changing circumstances.¹²⁵

Robert Goodin advocates “revisability” as an important principle of institutional design, which should be a response not only to the changing societies, but the human fallibility.¹²⁶ This theory may appear to be very responsive to the legacies of institutional design in the ex-Soviet area, where the upshots of idealistic designing still remain uncured. Apparently, not so detrimental is the choice of a bad institution, as either its continuing functioning on the same weakly-founded grounds, or its equally abrupt substitution by a completely new and alien colleague in a time when the previous “bad”

¹²⁴ The distrust towards the old, Soviet judiciary among the constitutional fathers of the democratic transition has been an important consideration in institution-building in all over the post-communist world- see Herman Schwartz, supra note 5, p. 22; Sajó, András, supra note 6, pp. 253-254, as well as the discussion in Chapter 5.

¹²⁵ Larry Diamond, “In Search of Consolidation” in *Consolidating the Third Wave Democracies: Themes and Perspectives*, Johns Hopkins University Press, (1997) at XXV.

¹²⁶ Robert Goodin, supra note 25, at 40.

institution had nevertheless been to some extent “received”. Institutions, good or bad, create their capital in one or another way. And to a large extent where not the very choice of institutions themselves, but the mode of their introduction is the main source of design mistakes, the “robustness” of the institutional design- institutions’ capability of “adapting to new situations”- should be praised among the primary values of the institution-building strategy.¹²⁷

Conclusion

Despite the existence of different views on the current status of the post-Soviet societies on their way to democracy, the respective institutional building is still in process. More over, the institutional construction has in a sense been reborn in many of them: while the institutional choices in the early transitional periods have largely been made spontaneously, often by copying existing classical models and frequently being bound by granted formulas due to a range of factors, such as lack of experience, expertise, empiric evidence and the demand of urgent incorporation of new institutions, recent events can bear witness to a need for more sophisticated approaches to designing institutions which can now be grounded on the abundance of existing local and comparative material and especially the ways the adopted institutions recommended themselves through the past time. In this view, the institutional building is still in process, and it is especially in our days that the science of institutional design should feed the policy-making minds with a renewed enthusiasm. To paraphrase the words of one of the most notable new institutionalists, currently the institutional choice and design are again high on the political agenda of developing democracies.¹²⁸

The primary aim of this chapter was to show that institutional choices are right or wrong depending strongly on the peculiarities of the particular local context in which they are intended to function. The role of institutions in furthering democratic consolidation varies in its task, form, and contents depending on the social and cultural context in the particular country. Although varying in its magnitude from one country to another, the strongest impact of different cultural legacies pre-dispose the local circumstances which significantly constrain the paths for democratic consolidation in post-Soviet countries. In this situation, the primary task of institutions is to “relativize” the force of frames, habits and routines of legacies and to promote and develop civic virtues and political culture

¹²⁷ In Goodin’s interpretation, “robustness” is a term combining both desired qualities- durability and revisability. Robust institutions, according to this account, are those which are capable of adapting to new situations, but only in such ways that are appropriate to the new properties of the fundamental change, while making only surface accommodation to the new environment where there has not been a fundamental change: Goodin, *supra* note 25, pp. 40-41.

¹²⁸ James Olsen, “Institutional Design in Democratic Contexts”, *The Journal of Political Philosophy* 5, 203-229 (1997) at 208.

favorable to democratic governance. These efforts, though, should be cautious enough so as not to result in the advocating of ideal types and should be grounded in local demands and circumstances.

This chapter identified several principles of optimal design which should guide the responsible minds of the new generation of institutional (re)design in the struggling democracies of post-Soviet Eurasia. These principles are called for marking the new generation of institutional design which should make a clear step away from the institutional architecture of the past which was romantically aiming at production of ideal forms. It was argued that “optimal” rather than “ideal(istic)” design should be 1. intended at the strategic mission of development of civic capital and learning of the institutions of the constitutional democracy; 2. culture-sensitive; 3. timely; 4. democratic in form and in function. In combination with other necessary qualities, one should opt for institutional arrangements in any settings, i.e., their legitimacy and effectiveness, these features comprise the composite image of an optimal institutional architecture for a post-Soviet country.

CHAPTER 2

DEMOCRATIC DEVELOPMENT, CONSTITUTIONALISM AND CONSTITUTIONAL COURTS IN POST-SOVIET COUNTRIES: TWO DECADES OF FAILURES OF ACHIEVEMENTS?

A. Democratization

*Between dictatorship and democracy*¹²⁹

The assessment of democratic achievements in the post-Soviet area cannot be subject to a uniform and homogeneous overview. Neither have the achievements and failures on the way to democratic development been marked by any identical trajectories, nor have the countries involved in this research shown any close performance in their democratic indicators. Not only have the twelve post-Soviet countries taken a completely different path from their fellow East European post-communist countries (which mostly evolved into consolidated democracies without any considerable nostalgia and recession), but both the eventual political regimes to which our twelve countries arrived and the paths towards these final outcomes marked significant variations.

The political regimes in the post-Soviet area range from “tenuous democracies” to “outright tyrannies”.¹³⁰ The regular annual survey for 2007, conducted by Freedom House¹³¹ and based on a composite evaluation of political rights and civil liberties, indicates still very modest achievements by the CIS countries in democratization. Among the countries in this list, only Ukraine scores as a free country (in the 2005 survey, Ukraine was still among the partly free countries). Four countries are partly free: Armenia, Georgia, Kyrgyzstan and Moldova. The rest are not free countries: Azerbaijan, Belarus, Kazakhstan, Russia, Tajikistan, Turkmenistan, and Uzbekistan. In the multi-layered ranking of nations in transit, where the ratings are based on a scale of 1 to 7, with 1 representing the highest level and 7 the lowest level of democratization, the CIS countries score on such criteria as electoral processes, civil society and independent media correspondingly in the following way: Armenia: 5.75, 3.50, 5.14; Azerbaijan: 6.50, 5.00, 5.93; Belarus: 7.00, 6.75, 6.71; Georgia: 4.75, 3.50, 4.86; Kazakhstan: 6.50, 5.75, 6.39; Kyrgyzstan: 5.75, 4.50, 5.64; Moldova: 3.75, 4.00, 4.96; Russia: 6.25, 5.00, 5.75; Tajikistan: 6.25, 5.0, 5.93; Turkmenistan: 7.00, 7.00, 6.96; Ukraine: 3.25, 2.75, 4.21;

¹²⁹ The title is borrowed from Michael McFaul, Nikolai Petrov and Andrei Ryabov, *Between Dictatorship and Democracy: Russian Post-Communist Political Reform*, Carnegie Endowment for International Peace, 2004, VII.

¹³⁰ Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies throughout The World*, supra note 9, at 200-203.

¹³¹ For this and the following references to the Freedom House, see the official website at www.freedomhouse.org.

Uzbekistan: 6.75, 7.00, 6.82. For comparison, by the same criteria Bulgaria scores 1.75, 2.75, and 3.25, Macedonia does 3.25, 3.25, 4.25, and Croatia 3.25, 2.75, 3.75. The scores of Estonia are 1.50, 2.00, 1.50, Lithuania: 1.75, 1.50, 1.75, Poland: 1, 75, 1.25, 1.75, Czech Republic: 2.00, 1.50, 2.00.

The divide between the political regimes across the region remains significant as of today. According to Larry Diamond, among the post-Soviet countries Georgia, Ukraine and Moldova are the most democratic countries, with Armenia and Kyrgyzstan “having some significant elements of civic space and electoral competition, but within a context that lacks the wider political freedom and electoral fairness of democracy.”¹³² The other countries are put by Diamond in varying levels of authoritarianism, with Uzbekistan and Turkmenistan being on the extreme edge of this classification.¹³³

The paths to the existing regimes marked similarly inconsistent, though most probably fairly explainable trajectories. After the strong and widespread democratic euphoria that took place in the wake of and immediately after the collapse of the Soviet Union in 1991, the democratic development lived several ups and downs in the majority of these countries, though some of them, particularly the Central Asian republics, signaled their authoritarian tendencies quite soon. Russia’s democratic rise in the 1990-ies, itself fairly unstable during the presidency of Boris Yeltsin, changed dramatically under Vladimir Putin. Since, the developments brought to the emergence of the contemporary regime which is characterized as a product of failed democratization¹³⁴ where the trajectory of political development appears rather in the antidemocratic direction.¹³⁵ The erosion of the initial pro-democratic change has been patently noticeably in 1990-ies also in Belarus, Georgia, Kyrgyzstan and Ukraine,¹³⁶ and by the end of the 90-ies neither of these countries might be called a democracy. However, while Belarus kept further moving towards a concentrated authoritarian rule, Georgia, Ukraine and Kyrgyzstan pulled towards freer regimes between 2003 and 2005. The strong democratic movements in these three countries were pushed by what is commonly called “electoral” or “colored revolutions”¹³⁷ where the traditionally flawed elections were protested by the public and where these protests had grown up massively to throw the incumbents away from their offices. The

¹³² Larry Diamond, *supra note 9*, p. 200. The inclusion of Russia into the list of dictatorships, however, is challenged by others. See, in particular, Michael McFaul, Nikolai Petrov and Andrei Ryabov, *supra note 129*, VII. Although neither of these authors claims that Russia is a democracy, they do all agree that it is not a dictatorship either (hence the title of the book) and that it does retain some democratic elements (p. 2). For the divide in the academia about the status of the political regime in modern Russia, see Richard Sakwa, “Two Camps? The Struggle to Understand Contemporary Russia”, *supra note 13*.

¹³³ Id.

¹³⁴ See Stephen M. Fish, *Democracy Derailed in Russia: The Failure of Open Politics*, CUP 2005.

¹³⁵ Michael McFaul, Nikolai Petrov and Andrei Ryabov, *supra note 129*, 2004, VII.

¹³⁶ Diamond *supra note 9*.

¹³⁷ Paul D’Anieri, “Explaining the Success and Failure of Post-communist Revolutions”, *Communist and Post-Communist Studies* 9 (2006) 331-350, Michael McFaul, “Transitions from Postcommunism”, *Journal of Democracy* Volume 16, Number 3 July 2005, Joshua A. Tucker, “Enough! Electoral Fraud, Collective Action Problems, and Post-Communist Colored Revolutions”, *Perspectives on Politics*, 5: 535-551 (2007).

fluctuations of democratic ups and downs were relatively less dramatic in Armenia and Moldova. However, while Moldova's path was relatively unwavering, Armenia's recession in 1995-96 with further consolidation of the presidential power, as well as the recent political turmoil (2008), has been fairly visible.

At the other end of the spectrum, the four Central Asian countries have signaled their complete ignorance of democratic reforms from almost the outset.¹³⁸ The regimes in this region showed stable adherence to "sultanistic"¹³⁹ patterns. By 2005, in all of Central Asian countries, including Kyrgyzstan, the same leaders who ruled the republics in the last years of the Soviet Union, remained in power. Quite early, since mid-90-ies and until 2005, Turkmenistan emerged as an extreme sample of a dictatorial tyranny.¹⁴⁰ Uzbekistan's tendency towards a strongly concentrated autocracy was apparently not so intelligible at first, but became obvious after 2005, when President Karimov's Government expressly turned away from its formal observation of democratic principles by firing on and killing hundreds of opposition protesters.¹⁴¹ So far, in the region of the Central Asia only Kyrgyzstan showed a strong deviation from "sultanism" in 2005, while the stability of the authoritarian rule headed by the former communist leaders¹⁴² in the other countries of the region leaves little doubts.

The regime in Azerbaijan is reportedly tending to further authoritarian concentration with some elements of the political developments resembling rather the Central Asian sultanistic orders.¹⁴³ Still, it is hard to clearly classify Azerbaijan with either Central Asian or European "counterparts",¹⁴⁴ while the paths of political developments can eventually bring this country to either of the "camps".

This described variation in democratic performance most likely promises to preserve if not to widen its gap. Though unstable and not at all consolidated, some "new" post-Soviet democracies promise to deepen the democratic reforms. Meanwhile, the other group of countries, "especially Belarus and Central Asia, and most likely Russia itself", are said to have more than vague prospects for substantial democratization in the foreseeable future.¹⁴⁵

¹³⁸ See David Lewis, *The Temptations of Tyranny in Central Asia*, Columbia University Press 2008.

¹³⁹ Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*, Johns Hopkins Univ. Press, Baltimore, 1996.

¹⁴⁰ See e.g. Kareem Al-Bassam, "The Evolution of Authoritarianism in Turkmenistan", *Demokratizatsiya: The Journal of Post-Soviet Democratization*, Vol. 5, N. 3, 1997.

¹⁴¹ See Fiona Hill and Kevin Jones, "Fear of Democracy or Revolution: The Reaction to Andijon", *The Washington Quarterly* 29:3 (2006), David Lewis, *supra* note 91.

¹⁴² The infamous absolutist President Saparmurat Niyazov died in 2006.

¹⁴³ See Farid Guliyev, "Post-Soviet Azerbaijan: Transition to Sultanistic Semiauthoritarianism? An Attempt at Conceptualization", *Demokratizatsiya: The Journal of Post-Soviet Democratization*, Vol. 13, N. 3, 2005.

¹⁴⁴ Svante E. Cornell, "Democratization Falts in Azerbaijan", *12 Journal of Democracy* 2, 2001.

¹⁴⁵ Diamond, *supra* note 9, at 293.

The common patterns of governance

As mentioned in the introduction to the thesis, it is not the likeness of the democratic indicators and the political regimes of the CIS member-countries that allows for the generalization in this work. On the contrary, we have just seen that these indicators, as well as the emerged political regimes are not homogeneous at all. It is rather the homogeneity of the patterns, methods and styles of governance that enables a certain generalization in the discussion of the post-Soviet countries. Despite the divergence in the democratic credentials of the countries under research, one can attempt a conceptualization of common patterns of both democratic deviations, and democratic achievements. The commonality of the political characteristics in the formerly Soviet countries, despite the variations in regime types, is often emphasized in the academic literature. One study, for example, described the political regimes in Belarus, Russia, and Ukraine, three countries with quite differing democratic credentials, in the following way:

All three countries, albeit to different extents, are characterized by electoral fraud, intimidation of the media, coercion, weak constitutional states and party systems, as well as weak horizontal control systems.¹⁴⁶

Concentration of power is probably the most emblematic pattern of governance in virtually all the countries of this research. Despite the unanimous adoption of constitutional designs of separation and balance of powers, this tendency has proved irreversible in virtually all countries of the region. Whether explained by path-dependent historical dispositions towards having a strong leader, or blamed on other causes, the institution of presidency has evolved to become the key and almost everywhere the exclusive address of the power, starkly following the blueprint of “strong individualized leadership” which enjoys a power exceeding in scope the one granted by the constitutional text.¹⁴⁷ This is especially illustrative in light of the fact that among the twelve countries which are discussed in this work only two are formally presidential (Kazakhstan and Turkmenistan),¹⁴⁸ while all others have different forms of semi-presidential constitutions.¹⁴⁹ However, “super-presidents” emerged throughout the region despite the exact provisions of the respective constitutions. It is remarkable, furthermore, that the “strong individualized leadership” by and large preserves its positions and its basic *modus vivendi* even in those countries which relatively recently underwent fundamental political changes: Georgia, Ukraine, and Kyrgyzstan.

¹⁴⁶ See Tim Beichelt, “Autocracy and Democracy in Belarus, Russia and Ukraine”, *Democratization* (11:5, 113 — 132, 2004).

¹⁴⁷ Stephen Holmes, “A Forum on Presidential Powers”, *East European Constitutional Review* Vol. 2, No. 4 – Vol. 3, No. 1, 1994, 36.

¹⁴⁸ See Articles 1 and 2 of the Constitutions of Kazakhstan and Turkmenistan respectively.

¹⁴⁹ For the classification of semi-presidential forms of government, see Shugart, M.S. and J.Carrey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, CUP, 1992.

In Georgia, constitutional reforms to strengthen the presidential power were introduced immediately after the elections following the “Revolution of Roses”. The constitutional amendments resulted in the dominance of the President over the Parliament and in transformation of a once significantly strong Parliament to a “body loyal not only to the president but also to his government.”¹⁵⁰ Other reforms followed to even further strengthen the presidency.¹⁵¹ Eventually, the President’s power increased so much that this led to the following doubts about the democratic credentials of the system: “Sahakashvili’s power is concentrated in his personal office to a degree that could well impede or reverse the country’s democratic development.”¹⁵² It is noteworthy that the concentration of the presidential power greatly followed the same patterns as employed by the other post-Soviet leaders; in essence, the post-revolution Georgia’s path in governance did not differ from the post-Soviet proto-type in substance. For example, the creation of the “party of power”, eventually bringing Georgia to become a “one-party democracy,”¹⁵³ starkly followed the same root as was previously noticed throughout the region (see further the discussion in this chapter).

In other “colored revolutions”, Ukraine and Kyrgyzstan were apparently less “successful” in consolidating the sole executive power. In Ukraine, the quasi-permanent struggle between the two opposing political poles has resulted in a constantly tense relationship between the institutions of the President on one side and the Parliament and its majority-backed Government on the other. But the emergence of a “double-executive” system, with both the President and the Government having substantial powers, did not eliminate the informal concentration and abuse of power in each, but rather divided the scope of each and highlighted them, as neither the executive-president, nor the executive-government were able to resist the “temptation” to extend their power beyond the prescribed limits.¹⁵⁴ Finally, in Kyrgyzstan, the concentration of presidential power started becoming strong since the end of 2007, by which time the fragmented leadership in the interim failed to adequately strengthen its rule.

In view of these facts, concentration of power as a general phenomenon, as it may take different forms and lead to rather different political regimes, can be said to be the inherent and strongly rooted tendency in the entire region. This last assumption shall well be taken as a local condition rather than shall be contested when elaborating policy recommendations for democratization strategies and institutional (re)design. Instead, it makes sense to investigate and explore the composition, the internal structure and the mode of operation of this tendency

¹⁵⁰ Vladimer Papava, “Georgia’s Hollow Revolution: Does Georgia’s Pro-Western and Anti-Russian Policy Amount to Democracy?” *Harvard International Review* for February 27, 2008.

¹⁵¹ *Id.*

¹⁵² Diamond, *supra* note 9, 201.

¹⁵³ Laurence Boers, “After the ‘Revolution’: Civil Society and the Challenges of Consolidating Democracy in Georgia”, *Central Asian Survey* 24, N. 3 (2005): 333–50.

¹⁵⁴ Diamond, *supra* note 9, 201.

for predicting the further dynamics of its co-existence with the complex political processes in the post-Soviet region, as well as for elaborating sustainable strategies as to how to live and to cope with it.

By its inner structure and the nature, the concentration of power is roughly characterized by a monopolization of the executive privileges by an individual holder of the chief executive office who further delivers the patronage to his close network of clients. In the next chapters and in different contexts this work will discuss the mechanisms of the concentration-maintenance-reproduction of the political power inherent to the patrimonial political systems that emerged in formerly Soviet states. For the purposes of this chapter, we only need to mention the main instrumentality employed by the power-holding executives because these methods self-speak of the quality of democracy and constitutionalism and represent the particular patterns of governance discussed in this part. These are electoral fraud and supporting pre and post-electoral abuse, mobilization of resources by direct regulation of big businesses, control of media and “creation of structures that can secure active support for the regime in the time of crisis”,¹⁵⁵ preservation of formal democratic elections as the key legitimizing instrument for the power-holder, informal domination over and regulation of the other branches of the government from the central executive office, intimidation and persecution of oppositional political movements, free media and the institutions of civil society, and so on.

Electoral fraud is probably the key institution in the maintenance of the concentrated system as the latter does not attempt to break with the formal democratic constitution but prefers to fine-tune its meaning and procedures for the consumption of its elites. Elections are thus held but they are not intended at transfer of power but at its legitimization.¹⁵⁶ The political technologies of electoral fraud include both sophisticated tools for the specific “material” circumvention on the day of elections at the sites of elections (including bulletin stuffing, rip-off vote counting, vote-bribing, etc),¹⁵⁷ and supporting pre-electoral and post-electoral manipulations called to validation of desired electoral results. This last group of abusive technologies includes comprehensive intervention into the activities of state bodies and the civil organizations for the purposes of disguising the fraud: intimidation or bribing of election monitors, the media, and the judiciary, media campaign of clearing the “winner”, etc. The abuse of power is a principal resource for these technologies: the incumbent elite has the entire monolith power organism,

¹⁵⁵ Ivan Krastev, “Sovereign democracy”, Russian-style”, Published on open Democracy News Analysis (<http://www.opendemocracy.net>), 16 - 11 – 2006.

¹⁵⁶ See Steven Levitsky and Lucan A. Way, “The Rise of Competitive Authoritarianism”, *Journal of Democracy*, Vol. 13, N. 2 (2002).

¹⁵⁷ See Mikhail Myagkov, Peter C. Ordeshook, and Dimitry Shakin, “Fraud or Fairytales: Russia and Ukraine's Electoral Experience”, *Post-Soviet Affairs*, Vol. 21, N 2 (2005) for a comprehensive review of electoral circumvention technologies in Russia and Ukraine.

including both national and local authorities and law enforcement machinery, to serve its new electoral success by all legal and illegal means.

The last point brings to the necessity of highlighting another key element in the entire structure of power concentration-maintenance-reproduction: mobilization of all resources in the nation to serve the interests of the incumbent ruling elite or “nationalization of elite” as this tendency is depicted in a paper.¹⁵⁸ Such recruitment to “power elite” takes place in various dimensions. The mobilization of the economic resources matches the label of “nationalization” in probably the most illustrative way, though the commas by which the term *nationalization* is accompanied clearly indicate that we do not speak about state ownership of the formerly privatized companies but about state, or to be more precise, political control of the businesses. Clearly enough, this enterprise is intended at obtaining control of the financial resources and directing them for the implementation of the objectives of the ruling elite.¹⁵⁹ The project of mobilization, thus, does not tolerate the existence of business elites with alternative political interests and views. It rather uses or, more accurately, misuses the state power in order to deprive the oppositional business elites from the source of their income. These practices have been widespread all over the post-Soviet region, but perhaps the most illustrative and well-known of all examples is the persecution by the administration of Vladimir Putin of non-allying billionaires Boris Berezovski, Vladmimir Gusinsky and Mikhail Khodorkovsky. These “persecutions” normally take the form of legal proceedings, most popular among which are the tax motives. The project at the end results in removal of non-cooperating businesspeople from the economic and political space and in control over those who chose to cooperate.

The mobilization of the regional elite is another key “project” in insuring the support of local constituency by means of securing the cooperation of local leaders. On the lower level of communities, the success of this is insured by the abuse of administrative power and due to clientalistic networks dominating the society. The burden of this project is put on the shoulders of local state officers who manipulate (through bribing, harassing, administrative leverages such as cutting of state funding or firing from the jobs etc.) the community for recruiting its most resourceful elites. On the higher level, the mobilization of the regional elite was done in Russia through institutional changes to “strengthen the vertical power” resulting in elimination of regional elections in 2004.¹⁶⁰

Finally, the mobilization of the political elite usually takes place through the institutionalization of the previously discussed resources, as a rule by manipulations in the party system through

¹⁵⁸ Ivan Krastev, *supra* note 155.

¹⁵⁹ I do not simply mean that these objectives strictly include self-interest of the incumbent government, but that the financial means are served to implement the policies originating from the sole source of power.

¹⁶⁰ See *The Dynamics of Russian Politics: Putin's Reform of Federal-Regional Relations*, edited by Peter Reddaway and Robert Ortung, Rowman & Littlefield Publishers (2005).

creation of loyal and fake parties. This, as a rule, results in an emergence of one dominant party which brings together all major stakeholders from national and regional elites- a “party of power” (such as *Russia’s Choice* under Yeltsin and *Edinaya Rossia* under Putin in Russia, *Party of Regions* in Kuchma’s Ukraine, *Republican Party* in Armenia under much of Kocharyan’s presidency), as well as to emergence of other, often smaller parties which are called to creating of an illusion of competition and fake opposition (*Spravedlivaja Rossia* and *Rodina* in Russia, etc.).¹⁶¹

The power reproduction projects throughout the region are supported by what can be called “political legalism”. The formal constitutional framework and the entailing laws become manipulated by the incumbent elites for their self-interest in reproduction. By reference to the letter of law which is in any case adjusted to serve them, the incumbents succeed in outlawing their political rivals from the larger electoral competition (for example, by declining the registration of an oppositional candidate as it was the case with Mikhail Kasyanov or earlier with Yuriy Skuratov in Russia, or banning oppositional rallies and gatherings by reference to public security as it has become the practice throughout the region),¹⁶² while ignoring the gross violations of constitutional law by the power favorites. The reference to the constitution and the law, to which the incumbent politicians resort in such cases, creates an additional value to the enterprise of power-reproduction: an external illusion of legitimacy of their action.

The preservation of the formal constitutional structure of democracy and formal observance of its rituals, in this context, is intended at the function of legitimization of the status quo. This reality deserves a special attention for the purposes of this work, as the inter-relationship between formal democratic institutions and informal practices contrary to the spirit of democracy will be in the core of our discussion in subsequent chapters. This reality can well be considered as a common pattern in virtually all countries in the region. Including even Turkmenistan during the tenure of its President-for-life Niyazov, all these states chose to preserve their democratic constitutions and their procedures rather than to eliminate them, while the political practices in all of them openly deviated from democratic standards in one way or another. A due regard and knowledge of this apparently paradoxical political phenomenon are necessary for explaining the seemingly contradictory institutional preferences (for example, related to the question why constitutional designer politicians create constitutional courts though they perfectly understand that these courts can later decide against them?) and political practices which we will observe in the course of this work. Apprehension of the degree of respect and cynicism towards the democratic institutions and the exact incentives for keeping within the formal democratic boundaries in each particular sub-region or

¹⁶¹ See Andrew Wilson, *Virtual Politics: Faking Democracy in the Post-Soviet World*, Yale University Press (2005), Chapters 8-9.

¹⁶² See the description of these “technologies” in Chapter 4.

country is a key to understanding of the political processes and design strategies there. More light can be spread on this by consideration of the typology which prior works developed by explaining the general attitudes towards and motivations for the formal adherence to the democratic standard.

In a famous article, political scientists Steven Levitsky and Lucan Way distinguish between the following types of regimes which can characterize the political establishments in the former Soviet area: delegative democracy which was depicted by Guillermo O'Donnell,¹⁶³ competitive authoritarian regimes, and façade electoral regimes.¹⁶⁴ This typology can perfectly apply to the countries in our region, where most of the deliberation would most likely be between the two last types of regimes, while the label of “delegative democracy” would be granted to a post-Soviet country only with some serious reservations. But the point behind recalling this particular study is not in the exercise of assigning types for its own sake but in consideration of the particular conclusions about the one or the other. Thus, according to the authors of this research, in façade electoral regimes the democratic institutions exist (on paper only, most probably) but they do not bring to any real contestation, and hence these are classified as fully authoritarian regimes.¹⁶⁵ In contrast, in competitive authoritarian regimes, electoral institutions exist, and although the elections are mostly flawed, the democratic institutions create a possibility for the opposition to challenge, often significantly, the incumbent political leadership. The line between these two types is often difficult to draw, according to Levitsky and Way. However, it is important, they notice, “to distinguish regimes in which democratic institutions offer an important channel through which the opposition may seek power from those regimes in which democratic rules simply serve as to legitimate an existing autocratic leadership.”¹⁶⁶

This line is very important to be drawn in this work. Wherever the democratic institutions are said to be preserving the chance for the contestation, we will observe patterns of behavior of constitutional courts which are different from the ones in “full authoritarian regimes”. This work will subsequently show that the performance of constitutional courts considerably depends on the political situation and the predictability of the outcomes of electoral processes in a time. Wherever the regime type allows arising of such uncertainty, we may predict some distinctive patterns of judicial behavior which this work finds to be often pro-democratic.¹⁶⁷ In contrast, in the regimes which never allow a meaningful contestation, neither uncertainty and nor pro-democratic performance by constitutional courts is likely to be expected. These

¹⁶³ Guillermo O'Donnell, “Delegative Democracy,” *Journal of Democracy* 5 (January 1994): 55–69.

¹⁶⁴ Levitsky and Way, *supra* note 161.

¹⁶⁵ The authors mentioned Uzbekistan as a country falling under this category (p. 54) but most likely the other Central Asian countries except probably Kyrgyzstan fall under the same category.

¹⁶⁶ Levitsky and Way, *supra* note 161.

¹⁶⁷ See more in Ch. 3.

considerations may be high on the agenda of institutional designers, as it will be shown and discussed throughout this work.

The fear of genuine democratic activism and “colored revolutions-style” transformations is another typical pattern of the post-Soviet manner of governance which deserves attention in this work. Popular revolts against concentration of power in the hands of a bunch of corrupt and ineffective politicians, which rise in the aftermath of elections and which in a number of cases resulted in fall of the regimes (2003 in Georgia, 2004 in Ukraine, and 2005 in Kyrgyzstan), have become tormenting alarms for the quasi-authoritarian presidents which since became worried about the fall of their own regimes in the same scenario. These worries may well be understandable: the growing frustration with the concentration of power and political abuse is as natural and inherent, as the concentration of power itself was said to be. In this sense, the rise of popular oppositional movements, called to liberalization of regimes, can be viewed as a direct outcome of the political phenomenon which we observed in the previous paragraphs, that is the co-existence of formal democratic constitutions with non-democratic political practices. This is also the price that post-Soviet autocrat leaders pay for enjoying the fruits of preserving formal democracy.

The most fascinating outcome of the colored revolutions, from the perspective of a social scientist, is observation of the changes in the styles of political management and the general patterns of governance that these processes entailed. For the purposes of this work, the study of these patterns is important for the understanding of the nature and motivation behind political processes affecting, *inter alia*, constitutional courts and the executives’ attitudes towards them. Since the alarm about “colored technologies” and the threat of regime change was first heard by autocratic leaders all over the region, the patterns of governance, with which we are primarily concerned in this part of the work, have substantially changed, resulting in a new assault on political freedoms which are sought to be the main carriers of the revolutionary virus. With these new patterns, the regimes in our countries, we could say, entered a new phase of departure from democratic practices, which in this time acquired shades of defensive assault and return to Soviet-style fear of global conspiracy.

The preventive “technologies” designed to counteract the “colored technologies” were intended, first of all, to preempt all possible symptoms of popular manifestations and organized political defiance. In Russia and in almost all other countries “in defense”, the governments recruited the resources of law enforcement to persecute all attempts at manifestations of political freedoms. These included restrictions against political demonstrators, arrests of oppositional political leaders and journalists, banning of political rallies, etc. The back-up “measures” included even further attacks on free media intended at depriving the potential opponents from the opportunity to spread their ideas. Russia’s “campaign” is typical and

famous also for its attack on non-governmental organizations and externally-funded assistance programs. Although the “threat” of electoral revolutions was least likely especially in the Central Asian states, the anti-revolutionary mobilization did not avoid these countries too. The authorities in Kazakhstan launched an offensive on the few existing oppositional outlets before the presidential elections in 2005.¹⁶⁸ The authorities in Tajikistan adopted new laws restricting the interaction between foreign diplomats and the local civil society.¹⁶⁹ The Uzbek-style prevention resulted in the massacre of Andijan in the same year. In Armenia, the regime had long before operated restrictions on freedom of movement and assemblies to reduce the effect of oppositional demonstrations,¹⁷⁰ but the most outrageous manifestation of its panic against electoral unrest can be observed in its violent assaults on demonstrators on March 1 2008, in the aftermath of presidential elections with the “candidate of power” facing a political leader who managed to bring to the streets a number of oppositional parties.

The developments after the presidential elections in Armenia in 2008 could become an illustrative case-study for observing the patterns of anti-revolutionary governance towards courts in general and constitutional courts in particular. The lessons from the Ukrainian electoral unrest, alarming that courts may ally with political opponents if there are signs of uncertainty about the future winner of the elections,¹⁷¹ should have been learnt well by the politicians in Armenia. Now we can say with a certain degree of confidence that the attack on the opposition demonstrators in 2008 (after the presidential elections, just a few days before the scheduled constitutional court hearings on the appeal of the results of presidential elections) was largely aimed at reducing the political uncertainty in which situation the constitutional judges might reverse the official results of elections as announced by pro-governmental electoral commission. By this and other references, we come to appreciating the importance of knowledge on the political ingredients of electoral revolutions and prevailing patterns of governance for the study of constitutional courts, their behavior and institutional design.

In this part of the work, I skip through more detailed discussion of the patterns of governance concerning the harassment of constitutional courts by incumbent authorities, as these will be discussed in subsequent sub-chapters and then the chapters of the thesis.

¹⁶⁸ Diamond, *supra* note 9, p. 202.

¹⁶⁹ See Vitaly Slitski, “Preempting Democracy: The Case of Belarus”, *Journal of Democracy*, Volume 16, Number 4 October 2005.

¹⁷⁰ Most noteworthy and illustrative is the practice of restricting public transportation on the days when oppositional demonstrations are announced to take place: in this way authorities prevented the flow of protesters from the remote regions of the republic and the capital city.

¹⁷¹ Apparently, as the evidence shows, Ukrainian power-holders either ignored the aspect of courts or overestimated their control of courts, as the Supreme Court eventually decided for their opponent in 2004. See more on this in the next Chapter.

B. Constitutionalism and constitutional courts

From sham to pseudo constitutionalism

The evolution of constitutionalism in the post-Soviet area has at best marked a trajectory from “sham to pseudo constitutionalism.”¹⁷²

As in the Soviet times, when constitutions in the federal state, as well as in each constituent republic of the Soviet Union existed without any evidence of genuine constitutionalism, constitutions without constitutionalism are the paradigm as of today in virtually each post-Soviet country. The evolution from a sham to a pseudo constitutionalism, though, has fashioned an entirely different and unique constitutional reality, which has to be scrupulously observed because many answers to our inquiries are contained in the complexity of its structure. Some elements of this structure were to a certain extent discussed previously, namely the discrepancy between the formal constitutional institutions and actual political practices, as well as what I called “political legalism” where the incumbents were observed to create the illusion of following the letter of the constitutions for launching practices which are inherently anti-constitutional in nature.

Democratic constitutions emerged in the post-Soviet area following the demise of the Soviet Union in 1991. Inspired by the democratic euphoria of the epoch, these constitutions embodied the most progressive liberal ideas of the time, reflected in both the stipulation of rights and in stipulation of institutions of governance. The rights’ sections of these constitutions went to include the entire wide array of known freedoms and rights without a due care of the states’ capacity to stand for these and most probably sometimes without even a proper comprehension of these rights beyond their declaratory meaning. The macro-political institutions, provided by the constitutions, came as transplants from the existing western constitutions, and in many cases they appeared non-demanded, irrelevant and mostly non-functional. But the emergence of constitutions nevertheless had a tremendous importance, albeit symbolic. It marked a new political era; besides that of independence, this was an era of democratization - so strongly believed in at the beginning of 90-ies. Constitution-making, in this context, was largely a transitional instrument, and the new constitutions, as in many other cases of transitions, came to perform as road maps to highlight the trajectory from the past and to the future.¹⁷³

¹⁷² Richard Sakwa, “Constitutionalism and Accountability in Contemporary Russia: The Problem of Displaced Sovereignty”, in *Russia and its Constitution: Promise and Political Reality*, edited by Gordon Smith and Robert Sharlet (2007).

¹⁷³ Kirsti Samuels, “Post-Conflict Peace-Building and Constitution-Making”, *Chicago Journal of International Law*, N. 6, 2005.

With all this in mind, the erosion of democratic euphoria in the following years provides some confidence to say that even in the beginning of the new era the phenomena of democracy and constitutionalism were not clearly perceived in the formerly Soviet republics by either the polities, or the elites. These terms symbolized, rather abstractly, the path from a system to depart from and the one to aim towards, both represented as ideal types in the people's minds. As transitional road-maps, the constitutions' meaning was limited to framing the rules of the game by which the new social organism shall be guided.¹⁷⁴ This perception of constitutions as merely collections of rules stayed embedded in the post-Soviet societies until now, whilst no sense of intrinsic constitutionalism did emerge or develop (see more on this in Chapter 4).

In the first chapter I attempted to call the beginning of 90-ies as “epoch of democratic romanticism” in the post-Soviet area. The branding of this period as such looks justified as long as I succeed in demonstrating that whilst there was a tremendous emotional affection with liberal values, there was no substantial knowledge of democracy or constitutionalism either at the level of public, or at the level of their leaders. The decline in democratic support which resulted in manifest setbacks from democracy following the initial years of transitions is one obvious blueprint that leads to the suggestion. Now, having the retrospective picture, the affection with democracy and the same with constitutionalism in those years seems to be just as superficial, in the sense that it merely involved feelings, enthusiasm and hopes but not as much a rational comprehended choice grounded on the social experience of the polity, as the affection with bolshevism in the 20-ies, albeit, luckily, the parallel involves only the aspect of social knowledge of the new system.

More to the point of this work, the absence of the knowledge about the system and even its fundamentals, largely also on the level of the elites, looks also quite obvious in light of the way in which institutions were trusted and treated. The generous empowerment of institutions of democracy in the fashion of the consolidated western democracies but with quite a weak sense of sustainability of the institutions and their imperviousness against unfriendly social tendencies is a stark indication of the statement. Plenty of evidence about this phenomenon was provided in the preceding chapter, showing how much the choice of institutions often conflicted with the existing patterns of social relations, which rendered the new institutions incompetent and sometimes detrimental. But more evidence may be derived from this chapter, as we may see how inconsistently and paradoxically the same leaders-designers reversed their institutional choices in a matter of couple of years as they had to face growing incompatibility between the ways of the society and its new constitution and because they needed to address their own self-centered preferences.

¹⁷⁴ Id.

As far as the dynamics and the trajectories of constitutional developments are concerned, Russia's constitutional history looks again to be very pointing as it may insightfully guide us through the most paradigmatic phases and the forms which the democratic recession took in the post-Soviet neighborhood. It was not long after the democratic era's onset in Russia that both substantial segments in the elites and a huge part of the people signaled their strong nostalgia of the previous regime. Facing this growing setback, Yeltsin's government had to cope with what is described as a "permanent state of insurgency"¹⁷⁵ where constitutionalism, even if properly perceived, had to be sacrificed to transitional politics. By 1993, Russia had developed a decent body of what we might call a constitution, composed of several constitutional statutes enabling a fairly poliarchic state system with a super-strong constitutional court. Both the institutions of representative democracy, which eventually stood for neo-Bolshevik recession in 1993, and the constitutional court under this unwritten constitution then became victims of such transitional politics, as Yeltsin ordered shooting on the oppositional Parliament and suspended the Constitutional Court.

The new generation of constitution-making had to address these challenges, hence not surprisingly, a strong presidential power was stipulated by the Constitution to dominate these institutions. Paradoxically, in this light, the new Russian Constitution of 1993 nevertheless provided for an effective Parliament¹⁷⁶ and even a constitutional court. This might well be signs of resisting romanticism (still visible at the time, but living probably the last period of vigor) which were nonetheless limited to the bounds of rational choice. For a short time between the moments when democracy acquired its first substantial challenges and the phase when expressly non-democratic motivations and practices started to prevail, romantic democratic politics cohabited with emerging rationalistic politics, and by the time the latter would prevail acquiring ghastly corrupt practices, politics and designing were filled with patterns of both.

This brief retro-view may reveal the notorious patterns of both democratic romanticism and its further fading, as well as the patterns of the new generation of post-romanticism designing. Is the fact of stipulation of an extremely poliarchic constitutional system, copying the systems in the most advanced democratic countries, itself not an indication of an idealistic view on democratic politics and strong belief in the country's, including its elites', commitment to the democratic values? What about the idealistic views of and expectations from the formal institutions that these can properly function as if not affected by the patterns of social interaction? Then, is the emergence of a super-presidentialism as the dominant form of government in the region not a typical sign of the new post-romanticism interim era, with the conflict in values and tendencies underlying the process of design? Sakwa's following

¹⁷⁵ Sakwa, supra note 172.

¹⁷⁶ See Thomas Remington, *The Russian Parliament: Institutional Evolution in a Transitional Regime*, Yale University Press, 2001.

reflection starkly demonstrates the growing contradiction- a contradiction resided at the time in the minds of the politicians and perhaps the entire polity then, a contradiction that I would phrase as being between the still struggling democratic romanticism and now already well-exposed rationalist considerations:

While the 1993 Constitution embodies the principles of liberalism, it is predicated on the assumption that the strong president will also be a liberal. In the event of this not being the case, the authoritative (if not authoritarian) elements in the Constitution come into contradiction with its liberal provisions.¹⁷⁷

The claim that it did not prove being the case can hardly be challenged. Yeltsin's rule was overall described to be if not anti-constitutional, then at least "extra-constitutional".¹⁷⁸ But while Yeltsin's assaults on constitutionalism were pursuing a meta-goal of building a new system and were thus largely seen as transitional measures (once again, "romanticism" comes to mind as a good characteristic), Putin's Russia's intolerance of constitutionalism was a result of a completely different agenda, a rather pragmatic statist program intended at enhancement of the state's power and autonomy, often at the expense of fundamental rights. This new generation of governance is strikingly distinguished by its reference to law and order, a perception of constitutionalism of its own where the emphasis is put not on law as *jus*, but on law as *lex*.¹⁷⁹ Sakwa's meticulous review follows:

During Putin's presidency the practices of para-constitutionalism have been sharply accentuated. His regime has been careful not overtly to overstep the bounds of the letter of the Constitution, but the ability of the system of "managed democracy" to conduct itself with relative impunity and lack of effective accountability means that it is firmly located in the grey area of para-constitutionalism. ... Putin's system was legalistic but it often acted in a spirit contrary to that of constitutionalism. Putin's sovereignty games- restoring the autonomy of the constitutional state, challenging the autonomy of regional bosses, weakening the ability of the oligarchs to impose their preferences on the government, and freeing the presidency from the administrative regime- neglected one important element: the sovereignty of the people in a federal state.¹⁸⁰

The way of the Russian constitutionalism marked a trajectory from extra-constitutionalism to para- constitutionalism if we consider the post-Soviet period. It went from sham to pseudo-constitutionalism if the Soviet period is also considered. "Constitutionalism with adjectives" appears to be the indispensable companion of "democracy with adjectives".¹⁸¹ Post-Soviet countries developed a wide array of "constitutionalisms", and pretty much explicably, the types of constitutional regimes strictly followed their corresponding types of political ones. The Central Asian sultanistic regimes most likely made a trip from sham into sham

¹⁷⁷ Sakwa, *supra* note 172, at 13.

¹⁷⁸ *Id.*, at 15.

¹⁷⁹ This phenomenon is said to be a typical feature of the post-soviet legal culture. See William Butler, "Jus and Lex in Russian Law", in *Law and Informal Practices: the Post-Communist Experience*, edited by Denis J. Galligan and Marina Kurkchyan (OUP 2003), p. 59

¹⁸⁰ Richard RSakwa, *supra* note 172, at 20.

¹⁸¹ "Democracy with adjectives" became a popular term to be used for countries with formal democratic constitutions but practices falling short of democratic standards after the publication of "Democracy with Adjectives: Conceptual Innovation in Comparative Research" by David Collier and Steven Levitsky, 49 *World Politics*, 430-451, 1997.

constitutionalism. More liberal regimes had rather ups and downs, but luckily for the majority of them at least sham constitutionalism was left far behind, though not any one country made a strong application for a constitutional democracy well beyond unstable, defective constitutional regimes.

Emergence of constitutional courts and making of their institutional configuration

The nearly famous speculation “As Russia goes, so goes the region”¹⁸² is appropriate to be recalled with respect to constitution-making in the post-Soviet area, aside the well-grounded “continuity” hypothesis that the constitutional institutions of Russia itself originally paralleled those in the last years of the Soviet Union.¹⁸³ The spread of new macro-political institutions, in one country after the other, instantaneously repeated the major institutional choices made in Moscow under the pressure from contingent political realities. Strong parliaments which emerged immediately with the first signs of regime change and at first carried the entire burden of political power once gave a way to strong presidents in all post-Soviet countries. The institutions of vice-presidents, formerly popular among CIS countries, started bothering the emerging super-presidents since the Russian vice-president Rutskoy defected his boss Yeltsin in October 1993; by then, vice-presidents existed in most of the newly independent republics. The choice of the semi-presidential system of governance, as it proved “optimal” in Russia, hardly avoided the other countries. Among them, only the Kazakh and the Turkmen constitutions expressly announce presidential systems, though both countries chose, nevertheless, to have governments as separate institutions from that of the president. In Kazakhstan, despite the announced presidential form of government, the constitution provides also for a prime-minister. The parliamentary form of government, instead, was totally rejected, except that Moldova, uniquely, later made a move towards it.¹⁸⁴

This trend did not pass by the constitutional courts as these courts were created in all the post-Soviet countries apart from Turkmenistan. The birth of constitutional courts, in the same way as in Central and Eastern Europe, came to symbolize the change and the arrival of the new era, manifested by constitutionalism as the fundamental ideology and constitutional courts as the key guarantors of constitutionalism, albeit, strongly so in some countries and not so much in

¹⁸² Michael McFaul, “A Mixed Record, an Uncertain Future”, *Journal of Democracy* 12.4 (2001) 87-94, at 91.

¹⁸³ See Robert Ahdieh, *Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy 1985-1996*, The Pennsylvania State University Press (1997), p. 47.

¹⁸⁴ See ‘Moldova Update’, *East European Constitutional Review*, 9, Autumn 2000, pp. 35–37; Lucan Way, “Pluralism by Default in Moldova”, *Journal of Democracy* 13.4 (2002) 127-141.

others, the choice of this institution might have more to do with the previously described “continuity” and transplanting from the Russian constitutional structure. The continuity in designation of separate tribunals was set up even earlier by the creation of the Constitutional Supervision Committee of the USSR and by the amendment in the Soviet Constitution allowing each Republic within the Union to establish its own body of constitutional supervision. The “path-dependency” created by the beginning of this new, in a way exotic institution involved one republic after the other. Some of them, Russia or Kyrgyzstan, for example, attempted the creation of a constitutional review body even before they became independent. The others opted for a separate court much later. It is noteworthy that there are no strong evidences of any significant debates about whether or not to designate the function of constitutional review as a separate institution. It rather seems that the originally taken path of constitution-making concerning the constitutional courts became “self-enforcing” once it was set up in the capital city of the Soviet Union- a status that Moscow would informally carry by the force of inertia well beyond the time it officially ceased being the capital of the other republics than Russia.

The hypothesis about so-to-be-called “reflex constitution-making” receives another confirmation by the fact that constitutional courts became very popular in a number of autocratic regimes where despite the overwhelming prevalence of autocratic government styles and the absolutely symbolic importance of the constitutional review, constitutional courts still exist, though they do not matter. The paradox is observed by a student of post-Soviet Russian constitutional justice- Alexei Trochev- who has insightfully explored constitutional courts in the regions of the Russian Federation to find out that these courts persisted in the most autocratic regions while did not get rooted in the most liberal, competitive ones.¹⁸⁵ Why these plainly undemocratic regimes, either in Russia or in other post-Soviet states, prefer to preserve the constitutional courts instead of getting rid of them? One rational, yet obvious, answer offered by Trochev himself is that rulers create and tolerate constitutional courts as long as the courts provide benefits for the incumbents and do not interfere with policy-making, otherwise- into the rulers’ sole province.¹⁸⁶ This suggestion is both straightforward from the point of view of rational choice theories, and “well-documented” in a sense that there exist a number of studies endorsing the hypothesis through field research and ample case-studies.¹⁸⁷ But non-interference with policy-making is itself not a self-sufficient reason for bringing constitutional courts in. Meanwhile, what would be the benefits for autocrats in creating sham courts? It is true that constitutional courts in a number of post-Soviet regimes often play a role which is simply derogatory; they persist solely because their existence adds to the image of the political

¹⁸⁵ See Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006*, CUP 2008, at p. 2.

¹⁸⁶ *Id.* p. 19.

¹⁸⁷ These are amply presented throughout this work. For one, see Epstein, Lee, Knight, Jack and Shvetsova, Olga, “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government”, 35 *Law and Society Review* 164 (2001).

entity as a suit and tie add to the image of a despotic ruler. But this particular argument more emphasizes the “path dependency” of the choice, than its pure rationality. Constitutional courts were opted for to be a part of the constitutional systems in the vast majority of post-Soviet countries very much because these courts then symbolized the spirit of the epoch, as previously noted, and for this specific inquiry it is rather irrelevant whether or not the particular states did make the choice out of respect towards that spirit or from the considerations of copying its conventional image.

The paradox noticed in the fact of the popularity of constitutional courts in autocratic political regimes in the Russian Federations may be viewed as another manifestation of the phenomenon often observed through the apparently puzzling fact that the same designer-politicians “easily” shift their preferences by creating a strong constitutional court and then suspend it and then, again, re-open it.¹⁸⁸ This phenomenon should be necessarily examined in the context of the multiplicity of factors predisposing the configuration of the constitutional forms. While democracy and constitutionalism might have meant an image and their institutions might have been intended as window-dressing in some places and in certain periods, this cannot be true of a large number of countries where the change from the previous regime towards democracy was originally treated with enthusiasm and euphoria. Perhaps not totally perceived and rationalized, the birth of constitutional justice, in the most part, was nevertheless a product of an honest belief in the values of constitutionalism. Once created, constitutional courts furthermore acquired a fair bulk of legitimacy among the polities, and while rational calculations did play a crucial role in their design, the existence of the body of constitutional review got deeply embedded in the political system in many societies. This bouquet of the different incentives- explained by both behaviorist and institutionalist paradigms- accompanied the path of constitutional courts throughout their entire route, and while some of these incentives could prevail over the others in particular times and epochs, neither of them can be excluded from the review at any juncture in the history of this institution in the post-Soviet stage.

The previously observed patterns of democratic romanticism, post-romanticism and then, fairly enough, the epoch of strongly rationalist paradigm may offer an intrinsically acute perspective on the study of institutional design of constitutional courts throughout the time. The mere fact of the appearance of constitutional courts itself symbolized the reign of the first, noblest, romantic period, but the look at the typical configurations of constitutional courts’ settings, created in that time, also can reveal the typical blueprints of the epoch’s influences. In Russia, a constitutional court was formed in 1991 which was ever the most powerful tribunal of its kind (furthermore, the First Russian Court). Its powers included both concrete and abstract review of

¹⁸⁸ See Alexei Trochev, *supra note 185*, at p. 4.

international agreements, laws and presidential and governmental acts, jurisdictional disputes, provision of expertise on impeachment of the highest state officials, constitutional review of suspension of political parties. The Court was famously empowered to review constitutional complaints- an institution which was so far known only in Germany.¹⁸⁹ The Court also possessed a right to a legislative initiative in cases when it would identify a gap in the laws. Other unusual powers granted to the Court included the right to provide binding interpretations of the Constitution and the right to launch proceedings on its own initiative. To sum up, as a Russian constitutional judge remarked, the First Russian Court was assigned all possible responsibilities from every existing model in a way that “the law overbuilt the institution” and that the court “could not bear the weight of its own construction”.¹⁹⁰

The question about what was the foremost rationale behind creation of such an overwhelmingly authoritative court is not even much contested. Despite the evidence of the influence of several interest-groups on the designing process, the emergence of the First Russian Court is plainly attributed to the “messiah-like vision of the court” by the strongest advocates of a new constitutional system and the ones who can be called the fathers of that constitutional system, and first of all Boris Yeltsin and his team.¹⁹¹ In Ukraine, a constitutional court law was adopted as early as 1992 which likewise empowered a tribunal with “far reaching powers”.¹⁹² Although this tribunal never was effective and the formation of the constitutional court (with much more modest powers) was delayed up until the adoption of the Constitution in 1996, the fact speaks for itself.

The shades of “post-romanticism”, a period which may have started after the 1993 Coup in Russia and following Yeltsin’s attack on the Parliament and suspension of the First Court, now shaped some new contours for any constitutional courts in the region. The courts of post-romanticism are still the essential parts of the constitutional structures and they still bear responsibilities for separation of powers and constitutional check on the state of fundamental rights protection, but they are no longer overwhelmingly authoritative and do not have over-reaching powers any more. The Second Russian Court, given a birth by Russia’s Constitution of 1993, came as a rather pragmatic compromise between the rationalistic leanings of the triumphant team of Yeltsin and the struggling idealists within the Constitutional Convention.¹⁹³

¹⁸⁹ Klaus von Beyme, “The Russian Constitutional Court in an Uneasy Triangle Between the President, Parliament and Regions” in Constitutional Justice, *East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, edited by Wojciech Sadurski (Kluwer Law International, 2002), at 314.

¹⁹⁰ Quoted in Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, supra note 5, p. 116.

¹⁹¹ Trochev, supra note 185, p. 72.

¹⁹² Kataryna Wolczuk, “The Constitutional Court of Ukraine: The Politics of Survival,” in Constitutional Justice, *East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, edited by Wojciech Sadurski (Kluwer Law International, 2002), at 329.

¹⁹³ Trochev supra note 185, 73-75.

The latter insisted that the constitutional court is necessary for Russia's democracy and that it would enhance the democratic image of the country both within the country and in the eyes of the international community, in sharp contrast to the moods of Yeltsin and the rationalists who seemed to be for the elimination of the separate tribunal.¹⁹⁴

The fact that Yeltsin gave a way to the arguments by the later day democrats in 1993 speaks of the remaining democratic sentiments within the political elites in that time. The years to come marked the further movement away from the remaining sentiments both in Russia and elsewhere. Wherever strong constitutional courts were already created, they subsequently became latent either as the result of executives' "attacks" as in Belarus and Kazakhstan,¹⁹⁵ or as the result of rather silent domination of the presidents over these institutions. Where no constitutional courts were created yet, the new constitutions provided for substantially powerless bodies. Armenia's Constitutional Court, provided for by the Constitution of 1995 and the Law on the Constitutional Court of 1996, emerged as one of the weakest constitutional tribunals in the world. Ukraine's Court, as already pointed out, also came in 1996 as a rather weak tribunal, with no right to review individual complaints and electoral disputes.

But as paradoxical as it sounds, the rationalist paradigm proved not only fit to downgrade constitutional courts but also to empower them. As the ideological euphoria and the democratic pathos eventually faded away, the sole dominating rationale for institutional design remained the politicians' self-interest, the latter conventionally observed as having multiple faces. The patterns of constitution-making in this epoch perfectly match the characteristics depicted in the rationalist stream of the theories of judicial review from Landes and Posner and to Ramseyer and Ginsburg.¹⁹⁶ These theories, depicting the politician-designers as purely rational actors in a competitive electoral market, at some point suggest that constitutional courts emerge as weak institutions only if the incumbent politicians expect to stay in power after the upcoming elections. But if the incumbent politicians expect to lose, as Tom Ginsburg's "insurance theory" puts forward, they stipulate strong constitutional courts as insurance to shield their policy choices against the incoming political elite's attempts to reverse their "contracts".¹⁹⁷

The entire Landes-Posner-Ramseyer-Ginsburg rational-choice premise gets a perfectly accurate verification in the case of the Armenian Constitutional Court. Back in 1995, when the Constitution was adopted, the running political elite in Armenia and its leader, President Ter-

¹⁹⁴ *Id.*

¹⁹⁵ In Kazakhstan, the Court's activism in 1995 resulted in constitutional changes which closed the constitutional court and introduced a new body, Constitutional Council, with limited competences. In Belarus, Lukashenka forced resignation of "activist" judges in 1996.

¹⁹⁶ William Landes and Richard Posner, "The Independent Judiciary in an Interest Group Perspective", 18 *Journal of Law and Economics* 875 (1975); Mark J. Ramseyer, "The Puzzling (In) Dependence of Courts", 23 *J. Legal Stud.* 721 (1994); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, (CUP 2003).

¹⁹⁷ Tom Ginsburg, *supra note 196*, pp. 22-89.

Petrosyan, had no serious worries about their political future, and the creation of a strong constitutional review body were not likely to be in their rational interests- brilliantly in line with the hypotheses by the above-mentioned authors. As a result, unlike all constitutional courts in the post-Soviet area designed in the preceding “era”, the Constitutional Court of Armenia emerged as a body with only a few powers and a very limited access. Only the political bodies- the President, the 1/3 of the Parliament, and the Government- could apply to the court with a request to review a law on the subject of its constitutionality; neither individual complaints, nor court referrals were then allowed.¹⁹⁸ By the time the Constitution was amended in 2005, the overwhelming majority of the judgments by this tribunal- 91.8% of all decisions- were made on the compliance of international agreements of Armenia with the Constitution.¹⁹⁹ Another statistical number speaks about the status of the constitutional review and especially about the state of inter-institutional accountability in the country: 92.9% of all cases in the court were initiated by the President of the Republic.²⁰⁰ After Ter-Petrosyan abruptly resigned in 1998 (a development that was hardly believable in 1993-97), the new President-elect, Kocharyan, initiated constitutional reforms intended at shifting the balance of powers more towards a parliamentary form of government and at a better equilibrium between powers; these constitutional reforms envisaged a higher status and more powers for the constitutional court too.

But this was somewhat populist rhetoric. Kocharyan was not a worse rational actor than his predecessor: the designing of a strong parliament and a strong constitutional court was not in his best interests since his powers tended towards increasing concentration after 1999. As a result, the referendum on constitutional amendments, held in the end of 2003, after a few month from Kocharyan’s re-election in the office, failed, and the failure since then was mostly blamed on the lack of enthusiasm from the authorities themselves.²⁰¹ In 2003, President Kocharyan still had a full term of 5 years in office. The situation started changing closer to the end of his second term. As the presidential tenure in Armenia is limited to two terms only, Kocharyan had no more standing incentives for keeping the constitutional status-quo, and the amendments were passed on a referendum in 2005, this time thanks to overzealous propaganda by the authorities. The new Constitution brought about a completely new constitutional court. Standing was expanded to include individuals (individual complaints), general courts

¹⁹⁸ Art. 101 of the Constitution of the Rep of Armenia in its 1996 edition.

¹⁹⁹ Gagik Harutyunyan, *Constitutional Culture: The Lessons of the History and the Challenges of the Time*, in Armenian (2005), p. 243.

²⁰⁰ Id.

²⁰¹ Alexander Markarov, “MacroInstitutional Political Structures and Their Development in Armenia”, *Demokratizatsiya*, Spring 2006.

(referrals), bodies of the local self-governance, as well as the ombudsman and the prosecutor general. Now the 1/5 of the members of the Parliament can apply to the court.²⁰²

The overarching conclusion ensuing from the discussed patterns is easy to make: the court-empowering rationalist paradigm is activated in the presence of a political competition allowing anticipation of electoral uncertainty. As we discussed already in this chapter, not in all of our countries could one find at least bare minimum of political competition, and the mere persistence of constitutional courts, often formally very strong ones, in countries such as Tajikistan, Uzbekistan, Belarus or Azerbaijan should not mislead us as these courts modern profiles were likely shaped not by the conflict of political interests, as the latter simply did not survive in these countries, but rather by the force of continuity, formalism and the logistics of sham constitutionalism. Meanwhile, as was the case in Armenia, political empowerment of constitutional courts may become high on the agenda as soon as we can observe increasing tendencies toward more dynamic competitive political environments in a country- Moldova, Ukraine, Georgia, and Kyrgyzstan all being candidates as of now. The observations in this part of the work further support the essential methodological bias of this work that the study of institutional design of constitutional courts shall be inalienably linked with the study of political regimes in the target countries.

C. Constitutional courts: institutional design

Despite the variations in particular configurations of the institutional settings of post-Soviet constitutional courts, a generalization as regards to the common profiles of these courts can be sought. For these purposes, this work will follow Professor Sadurski's attempt at describing a common model of constitutional tribunals in the Central and East European region.²⁰³ This methodological "transplant" is not only convenient for practical reasons, but is also important for two substantive reasons. First, this exercise is called to further confirming this chapter's prior generalization about the common patterns of political and institutional character, which justify the reference to the "post-Soviet region" as to a "kind of its own" for a scientific conceptualization. Second, this exercise is useful from comparative perspective as well, as it will expose stark commonalities also in between constitutional courts in the CEE and CIS regions as far as institutional design is concerned.

²⁰² Art. 101 of the Constitution of the Republic of Armenia.

²⁰³ See Wojciech Sadurski, *Rights Before Courts*, supra note 2, p. 5.

In both of these regions, the overwhelming majority of countries opted for a separate tribunal. As Estonia was traditionally recognized as the only country without a constitutional court in post-communist Europe, so Turkmenistan makes the only exception among the post-Soviet countries as regards emergence of a constitutional court. But while the absence of a constitutional tribunal in Estonia is only formal, as the function of constitutional justice is fully implemented in an alternative framework (to be discussed in Ch. 5), Turkmenistan's constitution can be said to be the only case of a total rejection of the institution of constitutional review in the entire post-communist region. Furthermore, in the CIS space, as in the CEE, constitutional courts have roughly identical macro-settings as regards the main responsibilities, access, tenure, appointment, etc. Here and there, abstract review is set as the principal function of the courts, as it is present in all the system, while we have significant variations as to the other responsibilities (see Table 2 below). In all countries except Kazakhstan abstract review is *ex-post*. Appointments, as a rule, are made by political branches (presidents and parliaments), except that in Georgia some of the constitutional judges are appointed by the Supreme Court and in Ukraine and Moldova the Bar and the Magistracy (a constitutional body composed of higher judicial and officers and which is responsible for composition of the judiciary) respectively have this privilege. The tenure varies, but in the vast majority of the countries it is limited (life tenure exists in Armenia and Russia only). Access was customarily concentrated in the political branches, as only a few countries allowed individual complaints before 2004. Since, the introduction of the constitutional complaint has become the tendency. *Actio popularis*, instead, is extremely rare as of today. It exists in Georgia, but the law regulating it is rather vague. In Tajikistan, *actio popularis* was introduced recently,²⁰⁴ but the promise of this reform seems to be in doubt, given the state of civic culture and citizen activism in this country.

For the ease of our analysis, two tables summarizing the entire range of institutional settings of all post-Soviet constitutional courts is attempted below. This empirical exercise, undertaken and carried out by the author of this thesis, presents so far the only systematic overview of the institutional settings of the constitutional courts in this region. Table 1 includes data on standard settings, such as tenure, number of judges, and access, but also columns (inception, major reforms, and democratic development) representing the dynamics of institutional changes and institutional empowerment/disempowerment in light of overall democratic development in a country. The section "inception" provides the years of the first inauguration of constitutional justice in the respective countries and not the date of the inception of the current courts: this serves the needs of tracing the patterns of institutional empowerment in light of the analysis in the historical perspective made in the preceding subsection. The column on access nominates

²⁰⁴ N. Buchari-zade, "Tajik Constitutional Court's powers increased", available online in Russian at <<http://www.centrasia.ru/newsA.php?st=1203004020>>.

qualifications rather than lists the subjects of access in order to prevent misapprehension from the numerical indicators of access (how many subjects have access), as the qualifications are not necessarily and directly correlated with the number of subjects given access. Access is considered as “wide” if both political branches, and individuals, and lower courts have the right of initiating a review, and “limited” if only one of these categories is given access. The word “rather” accompanies qualifications of systems with hybrid access which is neither wide nor limited: Moldova and Kazakhstan. In Moldova, the absence of the institutions of individual complaint and lower court referrals is “compensated” by the very wide list of officials having the access (even a single member of the Parliament, as well as the higher courts and the ombudsman have access), earning a qualification of a “rather wide”. In contrast, Kazakhstan’s grant of lower court referrals is diminished by the strictly limited access within the political bodies and failure to grant any access to the ombudsperson and the civil society organizations, earning a “rather limited”. The last column on democratic progress presents this work’s own assessment of the trajectories of democratic development in the post-Soviet countries since no consistent tracking of democratic paths of the countries is available which covers all the period since the emergence of first courts. The qualifications, then, rely on current assessments by the Freedom House, as well as a series of other sources mentioned previously in this chapter, and the available literature, reports and other materials witnessing the state of democratic governance in the historical perspective between 1991 and now.

Table 2 presents data on the responsibilities of constitutional courts in the 11 countries having constitutional tribunals. The last column demonstrates the statistical score of each court in proportion to the 10 selected responsibilities. This data represents the formal institutional strength of the courts but itself it is not an evidence of respective courts’ actual weight in the countries’ political arena. Included in this table are all of the “major” responsibilities typical to continental constitutional tribunals, as well as some marginal functions which are rarely found elsewhere. Among the latter category are the *actio popularis*, the courts’ right to self-initiate cases, and their right to a legislative initiative. One responsibility which is not common in other countries but is rather popular in post-Soviet countries is the opportunity to deliver binding interpretations of the constitution and often also laws.

Table 2 skips through abstract review of laws as this basic function is implemented in each jurisdiction, although in Kazakhstan, exclusively, this is done only before promulgation of laws by the President, in the *ex-ante* fashion.

Table 1

<u>Country</u>	<u>Inception</u>	<u>Major reforms since inception</u>	<u>Tenure</u>	<u>Number of judges</u>	<u>Appointm.</u>	<u>Access</u>	<u>Lower court referrals</u>	<u>Indiv. complaint</u>	<u>Democratic development since the inception of the court</u>
<u>Azerbaijan</u>	1998	2004, empowered	15	9	Parliament	wide	yes	yes, since 2004	rather declined
<u>Armenia</u>	1996	2005, empowered	life	9	Parliament President	wide since 2005	yes, since 2005	yes, since 2005	rather unchanged
<u>Belarus</u>	1994	1996, weakened	11	12	President Parliament	limited	no	no	declined
<u>Georgia</u>	1997	no	10	9	Parliament President Supreme Court	wide	yes	yes	rather improved
<u>Kazakhstan</u>	1992	1995, weakened	6	7	President Parliament	rather limited	yes	no	declined
<u>Kyrgyzstan</u>	1990	1993, empowered ²⁰⁵	15	9	Parliament	wide	yes	yes	rather improved
<u>Moldova</u>	1995	no	6	6	Parliament Government Magistracy	rather wide	no, only Supreme Court	no	rather improved
<u>Russia</u>	1991	1993, weakened	life	19	Parliament	wide	yes	yes	declined
<u>Tajikistan</u>	1995	2008, empowered ²⁰⁶	5	7	Parliament	wide	yes	yes, since 2008	rather declined
<u>Ukraine</u>	1996	no	9	18	Parliament President The Bar	limited	no	no	rather improved
<u>Uzbekistan</u>	1990	1995, empowered ²⁰⁷	5	7	Parliament	limited	no	no	declined

²⁰⁵ A. Satalinov, "Ten years of the Constitutional Court of Kyrgyzstan", Almanac of Constitutional Justice N 2, Yerevan, Armenia, 2001, available online in Russian at < http://www.concourt.am/armenian/con_right/2.12-2001/contents.htm>

²⁰⁶ N. Buchari-zade, supra note 155.

²⁰⁷ B. Eshonov, "The Independence and Effectiveness of the Decisions of the Constitutional Court of Uzbekistan", paper presented at the VI International Seminar on Constitutional Justice in Yerevan, Armenia, 5-6 October 2001, available online in English at < http://www.concourt.am/armenian/con_right/3.13-2001/genrikh-eng.htm> .

Table 2

<u>Country</u>	<u>Self-initiating cases</u>	<u>Legislat. initiative</u>	<u>Const. and statutory interpretat.</u>	<u>Ex-ante review</u>	<u>Internat. agreements</u>	<u>Jurisd. disputes</u>	<u>Impeach.</u>	<u>Elect. disputes</u>	<u>Polit. parties</u>	<u>Actio popularis</u>	<u>Overall institutional strength</u>
<u>Azerbaijan</u>	no	no	yes, both	No	Yes	yes	yes	yes	no	no	50%
<u>Armenia</u>	no	no	no	No	yes	no	yes	yes	yes	no	40%
<u>Belarus</u>	no	no	no	no	Yes	no	yes	no	no	no	20%
<u>Georgia</u>	no	no	no	no	Yes	yes	yes	yes	yes	yes	60%
<u>Kazakhstan</u>	no	no	yes, only Const.	yes ²⁰⁸	Yes	no	yes	yes	no	no	50%
<u>Kyrgyzstan</u>	no	no	yes, only Const.	no	No	no	yes	yes	no	no	30%
<u>Moldova</u>	no	no	yes, only Const.	no	Yes	no	yes	yes	yes	no	50%
<u>Russia</u>	no	no	yes, both	no	Yes	yes	yes	no	no	no	40%
<u>Tajikistan</u>	yes	yes	no	no	Yes	yes	no	no	no	yes	50%
<u>Ukraine</u>	no	no	yes, both	no ²⁰⁹	Yes	no	yes	no	no	no	30%
<u>Uzbekistan</u>	yes	yes	yes, both	no	Yes	no	no	no	no	no	40%

To conclude this section, a warning shall be made that the empirical data presented in these tables is not meant as a self-sufficient, comprehensive and anyhow precise tool for deductions and conclusions about the patterns of institutional empowerment of post-Soviet constitutional courts and neither about their real political weight. On the contrary, any consideration of the particular data may reveal the “paradoxes” of institutional empowerment, as discussed earlier, while any attempt at a quantitative analysis out of the previously discussed political context will not likely succeed in illuminating the puzzles. For example, the relatively recent court empowerments in Azerbaijan and Tajikistan shall not be interpreted as in necessary causal relationship with these countries’ democratic achievements and more over as direct effects of democratization, because, as it is evidenced also by the last column in the Table 1, the democratic development since the first inauguration of the courts has rather declined in both of these states. Meanwhile, the institutional disempowerments of constitutional courts in

²⁰⁸ The Constitutional Council of Kazakhstan reviews the laws passed by the Parliament but not promulgated yet by the President.

²⁰⁹ Only the laws envisaging constitutional amendments are subject to *ex-ante* review.

Kazakhstan in 1995 and in Belarus in 1996 have been the immediate offshoots of democratic recessions in these respective countries. The data, therefore, should be utilized exclusively in the context of the previously highlighted patterns of political governance, having in mind the degree of constitutional formalism and the status of constitutional institutions in these countries, as long as one applies the empirical information for the purposes of conceptualizing the patterns of institutional empowerment and the political standing of constitutional courts.

Conclusion

Having this much analyzed, democratic development even in the freest countries of the post-Soviet space still remains largely a work in progress. The two decades since the collapse of the Soviet Union have seen periods of democratic momentum and discouragement, and eventual democratic progress, if little, in some, and setback, often substantial, in other countries. Despite the variations, all countries share common patterns as regards both general style of governance and the status of constitutionalism and constitutional courts. The patterns concerning the constitutional courts include commonalities both in terms of the institutional profiles of these tribunals, and the status of constitutional adjudication in the political power-structures, the latter marked by relatively universal insolence of this institution, general control over and regular harassment of the courts by the dominant political power in the countries. The emergence and then the further path of the constitutional courts in the 11 post-Soviet countries have seen remarkable “paradoxes” of institutional empowerment of these tribunals, witnessing apparently puzzling phenomena, such as cohabitation of institutionally strong courts and clearly non-democratic regimes and, on the opposite, rather limited empowerment or decline of these courts in the more liberal political entities. These “paradoxes” may look striking only if we make our inquiries out of the larger political context discussed above but they will no longer seem so puzzling if scrutinized in light of the peculiar style of political governance in the region, where the existence of constitutional institutions is shadowed by the dominance of informal political practices. The knowledge of these political practices is the key to the conceptualization of the status and the institutional standing of constitutional justice in the post-Soviet land.

So far, politics is portrayed as influencing the entire scope of issues related with constitutional courts, including the institutional design. But this obvious fact should not in any way diminish the entire meaning of our larger work. As it was elaborated in the previous chapter, democracy-building is largely a function of institutional consolidation and development, where the role of new institutions- first of all in fostering the mechanisms of horizontal and vertical

accountability- acquires an especially crucial role.²¹⁰ This effect of institutions would now seem immaterial, but only if we were as romantic, inexperienced and impatient as the institutional designers and political leaders in the beginning of 90-ies. In reality, the role of institutions is enormous and defining in the long run and in a more realistic vision of the political processes and the change. As the subsequent chapters will demonstrate, institutional empowerment of constitutional courts matters and matters greatly if we look at political processes in a dialectical perspective, from the point of view of the inevitable evolutionary change in the basic software of the social structure. The preceding decades may be called decades of failure and frustration only if we were to expect immediate change and development. They may well be decades of achievements if we judge by the degree of legitimacy earned by the new institutions, including this of constitutional justice, since this legitimacy will amount for the most important capital in bringing the intrinsic change in these societies.

²¹⁰ For the analysis of this in light of the recent political developments in the world's developing democracies, see Diamond, *supra* note 9.

CHAPTER 3

IN DEFENSE OF POLITICAL EMPOWERMENT: APPRAISING COURTS IN POLITICS OF DEMOCRATIZATION

A. Defining political empowerment

This chapter seeks to answer a basic question whether or not one should opt for political empowerment of constitutional courts in post-Soviet environments if the aspiration of the designer is to promote democratic contributions by these tribunals. I suggest the term “political empowerment” for denoting a particular group of functions of post-communist constitutional courts which are “marginal”²¹¹ according to a leading student of post-communist constitutional courts or “alien to the role and the nature of constitutional courts”²¹² according to a constitutional judge from Armenia. Among these are the review of jurisdictional and other disputes between supreme bodies of the state (jurisdictional disputes), decisions on liability of top officials (impeachments), constitutionality of political parties (political parties), and review of electoral disputes (electoral disputes). These responsibilities seem to be indeed “marginal” and alien to constitutional tribunals’ nature if the review of constitutionality of laws is viewed as the central *raison d’être* of these bodies. But they have been intended to considerably enhance the overall competence and the institutional strength of post-communist constitutional courts.

To begin, “political empowerment” in the above-mentioned meaning can be said to be the common element of the institutional design in post-Soviet countries, though there are certain variations and peculiarities. The responsibility of constitutional review of jurisdictional disputes *per se* is found in the constitutional texts of Azerbaijan, Georgia, Russia, and Tajikistan.²¹³ In Belarus, the Constitution provides for the responsibility of the Constitutional Court to “give its conclusion on the presence of instances of systematic or flagrant violation of the Constitution

²¹¹ Wojciech Sadurski, *supra note 2*, at 13.

²¹² Felix Tokhyan, “Constitutional Control of the National Elections in Armenia,” *in Russian*, paper presented in the XI Yerevan International Conference “Role of Constitutional Courts in Ensuring Democratic Elections,” published in *International Almanac: Constitutional Justice in the New Millennium*, Yerevan (2006), at 113. Available online at the official website of the Constitutional Court of Armenia: <www.concourt.am>.

²¹³ Articles 30/III of the Constitution of Azerbaijan, 89/1 (b) of the Constitution of Georgia, 125/3 (a-c) of the Constitution of Russia, 89/2 of the Constitution of Tajikistan.

of the Republic of Belarus by the chambers of Parliament.”²¹⁴ In Moldova, the Constitutional Court shall “ascertain the circumstances justifying the dissolution of the Parliament.”²¹⁵

The disputes between higher state bodies can alternatively reach constitutional courts through the procedure of challenging the particular legal act of one state body by the other. For example, the Ukrainian Parliament asked the Constitutional Court in 2007 to review the decree of the President on dissolution of the Rada (Parliament) even though the Constitution did not literally provide for the responsibility of the Court to review jurisdictional disputes or dissolution of the legislature by the president.

Impeachments are part of the responsibilities of constitutional courts in Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, and Ukraine.²¹⁶

Review of constitutionality of political parties is assigned to constitutional courts in Armenia, Georgia, and Moldova.²¹⁷ This function was among the responsibilities of the Constitutional Court of Russia- the “First Court”- before its dissolution in 1993. That “First Court” era was marked by the case of *Communist Party*, which will be discussed below.

Finally, electoral disputes and disputes on the results of referenda are part of the task of the constitutional courts in Armenia (presidential and parliamentary elections and referenda), Azerbaijan (presidential and parliamentary elections), Georgia (elections and referenda), Kazakhstan (presidential and parliamentary elections and referenda), Kyrgyzstan (presidential elections), and Moldova (presidential and parliamentary elections and referenda).²¹⁸

The term “political empowerment” implies the deliberate choice of the designer to specifically authorize a certain type of responsibilities granted to constitutional review courts for enabling their intervention into politically sensitive cases. I endorse this deduction as the unambiguous implication of this research. The inclusion of these responsibilities in the list of functions of the newly introduced constitutional courts has clearly been targeted at creating a novel institution performing due check on political authority and restricting the abuse of constitution by the latter.²¹⁹ While the mentioned task of checking on political authority and restricting the abuse of constitution can in theory perfectly abstain from associations with politics, I hereby

²¹⁴ Art. 116 (10).

²¹⁵ Art. 135/1 (f) of the Constitution of Moldova.

²¹⁶ Art. 100 (5) of the Constitution of Armenia, Art. 107 of the Constitution of Azerbaijan, Art. 19/1 (h) of the Law on Constitutional Court, Art. 72/1 (5) of the Constitution of Kazakhstan, Art. 82/3 (4) of the Constitution of Kyrgyzstan, Art. 135/1 (f) of the Constitution of Moldova, Art. 125/7 of the Constitution of Russia, as well as Art. 13 (3) of the Law on the Constitutional Court of Ukraine.

²¹⁷ Art. 100 (9) of the Constitution of Armenia, Art. 89/1 (c) of the Constitution of Georgia, Art. 82/3 (8) of the Constitution of Kyrgyzstan, Art. 135/1 (h) of the Constitution of Moldova.

²¹⁸ Art. 100 (3) and 100 (3.1) of the Constitution of Armenia, Art. 86 and 102 of the Constitution of Azerbaijan, Art. 89/1 (d) of the Constitution of Georgia, Art. 72/1 (1) of the Constitution of Kazakhstan, Art. 82/3 (3) of the Constitution of Kyrgyzstan, Art. 135/1 (d and e) of the Constitution of Moldova.

²¹⁹ This is to a large extent a part of the common knowledge, but for the manner in which it is implied in major academic literature, see Herman Schwartz, *supra* note 5, pp. 22 and 241-242.

subscribe to a perspective of the term “political” which prefers its customary notion to the normative one.

To provide an overview of the foregoing argument, the use of “political” with respect to courts and judicial review is in the core of debates and controversies in the scholarship and is definitely a strong irritator in use in politics. For the purposes of this chapter, I refer to “politics” in the most commonplace meaning of the term. As a criterion for assigning certain functions of constitutional courts as political I look at the fitness of these functions to involve the courts in the very process of allocation and distribution of political power. In this light, all the roles from among the series of political empowerment are political simply because by the virtue of their participation in the allocation and distribution of the state powers the courts unavoidably get involved in partisan affairs, in which case the stamp of “political” attaches to the courts with no major difficulty.

A puzzling paradox might be suspected in my argument. It is exactly these types of roles, when courts are performing as “neutral umpires adjudicating between two parties,”²²⁰ that make up their legitimacy and support their opposition to being called “political.”²²¹ Indeed, in all of these mentioned cases, courts are set to perform as mere intermediaries in situations where the parties appeal for the resolutions of a conflict. Unlike in cases with the review of laws on the subject of constitutionality where this very conflict is typically an abstract category (to which the term of “abstract review” itself submits) and therefore the neutrality of judges is largely an abstract idea because the pre-existing law on which this neutrality is dependent is itself subject to the courts’ judgment, the “political” disputes, such as electoral controversies, acquire a more genuine shape of conflicts. Here, at the same time, the neutrality of courts seems to acquire a more authentic meaning due to the expectation of a more clear-cut body of rules on which the discrepancy between the two parties is founded. Therefore, the function of courts here seems to be a way more native to their intermediary role, and the use of “political” in its conventional meaning of “policy-making” thus seems to be less relevant to this case.

But this is still a largely normative account of the problem, to the virtue of which I do wholeheartedly subscribe myself. In reality, the proper performance of courts in line with their legitimate designation is often compromised by a range of factors resulting in voluntary or involuntary involvement in interest group politics and hence in erosion of the normative legitimacy of the judicial functions. This acknowledgment of the political-partisan nature of courts finds a perfect empirical verification through the examination of the political functions that courts are designed to perform in the formerly Soviet environments where the constitutional-judicial function inevitably has to find a path along the dominating tendency to

²²⁰ Sadurski *supra* note 2, Preface, XV.

²²¹ Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981).

reproduction of the concentrated political power systems. The evidence from the post-Soviet constitutional courts' activities, either recent or more *ancien*, supports this hypothesis. Where the tendency towards the concentration of the executive power proved to be the major predisposition of the political culture and where the reproduction of the concentrated government chose the path of non-constitutional and anti-democratic mechanisms- and this has been true about all of the countries in the region- the politically empowered constitutional judicial review had to adopt one of the below styles, each submitting to a political disposition:

1. explicitly support the existing non-constitutional regimes, eventually serving as a loyal agent of the existing power in place. This has been the dominant paradigm in the majority of countries in the post-Soviet area in most of the times and it possibly represents the most popular image of a constitutional court of a post-Soviet country. I refer to the political nature of such adjudicative style simply because of its affiliation with a concrete political agenda. In relation to the discussed functions of constitutional courts, the explicit support of the political regime by loyal agents-constitutional courts is called to validate the unconstitutional instrumentality of maintaining the incumbents' power by endorsement of bogus elections, authentication of unconstitutional bans on oppositional political parties and associations, supporting the incumbents in impeachment cases, etc.
2. support the existing non-constitutional regimes in a less explicit and ultimately a more strategic way (e.g. Armenia after 1998 and to a large extent the Russian Second Court). The political nature of this style still stems from its servitude to the dominant political program, but it is also distinguished by a rather strategic behavior of courts. In this style, courts behave in accordance with their long-term or short-term political calculations and their sense of expediency, but they keep formally showing due respect to incumbent politicians from the considerations of "institutional survival."²²²
3. resist the non-constitutional actions of the government and hard-push on politicians to keep them in their constitutional orbits. Normatively, this is what one expects the courts to do ideally, but in fact, the evidence submits that the survival of the style is not realistic unless a substantial state of democratic freedoms is reached. In fact, exactly this style of judicial "politics" resulted in the fall of constitutional courts in Russia (1993), Kazakhstan (1995), and Belarus (1996). The evidence is rather speaking of the fact that constitutional courts' activist pursuance of constitutionalism in modern post-Soviet political environments can take place only in situations of political uncertainty (such as electoral uncertainty, electoral revolutions, transitions from one political elite to the other, etc), if one does not count the initial years of democratic experience in this area (that is in early 90-ies) where the

²²² The term "institutional survival" is borrowed from Robert Sharlet, "The Russian Constitutional Court: The First Term," 9 *Post-Soviet Affairs* 1 (1993), at 17.

“romantic” constitutional courts did not yet experience *realpolitik* attacks from the rising super-presidential powers. A striking example currently comes from Kyrgyzstan where the constitutional court lives what is probably the first real momentum of judicial independence and constitutional significance since the emergence of this country in 1991, solely due to the relatively recent democratic “revolution” in the country which keeps the country’s political situation in a shaky transitional state for quite a long time. Meanwhile, although theoretically one could think of this style of constitutional courts’ behavior being capable of keeping a distance from partisan politics, the empirical record of judicial activism in post-Soviet countries submits to rather the contrary. The most paradigmatic cases where the higher courts “dared” to challenge the non-constitutional actions of higher officials (Russia 1993 and Ukraine 2004 and 2007) submit ample evidence of political partisanship on the part of either the court as an institution, or its individual members and fractions.

Each of these three paradigms of judicial behavior will be discussed more in detail further on in this work. For the purposes of this part of the work, the important testimonials to get derived from the cases refer to the predominantly politicized character behind each of these scenarios.

The pattern of politicization of courts in the first two paradigms flows from the failure of constitutional review courts to perform as prescribed by law from the considerations of political attachments. In both cases, political attachment is in one or the other way a product of institutional survival concerns, though the first and the second scenario take different modes of political loyalty. In fact, these two paradigms are the representatives of the same family of judicial inadequacy: failure of due performance in a pursuance of a political agenda.

The distinction between the first two types of performance is reflective of the political regimes in respective countries. The first category of judicial performance is more indicative of the political regimes with a stricter check on unwanted judicial opposition, representing the more concentrated and relatively less tolerant political systems, such as reportedly in the Central Asian Republics (with the exception of Kyrgyzstan after 2005), as well as in Belarus and Azerbaijan.²²³ The second type is more characteristic of political regimes where the concentration of the political power is contested relatively freely and where there is at least a formal respect of the constitutional separation of powers and judicial independence (e.g., in Armenia, Georgia, Moldova, Ukraine; Russia would qualify for this group until its recent setback, and now it is likely to score somewhere in between the two groups).

But this distinction is also largely formal because being dependent on the type of the political regime in place the distinction can alter together with the shifts in the regime type. For example, strategic performance of courts, typical to the second group sometimes even during

²²³ See Erik Herron and Kirk Randazzo, “The Relationship between Independence and Judicial Review in Post-Communist Courts”, *supra* note 8.

the regular tenure of quasi-autocratic regimes, can be demonstrated also by courts in the first group if the political situation changes in respective countries. This was the case in Kyrgyzstan, for example, where the constitutional court could clearly be qualified as an explicit supporter of the political regime (performance falling in the orbits of the first group) before the “Tulips revolution” in 2005, while it showed a considerable degree of defiance to the executive after the regime change (typical to the second group).

The political nature of the third type of judicial performance stems from purely empiric observations. In fact, the type of judicial behavior exactly supposes due performance by courts and it would ideally make them just apolitical, neutral and dependent on the constitutional law rather than on politics. But the politicization of courts in this case is due to the factual bankruptcy of rule of law in these political regimes and the impossibility of keeping the political powers in the constitutional orbits by constitutionally prescribed mechanisms in which case the courts have either to give up their struggle and hence become politically loyal agents of the government, or pursue their struggle in an extra-judicial space, hence necessarily involving in politics *per se*. This hypothesis is confirmed by a number of cases where constitutional courts tried to oppose the concentration of presidential power. The most striking of these examples is Russia’s First Court’s explicitly political behavior in 1991-1993.²²⁴

The partisan-political predisposition of the “marginal” functions of constitutional courts is also confirmed by the empirical observation of their adjudication. The function of deciding upon disputes between governmental branches and agencies, in general terms, has been at the core of likely the most illustrious post-Soviet political battles which involved constitutional courts- the power struggles between the presidents and the parliaments in 1993 in Russia and in 2007 in Ukraine.²²⁵ The two cases are very similar in their political context, for in both cases the controversy represented nothing other than fight between political groups dominating the institution of the president and that of the parliament, and here and there the courts’ function to serve as arbiter were recalled. In the Russian case, the Court’s involvement in politics was rather voluntary and it did not go along with a conventional legal adjudicative process. In the Ukrainian case, the Court’s involvement was recalled on procedural legal grounds, but the Court simply failed to perform as an arbiter, and its failure to perform was in gross violation of the prescribed legal procedure. For the purposes of this section, the two cases validate the “test” by confirming the unavoidably politicized context in which courts have to respond to

²²⁴ See, for example, Robert Sharlet, *supra* note 222, Robert Ahdieh, *supra* note 183; Herman Schwartz, *supra* note 5.

²²⁵ I subscribe to a broader interpretation of “disputes between governmental agencies” as not only purely legal inquiries about the exact scope of the responsibilities of any of the parties but as involving any possible controversies between the authorities which mask a genuine political conflict underneath an apparently legal dispute on the extent of the rights given to either.

jurisdictional disputes and by evidencing two situations of classical political partisanship demonstrated by political courts.

The political nature of the cases on political parties and associations before the constitutional courts stems from the dominant tendency of transforming this institution into an instrument of a partisan struggle for power by means of outlawing political opponents. In 1992 the Russian Constitutional Court was faced to decide on the status of the Communist Party in a political situation where the Court's stance on President Yeltsin's ban of the Communist party was perceived as nothing else than a "determining factor whether Russia would move forward or remain caught up in its past".²²⁶ One should observe that Yeltsin's extraordinary decree banning the Communist Party came up in circumstances of increasing political opposition from pro-communist political alliances, and that the decree was in fact served to disarm what would prove to become Boris Yeltsin's major political challenger for the next 5-6 years. Not surprisingly, the Court's decision took an entire year in a "political atmosphere which made neutral, effective decision-making by the court a mere impossibility".²²⁷ The decision, called "Solomonic"²²⁸ for its remarkable grounding on the political expediency rather than law and for its achievement in avoiding making of a clear-cut decision in what was a plain "zero-sum game",²²⁹ represented the first lucid demonstration of strategic behavior on the part of this Court, "catalyzing its descent into politics of the most partisan kind".²³⁰ The mere titles of the chapters in an article, analyzing the case in details, submit to its political nature: "The CPSU²³¹ Case and the Politics of Law", "Defining the Stakes: Backstage Maneuvering", "Pro and Con: Political Combat in the Legal Arena", "The Trial as Political Theater", "Conclusion: the Verdict as Politics, Law, and History".²³²

Impeachment cases, like jurisdictional disputes and electoral appeals, contain the high probability of power struggles masked by constitutional inquiries; here too, the courts inevitably become a key party in the de-facto distribution of political power. However, impeachment cases, unlike electoral disputes, are relatively rarely found in the post-Soviet constitutional courts' practice since as a political instrument impeachments can reach a court in a situation where there is a considerably powerful support of, for example, an anti-presidential coalition, whilst electoral appeals reach courts with the regularity of the electoral cycles and an appeal can be filed by a single electoral candidate and not necessarily a major political party or coalition.

²²⁶ Ahdieh, supra note 183, at 82.

²²⁷ Id.

²²⁸ Id., at 82.

²²⁹ Sharlet, supra note 222, at 17.

²³⁰ Ahdieh, supra note 183, at 80.

²³¹ Communist Party of the Soviet Union.

²³² Sharlet, supra note 222.

The electoral cases' political significance in the Soviet successor states is paramount due to both the predominant practice of electoral disguise of power reproduction, and the relatively recent emergence in the arena of "electoral revolutions" which substantially "activate" the constitutional review courts, as cases from Ukraine and Kyrgyzstan clearly suggest. The political sensitivity of electoral cases is also aggravated by their common zero-sum nature in which case courts get involved in uncompromised partisan power fights.

One clarification should be made about the entire line of argumentation in this section. Although I subscribe to a style of analysis where courts and judges are portrayed as political and very often as strategic and partisan actors, my position and analysis strives for a comprehensive account of judicial behavior. My account attempts to stay away from the treatment of law and politics as mere "epiphenomena of self-interested individual and group behavior", which is observed to be the dominant method in mainstream political science of behaviorist style, particularly in political jurisprudence.²³³ While a significant portion of truth about the judicial behavior should still be attributed to self-interest and personal considerations of individual judges especially in the subject countries where the share of political motivations in the process of decision-making prevails due to the constrained status of the judiciary and the higher probability of executive attacks on due performing courts, judicial decisions are so far largely conditional upon the organizational structures and formal rules of behavior, which impose their own autonomous constraints on the courts and which shape the very contours of strategic deviations. At the same time, even to the extent that attitudinal models are given space, my analysis avoids concentrating on mere personal self-interest and the utility of individual judges or courts as decisive elements of judicial decision-making.

Paying special attention to the considerations of political expediency and utility of courts and judges as prevailing in the political regimes and contexts under discussion, I do not rule out and, to the extent of their applicability, I do include in the scope of my analysis a variety of other factors as constituents of judicial decision-making, including the institutional constraints, legal techniques and traditions of constitutional and statutory interpretation, bounded rationality and lack of adequate information, altruism, patriotic motivations, political orientations, tastes, ambitions, and normative beliefs and value systems as multiple causes of judicial decisions. The preference of this or that consideration is largely conditional on the reactions of the immediate addressees of judicial decisions, such as the political actors and the democratic constituency, but also on such factors as the personalities and ideological preferences of judges, as well as the timing and the political environment and context in which the decision is to be made.

²³³ Rogers M. Smith, "Political Jurisprudence, the New Institutionalism, and the Future of Public Law", supra note 15.

As it will be observed later, constitutional justices in post-Soviet countries are more likely to stay loyal to the incumbent political regime for as long as the latter is expected to stay in charge of the political power. The likelihood of making decisions on merits increases in situations of political uncertainty and transition. So does the likelihood of exposure of pro-democratic ideological sentiments. The due examination of constitutional courts' behavior, therefore, is very sensitive to both spatial and temporal parameters of the object of the research. While the beginning of 90-ies, for example, can be observed as being marked with widespread dominance of ideological motivations both in designing constitutional courts and in the courts' activities in the majority of countries of this study (I called this "romantic" style), the succeeding years should rather be studied in line with the dominating tendencies of rational design and rational adjudication. In the same token, the transition to a more democratic regime, which may be observed to have started or soon to start in the post-Soviet world, will obviously mark another shift in the basic independent variables of judicial decision-making process. The gravity of emphasis on the dominance of self-interest in judicial behavior, thus, depends on the degree of democratic consolidation in a country (the more democratic the country, the less the portion of rational considerations) hence it is likewise subject to change with the transformations in regime types.

The concern for "spatial and temporal parameters" in this study allows a generalization that constitutional-judicial decision-making in the post-Soviet countries of the time when this work is being written is dominated by the courts' rational calculations of political expediency and their own self-interest (including the considerations of personal and professional security) which is mostly due to the constrained status of the judiciaries in these countries and the threats of attack coming from the concentrated executives. But a variety of other considerations, described above, take place in making judicial decisions. The presence of the latter considerations increases along with trends to democratization on one hand, and along with changes in the dispositions of political powers in particular times (such as in the times of transitions from one political leadership to another), on the other. The type of political regimes remains the basic independent variable for judicial behavior, with judges' and courts' motivations mainly being predetermined by the expected reaction of the political leadership on the decision. The study of the political regime and the political culture in the particular place and in particular time, the regime's nature and the power-structure technologies inherent to it, the dynamics and qualities of changes and transformations- all this is therefore the key to the correct diagnosis of the role that constitutional courts can play in the process of democratic transition.

B. Appraising courts in post-Soviet politics (of democratization)

The recent scholarship on post-Soviet democratization seems to pay little attention to the political significance of constitutional review courts and their role in democratization. In general, post-Soviet constitutional courts, unlike their Central European colleagues, have rarely appeared under scrutiny by English-language scholarship.²³⁴ The research on democratization in the former Soviet Union, most of which is of political science origin, has generally ignored constitutional courts as agents of political change.

Meanwhile, growing attention has been paid to the phenomenon of global expansion of political judicial review or, to put it popularly, judicialization of politics worldwide.²³⁵ To roughly summarize some of the insights from the study of this universal trend, political intervention of judicial review courts represents nothing less than a triumph of constitutionalism, supremacy of higher law, and democratization across the globe.²³⁶

Recent times have witnessed a new generation of democratic inspiration in the world. Ukraine, Burma, Pakistan, Kyrgyzstan, Armenia, a group of countries as far from each other geographically as they are culturally, have undergone some form of democratic development in one way or another. In many cases, courts have been charged with providing a decisive say about the destiny of democratic processes. In Ukraine, the Constitutional Court was involved in deciding whether or not President Yushchenko's decree to dissolve the Parliament was legitimate. In Kyrgyzstan, the Constitutional Court was central in deciding on the status of the constitutional amendments (a very politically-charged issue in the country at the time), and in general, the Court played an increasingly independent role in the political sphere after the demolition of Akayev's rule. In Pakistan, the highest court was charged with deciding on presidential elections and the constitutionality of Musharraf's next term. In Armenia, the Constitutional Court underwent just another review of complaints on presidential elections which reach this Court regularly after all presidential elections in this country.

²³⁴ The Russian Constitutional Court is the only one among its post-Soviet "colleagues" that has been relatively well studied by western students. See, for example, Robert Sharlet, *supra* note 222; Robert Ahdieh, *supra* note 183; Herman Schwartz, *supra* note 5; Lee Epstein, Jack Knight and Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, *supra* note 187. However, the scholarship on the Russian Court was in the most part attracted by the activism of its first sitting bench in 1991-1993 while this enthusiasm considerably declined in the last period when the Court no longer produced political sensations. Studies on the other post-Soviet constitutional courts on the European continent have been rather random, and comprehensive English-language studies of those in Central Asia are practically non-existent.

²³⁵ See Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power* (NYU Press 1995), Carlo Guarnieri, and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (OUP 2002), Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP 2004), Shapiro, Martin and Stone Sweet, Alec, *On Law, Politics, and Judicialization*, Oxford University Press (2002), to name only a few.

²³⁶ See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, *supra* note 196.

Whether or not one is convinced of the democratic pedigree of the global expansion of judicial power, recent evidence submits that democracy and the political empowerment of courts go in parallel. However, while one has to admit that as a rule, it is democracy that brings courts to the arena, and not vice-versa, scrupulous attention should be paid to those rare cases and opportunities in which the reverse is true.

Constitutional courts and democracy

The study of the relationship between constitutional courts and democracy is traditionally dominated by the debate on the “counter-majoritarian difficulty”,²³⁷ which has led the normative discourse on judicial review in the United States. This line of argumentation has been successfully transplanted also into the most influential philosophical account of constitutional courts in the post-communist world.²³⁸

I attempt to proceed from a different perspective. I take as a point of departure the position of Ronald Dworkin where the courts acquire their legitimacy not from the conventional normative constructions, but from their institutional virtue to contribute to the democratic conditions: by what means the democratic conditions are best met is an empirical, rather than a normative question.²³⁹

My concern is the democratization of a group of countries where politically active courts seem to be well positioned to contribute to this process. In political environments where the government is dominated by a small group of corrupt politicians abusing power, this mission of courts acquires a righteous, though a different type of legitimacy. In this sense, I agree with Kim Lane Scheppele in that courts in post-communist countries can assume the role of democratic citizenries’ advocates against governments which break their promises to the public: in a real, as opposed to an “idealized” or “pure” political context, the courts appear to be better for democracy than the other, “democratic”, powers.²⁴⁰ Constitutional courts in these countries are respected by the public more than any of the other branches; constitutional courts, as far as they can, push the governments to stay within the limits imposed by constitutions; constitutional courts, through individual complaints, enable citizens to access policy issues while no such access, as a rule, is available through elected politicians- as a result, constitutional courts are more responsive to the public than the political branches.

²³⁷ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill 1962).

²³⁸ See, e.g., Wojciech Sadurski, *supra note 2*.

²³⁹ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution*, *supra note 18*, p. 34.

²⁴⁰ Kim Lane Scheppele, *Constitutional Negotiations: Political Context of Judicial Activism in Post-Soviet Europe*, *supra note 5*, 233-234 (2003).

Constitutional courts, therefore, are good for democratic governance. But more than that- as I want to argue here- constitutional courts in post-Soviet settings are not only good for democracy, but are also remarkably good for democratization, something that is the biggest of challenges in the countries of the former Soviet Union. My arguments follow.

Conceptualizing democratic contributions by constitutional courts

Instead of normative inquiries, I propose a framework of analysis where the issue of courts' aptitude for democratic contribution is reviewed in the light of their institutional and ideological settings, as well as their predispositions in interest group politics. My hypothesis is that constitutional and other higher courts deciding politically sensitive issues in post-Soviet countries are pro-democratic agents, though this statement shall avoid clear-cut readings and shall be tried against the background of the enormous pressure to which these courts are subject from the side of super-executives. Normally, courts are weak and too constrained to be able to significantly impact the process of democratization. However, they become strong pro-democratic actors in times of political transitions and uncertainty, when they are likely to ally with pro-democratic parties.

My use of "democracy" in this work has a largely generic association, referring to the basic system of social and political organization distinguishing the western societies. This generalization seems to be justified from the perspectives of the common post-Soviet discourse where the emblematic term "democracy" is associated with political regimes based on free and equal access to political participation, respect for human rights, and adherence to rule of law in general. Being democratic or pro-democratic, in this perspective, denotes manifestation of any reasonable departure from and opposition to the anachronistic Soviet or post-Soviet style of government towards a political organization based on the principles mentioned.

To examine the constitutional courts' political orientation, I start by testing the arguments which support the courts pro-democratic predispositions. Furthermore, I proceed by looking at the causes and nuances of their constrained status and the anthropology of their apparent attachment to the existing non-democratic regimes in the formerly Soviet area. Finally, I extract my conclusions about the political status of these courts from the comprehensive analysis of the tradeoffs between the different predispositions, to a large extent relying on the examination of courts' strategic behavior in the *realpolitik* of the tough post-Soviet power-structures.

Democratic courts: institutional perspective

To begin with, the simple fact that the behavior of judges is impacted by a variety of factors other than law should be observed. It is very important, however, that the point is not overstated.

In a study on the post-communist courts of Central and Eastern Europe, Herman Schwartz wrote:

Admittedly, the notion that a judge is above the ordinary passions of the day and acts according to some abstract notion of the law is something of a myth. Judges read newspapers and watch television. But nations live by myth, and the myth of judicial objectivity actually has more truth to it than cynical conventional wisdom would have it.²⁴¹

The conventional wisdom about the post-Soviet higher courts may well be that they are hardly independent at all and that all their conceptual *raison d'être* is merely to endorse the power deals of incumbent or prospective political elites. It would be hard to disagree with this. Moreover, this reasonable generalization is offered as the key point of departure when analyzing the courts in post-Soviet politics. The memo for not overstating this point was made for taking the account of all the situations when objectivity and the “abstract notion of law” appear, as it should be normal, the principal driving force underneath judicial decisions.

Observance of the law and professional responsibilities, ethics, morality, and civic commitment predispose one but not the most common of these situations. This is not to say that judges in these countries are less decent, patriotic or freedom-loving than elsewhere. It is just that they are more constrained and that the price for the defiance is not the same as what the judges in more mature democracies would pay. For the purposes of a realistic and eligible conceptualization, morality and civic responsibilities of post-Soviet judges should often be looked for in the hidden messages and manifestations behind the official judgments endorsing political incumbents. Objectivity in interpreting laws concerning distribution of political power in post-Soviet countries is not what can be exposed publicly in our days- a lesson that constitutional judges have learnt well since they or their colleagues were attacked by politicians in the early years of the democratic transition. Morality, professional ethics and patriotism are rather things that have to be carefully disguised, if they run contrary to the standard of loyalty to the incumbent or forthcoming executives. One of the most illustrative manifestations of this paradigm is the fairly popular practice where the courts somewhat implicitly disapprove of the violation and abuse of constitutional law by the incumbents in the non-binding part of their judgments, while silently endorsing the abuses in the binding part. This has been, for example, the preferred style of the Armenian Constitutional Court which has repeatedly conveyed its

²⁴¹ Schwartz, *supra* note 5, at p. 238.

approvals of corrupt and rigged elections with deliberately ambiguous non-binding statements of clearly pro-democratic nature.²⁴²

Courts re-visit their primary institutional responsibilities also when the political constraints suddenly unchain them in certain political situations. This may happen, for example, in transitional periods of political regime change and in times of electoral uncertainty. Uncertainty gives courts a certain independence and enables greater self-expression. Also in these situations, objectivity takes precedence due to rational choice because courts choose legitimacy as a safeguard in a case where there is a difficulty in calculating the likely winner. The behavior of courts in such circumstances is analyzed in length in the following sections.

Adherence to the “notion of law”, provided a “state of normalness” was arrived at, would predetermine constitutional courts’ liberal and pro-democratic position. Post-Soviet constitutions, almost without exception, formally provide for a wide range of fundamental liberties and rights and the principles of democratic governance. From the legal point of view, this is slightly aggravated by the culture of positivist legalism that dominates in the judicial mentality in the formerly Soviet civil law countries.

Kasyanov v. Central Electoral Commission,²⁴³ a politically-charged case before the Russian Supreme Court at the beginning of 2008, can be an example. This fundamentally constitutional case of barring the key opposition candidate for the presidential elections in Russia ended up in a review of the compliance of the formal process of nomination of the candidate with the scrupulously detailed procedure provided by the law on presidential elections and by supplementary standards imposed by the Central Electoral Commission (CEC). In particular, the CEC refused to register the key opposition contender and former Prime Minister Mikhail Kasyanov as a candidate in presidential elections in Russia in 2008. In its decision, the CEC referred to irregularities in the procedure of the collection of pre-electoral signatures, which are required by the Russian legislation from a candidate for being promoted as a nominee, as grounds for voiding Kasyanov’s registration. The Law of Russia on the Elections of the President provides, in the best Soviet traditions, for detailed procedures for nomination and registration of the candidates, including highly technical description of each of the required procedures to be completed and “spravkas”²⁴⁴ to be supplied. The CEC’s arguments for disqualifying the potential presidential candidate because of some technical irregularities with the signatures sounded unjustifiably formalist. For example, one of the reasons for invalidating the signature-votes collected for the candidate was that the signatories failed to provide their

²⁴² See the discussion on Armenia below.

²⁴³ See the decisions of the Supreme Court of the Russian Federation of 15 February 2008.

²⁴⁴ The infamous Russian word for various requirements in a written form, such as confirmations, validations, approvals for completing administrative procedures, widely associated with the highly bureaucratic system of administration.

full address by not indicating the federal unit where they were registered, as required by a standard signature collection form stipulated by the CEC. It is worth mentioning that it was nevertheless admitted that the required number of signatures in favor of the candidate had in fact been supplied and that the signatories had personally signed; the violation was considered to be in the technical deviations in the process of signature collection.

The decision of the CEC was reviewed twice by the Supreme Court of Russia, as the Russian Constitution does not provide for review of electoral disputes by the Constitutional Court. On both occasions, the Supreme Court (once in its plenary seating and then as the Supreme Cassation instance) declined Kasyanov's appeal and confirmed CEC's decision.²⁴⁵ Mikhail Kasyanov was the only liberal contender for presidency and President Putin's staunchest critic. The CEC's rejection of his registration was widely believed to be the Kremlin's way for "legally" barring him from the campaign.

All this said, the positivist legalism of this type is more an instrument of political partisanship rather than a true manifestation of the legal technique, especially when higher courts are concerned. In the case of Kasyanov, legalism was most probably exploited in order to produce a politically expedient decision.

Democratic courts: political orientation and ideological leanings

By virtue of the large public expectation from this newly created institution, post-communist constitutional courts obtained the most educated and professionally respected specialists or politicians in each nation at the time of emergence of this institution. In most of the cases, this took place during the first half of the 90-ies, a time that marked ideologically the most romantic period of post-communist democratic momentum. Most of the constitutional judges in a typical post-communist country are law professors and scholars of the democratic stream.

The way these courts perceived their roles and the nature of their activism during the early 90-ies is also be evidence of the democratic orientation of their members. Just as in Eastern Europe, in many countries of the post-Soviet region the entrance of the constitutional courts onto the scene was also marked by an earnest democratic activism. The anti-presidential activism of the first Russian Court has become legendary.²⁴⁶ The Constitutional Court of Belarus set up in 1994, had by 1996 ruled almost twenty acts of the dictatorial President to be

²⁴⁵ Such formalism may be said to be in the best traditions of the Russian Supreme Court. On 4 December 2003, for example, the Court upheld the decisions of an electoral commission and a lower court rejecting registration as candidate to the State Duma (Parliament) of Yuriy Skuratov, the former Prosecutor General of the country, on the grounds of submission of "inaccurate personal information". In particular, the Court accepted the reasoning of the electoral commission that the candidate has failed to provide proper information about his employment by not mentioning the fact that he had a second job of a professor at a university in Moscow. See Skuratov v Russia, 21396/04, ECHR, 2007.

²⁴⁶ See Ahdieh, Sharlet, Schwartz, Epstein et al, supra notes 183, 222, 5, and 187 respectively.

unconstitutional.²⁴⁷ In Kazakhstan, the Constitutional Court was involved in a serious political controversy by opposing the autocrat President and the Parliament in 1994.²⁴⁸ Although discontented politicians have in several cases “punished” the daring judges by either dismissing, or rotating them (rotation took place with the famous Solyom Court in Hungary),²⁴⁹ in many countries the democratic romantics are still on the constitutional courts’ benches. As an example, as of the end of 2007, 11 members of the 19-member Constitutional Court in Russia were appointed before 1996 and the majority of them were members of the “legendary” First Court.

The liberal orientation of constitutional courts is further confirmed by the fact that many of them, who are famous for their deference to the incumbent executives in sensitive cases, are perfectly objective and liberal in all those cases which do not interfere into the sphere of vital political interests, namely the majority of human rights cases. Not a surprise then, the Second Constitutional Courts in Russia, which is known as the “the fifth wheel of the carriage of Russian autocracy,”²⁵⁰ is fairly activist and assertive in its human rights cases.

Very often, politically motivated constitutional court members are full of ambitions for personal political career. Constitutional judges are not career judges in the European sense. They are not selected from the pool of judicial candidates based on the results of routine juridical tests. As a rule, they are appointed to office by political bodies. Very often the selection is divided between presidents and parliaments, and only in a few cases do other bodies take part in the selection process. Appointment by parliaments is always associated with political parties’ interests and thus the process is subject to interest groups’ influence. Not in all countries do constitutional judges have to be lawyers.²⁵¹

A number of judges in the constitutional courts of these countries have a previous record of either political activism, career or ambitions in politics. The example of the first Chairman of the Constitutional Court in Russia, Valery Zorkin, now re-appointed as Chief Judge by Putin, is the most remarkable illustration of this. Consider, for example, such illuminating evidence as numerous cases of Zorkin’s public appearance on television during the First Court, when he, on behalf of the Court, often spoke with political assessments. In 1993, Zorkin personally involved in the political controversy between the President and the Parliament in an unusual capacity of a political mediator.²⁵² Last but not least: after his resignation, in 1996 Zorkin ran for the post

²⁴⁷ Sadurski, *supra* note 2, at 4.

²⁴⁸ Herman Schwartz, *Legitimizing the Power of One*, Transitions, December 13 (1996).

²⁴⁹ Scheppele, *supra* note 5, 227.

²⁵⁰ Schwartz, *supra* note 5, 162.

²⁵¹ This is the case in Armenia where the law specifies a requirement for higher education and an experience in the legal field, but not legal education or degree *per se* (see the Law on the Constitutional Court of the Republic of Armenia, Art. 3 (1)).

²⁵² Schwartz, *supra* note 5, 133.

of the President of the Russian Federation.²⁵³ Armenia's Constitutional Court Chairman was Vice-President and Prime-Minister before he became the Chief Judge. The current Chairman of the Georgian Court previously held ministerial positions while his predecessor held the positions of Justice Minister, Secretary to the President and member of the National Security Council. In both Armenia and Georgia, the names of these judges have been constantly mentioned as probable candidates for higher political roles.

Judicial activism, democratic pathos, and the promise of public appraisal are perfect opportunities for ambitious judges, but these may also become temptations for those who were not considering political career. As this analysis will show, judicial activism in particular political circumstances contains a high probability of gaining strong public support and legitimacy for the judges since by virtue of institutional design the courts often become the final instance for conflict resolution in political confrontations, which habitually involve a bold-line division between incumbent political elites striving at reproduction of their power by means of abuse of public resources and pro-democratic parties.

Democratic courts: legitimacy and public reputation

Courts may often resort to pro-democratic decisions from considerations of legitimacy and public support.

Scheppele shows how enormously the popularity of constitutional courts has grown in all countries where they have acted independently.²⁵⁴ The public support of constitutional courts was first of all predetermined by the designation of these institutions which were created to promote constitutional provisions of power-sharing and democratic governance, as well as basic freedoms and rights. Where the courts proved to be activist in implementing these functions, their public support has indeed been enormous like in Hungary.²⁵⁵ But even in those countries where the courts have not been capable of assuming the role of constitutional check on the government and have rather become devoted "agents" of the government, constitutional courts are still more popular than either the executive or legislative bodies, or even regular, general courts. First, these courts do not share the other bodies' deserved reputation of totally corrupt institutions since they do not have functions related to allocation and distribution of resources. Second, as Scheppele emphasizes, the constitutional courts' public reputation enhances due to their right-protective activity, especially in those countries which enable individual complaints, and in general, due to their being democratically more responsive than

²⁵³ Id., 143.

²⁵⁴ Scheppele, supra note 5, 222.

²⁵⁵ Id.

the elected officials.²⁵⁶ Finally, pro-democratic decisions or, indeed, any decisions which contest the running government produce public support in any case and for any institution that challenges the highly discredited politicians and the government.

Legitimacy and public support, on their own, are not sufficient assets for the courts during the regular tenure of super-strong politician-executives as discontented leaders are likely to attack them at the first sign of the courts' dissent. In normal circumstances, legitimacy is the first thing to be sacrificed when important political considerations or the judges' security is at stake. This changes when there emerges an approximate political balance between the ongoing government and an aspirant political alliance. In such cases, legitimacy transforms to a strategic factor. It is an important aspect to be considered by constitutional courts' members-rational actors who are in trouble identifying the winners, when estimating their utility after the elections. Meanwhile, the factor of public appraisal becomes a central pressure on the courts in times of political crisis. It is widely believed that the public pressure was one of the main factors pushing the Ukrainian Supreme Court to decide for the pro-democratic candidate in the 2004 presidential elections.²⁵⁷ It is also very likely that the fear of public pressure on the Constitutional Court led the Armenian President to use force to stop the ongoing demonstrations by the opposition only a few days before the Court hearings after the presidential elections in 2008.

Reaching a pro-democratic decision is not a challenge from the purely legal perspective. Post-communist constitutions formally meet the democratic standards, and it is technically possible to make decisions pleasing the pro-democratic parties either by a positivist interpretation, if the case is on merits, or by an activist interpretation of the constitution. If there is an apparent technical difficulty for deciding for the democrats from the point of view of the letter of law, the courts can apply the general democratic principles set in the foundations of the constitutions, in the manner of the Constitutional Court of Armenia, which proposed a "referendum of confidence" as a way of overcoming the hostility within the society that has been caused by controversial elections. The Constitutional Court made its submission in an activist way, which distinctively deviated from the conventional Soviet-type positivism of fellow courts, by directly applying the preamble to the Constitution and its nonspecific call for democratic governance and civic harmony.²⁵⁸ Last but not least, in the current political environments in the formerly Soviet countries, the likelihood of arriving at a decision on merits which please democratic parties is very high since these are the ruling political groups and leaders mostly who use circumventing electoral technologies and anti-constitutional and anti-

²⁵⁶ Id, 221.

²⁵⁷ See Mark MacKinon, *The New Cold War: Revolutions, Rigged Elections, and Pipeline Politics in the Former Soviet Union 204*, (New York: Carroll & Graf Publishers 2007).

²⁵⁸ This case (Armenia 2003) is discussed later in this chapter.

democratic methods while their more democrat opponents hardly have the resources, if not the willingness, to resort to abusive technologies.

Constrained courts: political pressure

Courts naturally tend to be independent. Their independence, however, is threatened by existing anti-democratic regimes in post-Soviet countries because the political credo and the utility of presidents lie in their monopoly over government, while by the virtue of their institutional design post-Soviet constitutional courts are empowered with the duty of checking and balancing the other branches.

The executives' attack on constitutional courts in the first half of the 90's has left little optimism for independent judicial review. The Constitutional Court in Russia was suspended by Yeltzin in 1993 after getting involved in the controversy between the assertive President and the retro-minded Parliament.²⁵⁹ The Constitutional Court in Kazakhstan, which "dared" to repeatedly decide against the will of the incumbent, was taken out of the Constitution by President Nazarbayev in 1995.²⁶⁰ The substitute institution, which is formally on the scene until our days, is a much weaker body called Constitutional Council. In Belarus, Lukashenka forced the resignation of justices starting in 1996, by when the Constitutional Court had actively involved in striking down anti-democratic legislation by the President.²⁶¹ The new judges have kept loyal to the "Bat'ka."²⁶²

Being involved into electoral disputes and political games by the virtue of constitutional imposition of arbiters' functions in electoral and other political matters (this was the designers' irony), constitutional justices in post-Soviet countries have to release decisions coping with the interests of dominant political litigants who possess powerful instruments for influencing constitutional courts. These instruments range from banal trade off with courts' and judges' logistics and remuneration,²⁶³ removal of judges from office and misuse of law for their persecution,²⁶⁴ and to threats to personal and physical wellbeing, as well as physical abuse per se.²⁶⁵ After all, if the political culture allows poisoning of the key presidential candidate on the

²⁵⁹ For the details, see Ahdieh, Schwartz, and Sharlet, *supra* notes 183, 5, and 222 respectively.

²⁶⁰ Schwartz, *supra* note 248.

²⁶¹ Schwartz, *supra* note 5, 226.

²⁶² The "official" nickname of President Lukashenka, meaning "good father".

²⁶³ Cutting off telephone lines, withdrawal of security guards and deprivation of other privileges of the Russian Constitutional Court in 1991-1993 is an example.

²⁶⁴ For example, judge Mykola Zamkovenko was removed from office and sentenced to suspended two years of prison after releasing an oppositional leader in Ukraine in 2001 (see Andrew Wilson, *Ukraine's Orange Revolution* (Yale University Press 2005) at 146.

²⁶⁵ Intimidation and even personal attack have been recorded in Russia in 1991-1993 (see, for example, Schwartz, *supra* note 5, at pp. 119-120) but this is hardly the only case since most of the cases are not likely to get recorded. Threats have also been reported by Ukrainian judges in 2007 (see < <http://en.rian.ru/analysis/20070412/63540240.html> >). The pressure on judges of the Constitutional Court in Ukraine

eve of elections with the investigations of the incident suspecting involvement of secret services and foreign intelligence,²⁶⁶ how can constitutional judges be sure of their own security when the future of political power depends on their decision?

The behavior of the Second Russian Court is typical to the courts' performance in such circumstances. As Epstein, Knight and Shvetsova demonstrate, this Court prefers to avoid deciding on cases which clearly involve them in controversies between political actors, namely in the separation of powers dimension, while it is more active in the other areas, such as human rights, which appear to be safer for the Court to interfere.²⁶⁷ Similar observations have been made about the Ukrainian Constitutional Court too. It appears, in particular, that the Court had refrained from adjudicating matters affecting major political disputes; this was its "survival strategy" in the uneasy controversy between the political actors. In most of the cases, the Court had abstained in breach of its duty to decide. Clearly, avoidance of deciding on politically sensitive cases is often the only way for the courts to shield themselves from attacks by the politicians. This paradigm was certainly still the case in 2007 when the Ukrainian Constitutional Court failed to produce a decision when requested to review the constitutionality of the President's decree dissolving the Parliament; several judges reported pressure, the chief justice resigned and several others were dismissed, but in the end no decision was made.

It is noteworthy that unlike the first Russian Constitutional Court, whose political activism is legendary, the second Court has not decided a single case which would seriously upset the Russian President. A survey of the Second Court's case law would prove inconsistency in its ideological reasoning: while in the human rights dimension, which is as mentioned mostly "safe", the Court enthusiastically protects the fundamental standards, proving the judges' inherent democratic orientation, the "political" cases, in which the incumbent political leadership had important stakes, demonstrate the Court's total loyalty to the politicians, very often at the expense of consistency with its own previous or analogous doctrines.

In 2005, for example, the Constitutional Court was faced with deciding on perhaps one of the most controversial decisions of Putin's administration: elimination of the elections of regional governors. Putin's project was challenged before the Constitutional Court by an individual petitioner, and in December 2005 the Court decided²⁶⁸ for the President, holding the new rules to be in conformity with the Constitution, even though in 1996 the same Court had upheld the principle of regional elections.²⁶⁹ President Putin's pursuit of banning regional democratic

was recognized by the Parliamentary Assembly of the Council of Europe (PACE) in its Resolution 1549- available at <<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/ERES1549.htm> >.

²⁶⁶ This was the case with now President Yushchenko of Ukraine in 2004, see Wilson *supra* note 264, 96.

²⁶⁷ Epstein et al, *supra* note 187.

²⁶⁸ See the decision N 13-II of the Constitutional Court of the Russian Federation of 21 December 2005.

²⁶⁹ See the decision N 2-II of the Constitutional Court of the Russian Federation of 18 January 1996.

elections was intended to strengthen the federal state (through “verticalization of state power”²⁷⁰) in Russia’s fight against terrorism after the Chechen attack on Beslan in 2004.²⁷¹

To the surprise and disappointment of many fans of the Constitutional Court, as well as the legendary activist chief justice Valery Zorkin, the Court upheld the President’s awkward reasoning. It would be hard to find consistency in the Court’s reasoning. The reality rather reflects the typical pattern in Russian-type post-Soviet countries where the courts are subservient to their political masters. Meanwhile, Epstein et al attribute such performance of the Court to its rational behavior aimed at creating a “reservoir of public support” and “ensuring the court’s legitimacy in the long run.”²⁷² It is obvious that the rational calculations of the Russian judges of 2005, unlike in 1993, prevailed over their ideological orientations. This is a typical behavior of constrained courts where the judges are, in fact, confronted to guarantee the courts’ institutional survival,²⁷³ as well as their own personal security. Times have not significantly changed since 1993, and it is evident that a President who decides overnight to eliminate the election of governors in a federal state would not think twice before eliminating the constitutional court.

Courts in partisan politics

Courts are political actors whether we like it or not. According to Robert Dahl, courts are the agents of the dominant political alliance and an “essential part of the political leadership.”²⁷⁴ Judges are the agents of the government in Shapiro’s “political jurisprudence.”²⁷⁵ Judges are not the politicians’ agents, they are “above politics”, as Landes and Posner put it in another influential essay.²⁷⁶ Courts advocate the will of political powers in place, Shapiro says. Courts are not the allies of the current political powers; rather, Landes and Posner argue, they enforce the “contracts” between the rule-enacting political alliances and their main partners, the interest groups. In all interpretations, however, courts appear as rational strategic actors.

Courts are somewhat different strategic actors in post-Soviet countries than they are in developed market democracies. While the logic of Dahl and Shapiro reflects a political reality

²⁷⁰ See Duckjoon Chang, “Federalism at Bay: Putin’s Political Reforms and Federal-Regional Relations in Russia”, available at <http://src-h.slav.hokudai.ac.jp/pdf_seminar/20050516/ChangDukJoon.pdf>.

²⁷¹ See Pain, Emil, “The Chechen War as the Prelude and Model for Federal Reforms in Russia”, in *The Dynamics of Russian Politics: Putin’s reform of Federal-Regional Relations*, edited by Peter Reddaway and Robert Ortung, Rowman & Littlefield Publishers (2005); Stephen Wegren & Andrew Konitzer, “Prospects for Managed Democracy in Russia”, 59 *Europe-Asia Studies* 1025, 1027 (2007).

²⁷² Epstein et al, *supra* note 187, 154.

²⁷³ *Supra* note 222.

²⁷⁴ Robert Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 *Journal of Public Law* 279, at 293 (1957).

²⁷⁵ Shapiro, Martin, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York: Free Press of Glencoe 1964).

²⁷⁶ William Landes and Richard Posner, *supra* note 196.

in an established competitive democratic polity, and the logic of Landes and Posner of a competitive market polity, the post-Soviet political environment is neither of these. Courts in these formerly authoritarian countries are not even the agents of government; they are their servants.

In ordinary circumstances in the region, courts' political pragmatism prevails over all the other considerations. Surveys of the case-law may confirm that political expediency does not leave too much space for ideological or contractual alignment and partisanship if the latter goes against the incumbent or imminent political power. Judges of the Supreme Court in Ukraine, for instance, were generally expected to decide for the pro-governmental candidate in 2004, because they were the political appointees and the protégées of the running President and in general they were largely believed to have a stake in the reproduction of the political power.²⁷⁷ At the end of the day, however, under a pressure from the public and timely estimating the shifts in political balance, they "breached the contract" by endorsing the oppositional candidate. In another review of presidential elections, the Constitutional Court of Armenia, which was largely expected to ally with the oppositional candidate for presidency in 2008, decided for the "candidate of the power" as the political expediency almost indubitably recommended to side with the latter.²⁷⁸

Courts as rational actors

Given so many factors predetermining judicial behavior, higher courts' decision in a particular politically sensitive case is a product of a trade-off, strategic deliberation and maneuver allowing the judges to find the best compromise between the conflicting reasons.

An important caveat should be kept in mind. Being powerless by themselves to impact the course of national public policy and thus "inevitably part of dominant national alliance,"²⁷⁹ as rational actors courts constantly seek a partnership with the most promising political power in place. Learning the lessons from their unpromising alliance with the losing party in 1993, constitutional judges in Russia are likely to remain loyal to the executive which seems to be unbeatable in the foreseeable future. Constitutional Courts acquire their momentum in the times of political uncertainty. Modern Russia, hence, is no longer a good case-study for our purposes. More promising are the other countries where the dominance of super-strong presidents in a long run seems not to be so obvious: Ukraine, Georgia, Kyrgyzstan, and eventually Armenia.

²⁷⁷ MacKinnon supra note 257, 203.

²⁷⁸ Most of the sitting judges were appointed to the Court by at the time President Ter-Petrosyan, who was running as a candidate from the opposition in 2008. It is believed also that the Chairman of the Court kept very close relations with Ter-Petrosyan since he served as Vice-President for him and was the key member of Ter-Petrosyan's team at the beginning of 90-ies.

²⁷⁹ Dahl, supra note 274, p. 293.

Higher courts' rational calculations unveil during times of political transition and crisis. If in a situation of political uncertainty a court has to decide on a case involving the interests of equally likely winners in future elections, the courts' decision in most of the cases, such as disputes on the results of presidential elections, has to favor one of the players over the other, making them a party to a zero-sum game. This is the irony, the danger and the virtue of an institutional design that gives the constitutional courts a last say in political confrontations. From a purely game-theoretic perspective, where no other factors are considered except the clear rational analysis of the players, taking the side of either of the players promises about 50% likelihood of pleasing the future winner. Given that we consider the attitude of the courts in case of political uncertainty when one of the players is a pro-democratic, or a relatively pro-democratic, or a more pro-democratic party than the other, the rational actor-judges will choose to decide for the more pro-democratic candidate: the pro-democratic decision will promise legitimacy and public support as a last-harbor excuse and defense if the non-democrats win whereas no excuses at all would be there if a non-democratic decision was made and the democrats eventually won.

The rationalist perspective may seem to undermine the statement about the democratic potential of courts. I argue to the contrary. Constitutional courts are pro-democratic exactly because they are rational actors. The courts do not like to be servants, but if have to be, they want to choose their masters. The rational long-term interest of judges is in the soonest possible departure of undemocratic government and in the advent of a friendlier one for their independence. This long-term interest of the judges represents their rational choice which is hidden deep while executives are strong and stable, and this is why I call them "Trojan horses of democracy."

*Political uncertainty*²⁸⁰

The settings for our analysis are mainly underlined: post-Soviet constitutional courts, like all courts, are rational strategic players; alone, they are constrained and weak institutions which seek an alliance with the major political power in place. Dahl's insightful essay provides in part:

Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominant

²⁸⁰ For the sake of avoiding confusion caused by the possible divergence in interpretation of this term, here and afterwards in this work "political uncertainty" shall mean an uncertainty within the society and the political groups about the outcomes of elections or other power-generating processes which determine the political leadership of the country for the nearest future.

alliance, the Court of course supports the major policies of the alliance. By itself, the Court is almost powerless to affect the course of national policy.²⁸¹

Although “short-lived”, the transitional periods however need to be paid attention. Political uncertainty, as a rule, minimizes the dependence of the courts and better exposes the real orientations of the judges. Still, there is a big portion of rational analysis about future winners which may be found in constitutional courts’ decisions at the time of uncertainty. The relative uncertainty puts the courts against a dilemma as they experience hesitation about the winner. The complete uncertainty (e.g. at the peak of the 2004 post-electoral crisis in Kiev) leaves even less chance for accurate forecasts at all and grants unlimited independence to courts.

It is nonetheless important to distinguish between political uncertainty in a one-off zero-sum setting, which can be found in most of the post-Soviet in-house political confrontations, and stable political uncertainty, which is rather exceptional and in a classical form has been so far observed only in Ukraine after 2006. In a one-off zero-sum setting the game is about gaining a single political competition- normally presidential election- where the winner takes all of the power. In this scenario, the uncertainty about the winner in the political competition exists only by the time when the official power game (election) is over, as afterwards the winner seizes the entire political authority and leaves little chances for the opposition to keep contesting its dominance. In contrast, one can observe a stable political uncertainty in regimes where the race for the political power is rather ongoing and is not entirely dependent on a single political contest (election), as the balance between the competing camps is relatively equal and neither of the parties is strong enough to attain a decisive gain which would considerably weaken or destroy the other.

While the hypotheses of this analysis with respect to the patterns of judicial behavior are generally related to the common cases of political uncertainty of the zero-sum nature, stable uncertainty produces a completely different political situation, which deviates from the paradigm of “short-lived transitional periods” mentioned by Dahl.²⁸² Judges’ behavior in stable uncertainties may no longer be subject to the conventional patterns. This paradigm is well-illustrated by the comparison between the two Ukrainian cases which will be discussed later in this chapter.

Let us project a typical case to appear in a constitutional court at a time of political uncertainty. The dispute on the results of presidential election is the most common and most illustrative of possible cases, hence we can conceptualize based on its paradigm. The situation of stable non-transitional uncertainty can be ignored for the purposes of conceptualization because it is

²⁸¹ Id.

²⁸² Id.

exceptional in post-Soviet countries, as well as because of its relatively contingent nature which makes its patterns hard to conceptualize in essence.

When there is a complete uncertainty, such as the Ukrainian case in 2004, the court becomes nearly the most crucial player of the time because given the absolute balance between the two conflicting parties, the court decides the winner. If this is the case, then there is an overwhelming likelihood that the court will decide for the more democratic litigant as the courts have the incentives to support the more democratic party. First, the more democratic power will, as mentioned before, allow more independence for the court. Second, the court and its members nurse ambitions to become a public champion. Third, the pro-democratic decision will raise the legitimacy of the court and will give judges a necessary minimum of guarantees in the worst scenario. All these have been discussed above. Ultimately, there are no factors in support of the non-democratic candidate, unless the latter is more preferable for particular strategic considerations, but this would probably be relevant to the situation of relative, rather than complete uncertainty. The Ukrainian case of 2004 supports the hypothesis of this part in relation to complete political uncertainty.

The prevailing rationale of judges in a situation of relative uncertainty, when the courts' position is unlikely to decide the winner, is to support the most probable future winner. Relative uncertainty, which is more likely compared to complete uncertainty, is a more complex situation to analyze. If the more democratic candidate seems to be stronger, the preferences of the judges will, for all the reasons given above, certainly be on the democrats' side. The relative (about 60-40%) lead of the less democrat candidate is likely to place the court in a situation of a serious dilemma. As political expediency prevails, ideological sentiments running contrary to the political expediency are likely to take place only at the extent at which the judges' predictions demonstrate survival of the existing uncertainty after the elections.

One question arises though: why would courts prefer to decide against the interests of the more likely winner if their unequivocal partnering with the potential winner could even more strengthen the latter? It is highly probable that courts behave in such a way to demonstrate a more diplomatic attitude and not disappoint the political opposition, which can likely keep chances for a takeover if it was strong enough to challenge a semi-autocrat in a semi-autocratic political system. Meanwhile, the democratic takeover is increasingly the tendency in this region, illustrated by a good portion of evidence in Georgia, Ukraine, and Kyrgyzstan, and this cannot be neglected by experienced politicians such as constitutional judges.

Testing the hypotheses: post-Soviet courts in politics

In this section, I intend to use the framework set earlier in this chapter for analyzing the performance of courts in cases involving considerable political controversy and a genuine clash for power. The selected case-study comes from Armenia, Ukraine, and Kyrgyzstan. This choice is not arbitrary.

First, it is in these countries particularly that higher courts were involved in political power games, and the study of their performance can contribute to the conceptualization of judicial behavior undertaken in this work. It has been already pointed out that electoral and other political controversies do not always involve courts. In Georgia, for example, the political situation has been very tense since 2003 (when the Georgians throw the incumbents away during their “Revolution of Roses”), for some reason, no major controversy between the parties of the power and the opposition has resulted in judicial review. Yet, the Georgian Constitution allows review of constitutionality of elections in the Constitutional Court.²⁸³

Second, the selection is done from the countries which offered cases where the behavior of constitutional or higher courts deviated, in one way or another, from the “standard of loyalty” to the incumbents. Not accidentally, these cases come from countries which allow more political pluralism and which have an overall better score in democracy. From this perspective, the case-study does not include Russia or the Central Asian states except for Kyrgyzstan, which underwent serious regime-change after its own “revolution” in 2005.

Finally, the selection has been from the relatively recent cases, as these may better illustrate the contemporary tendencies in the performance of higher courts, especially those related to electoral and other political turmoil. Hence, the selection deliberately abstains from including cases from the “romantic democracy” epoch of the early 1990’s. This epoch was characterized by a substantially different motivational structure of judicial behavior and marked rather an era of idealistic judicial activism. The case selection starts from 1996, by when the most brutal attacks on constitutional courts took place. Since then, the status of constitutional courts has completely changed and has started taking the modern shape of subservience to the executives.

Armenia. The saga of three presidential elections

1998. The first test for democracy

Since its creation in 1996 until 2005, the Constitutional Court of Armenia was institutionally the weakest court among its “colleagues” in the region. Adopted as late as in 1995, the Armenian Constitution allowed access to the Constitutional Court only to a select group of state

²⁸³ See Art. 89 (d) of the Georgian Constitution.

officials for matters of abstract review only.²⁸⁴ The general public, as well as political parties which could rely on the support of less than the 1/3 of the Parliament, were denied access. This evidence proves Tom Ginsburg's logic, in line with Mark Ramseyer,²⁸⁵ that constitution-drafter politicians prefer judicial independence when they believe that they will lose future elections, whereas politician-designers prefer dependent courts that can be manipulated to achieve policy outcomes if they are confident in their success.²⁸⁶ However, according to the "standard" for the majority of constitutional courts in post-communist Europe, the Armenian Court was empowered with functions of a largely political nature, such as decisions on disputes resulting from presidential and parliamentary elections, on impeachments and on the constitutionality of political parties.

The case of presidential election of 1996²⁸⁷ was the first major challenge before the Court. The elections saw a close competition between two principal contenders: the running President Ter-Petrosyan and the candidate from the united opposition, Vazgen Manoukyan. The official results gave 51.75% to Ter-Petrosyan, now commonly recognized to be a product of count manipulation, and 41.29% to Manoukyan. This was ever the tensest presidential contest in Armenia which would most likely bring a first-round victory to Manoukyan if not the abuse of power by the incumbents.

Before the case reached the Constitutional Court, the post-electoral developments had resulted in mass protests of the opposition flooding the streets of capital Yerevan. These were quickly suppressed rather soon by the tanks called in by the President's military commanders. Demonstrations were banned, a number of oppositional candidates were arrested, and Manoukyan was wanted for arrest when the petition was filed to the Constitutional Court. Nobody doubted then that the authorities had succeeded in suppressing the protest for serving their reproduction. Indeed, the Constitutional Court was not given a real chance for defiance.

As expected, the Court decided two months after the date of the elections to endorse the re-election of Ter-Petrosyan. The legal technique applied by the Court to validate the perceptibly rigged ballot would later become a conventional tactic for imitating objective review: the Court recognized the facts of irregularities in a number of polling stations but considered these to be insufficient for invalidation of the elections. This technique was later applied to validate the

²⁸⁴ Constitutional Court's powers and responsibilities were enlarged by the Constitutional amendments of 2005.

²⁸⁵ Mark J. Ramseyer, *The Puzzling (In) Dependence of Courts*, supra note 196.

²⁸⁶ Ginsburg, supra note 196. The logic of the *insurance theory* was once again confirmed during the two attempts at constitutional amendments in Armenia which intended, among other changes, at strengthening of the Constitutional Court. In the first time, in 2003, the constitutional referendum failed to endorse the amendments, as it was commonly believed because of the lack of support from the running President who expected to stay in office for another full presidential term; in the second time, at the end of 2005, the amendments were passed with the vigorous support of the same President who in this time was much closer to the end of his second, final term. In general, Armenia is a very illustrative case for this theory.

²⁸⁷ See the decision DCC-26 of the Constitutional Court of Armenia of 22 November 1996.

presidential elections in 2003 and 2008, both times elections being reportedly rigged. Meanwhile, the defects in this tactics were obvious: the 1.75% margin bringing a first-round victory to the incumbent in 1996 was very small for ignoring the evidence of widespread violations, bulletin stuffing and abuse of public resources. The reputation of the Court was thus gravely damaged in the very first year of its operation.

2003. Referendum of confidence

The appeal was submitted to the Constitutional Court of the Republic of Armenia by the presidential candidate Stephan Demirchyan on the results of the second round of the elections. Preceding the petition, the second round of the presidential elections between the running President Robert Kocharyan and the candidate Demirchyan resulted in the former getting the support of 67 % of the voters, according to the official results. Neither Kocharyan nor Demirchyan received a sufficient number of votes for an immediate victory in the first round where several other candidates ran.

In his petition, Demirchyan pointed out essential violations committed during the election process, including mass bulletin stuffing and abuse of public resources by Kocharyan, the incumbent President. The facts of widespread violations and circumventions during the elections were *inter alia* recognized by the different groups of observers, including international organizations, and were commonly believed by the public. It is important to note that the decision of the Constitutional Court was due in a situation where the results of the elections were officially upheld by the Central Electoral Commission, commonly viewed as the incumbent President Kocharyan's proxy. By the time the Court decided, Kocharyan had been officially sworn in for his second term.

Demirchyan appealed to have the second round of the Presidential elections announced invalid because of widespread violations. He claimed that the elections did not adhere to the constitutional principles of free, equal and secret ballot. The Constitutional Court acknowledged the cases of numerous violations submitted by the applicant and eventually declared that the results of elections in a number of polling station, where the violations were documented, were "unreliable".²⁸⁸ In sum, having found that the elections in general fell short of the proper democratic standards due to the facts of violations "which in their nature are not compatible with future democratic developments of the country", the Constitutional Court, nevertheless, ruled to leave the Central Electoral Commission's decision unchanged, saying that the evidence of "duly legally formulated and evidentially justified electoral violations" has not been significant enough to have materially impacted the results of the elections. Thus, the

²⁸⁸ See the decision DCC-412 of the Constitutional Court of the Republic of Armenia of 16 April 2003.

ruling of the Constitutional Court upheld the results of the second round approving the re-election of acting President Robert Kocharyan in the office.

The decision of the Constitutional Court, however, contained another statement of a non-binding nature which raised divergent reactions from almost all political segments and became a spectacular item of professional interest. In particular, the Constitutional Court provided:

... considering that on the level of constitutional solutions, for institutions of representative democracy, not only the legality of their formation is important, but also important is the large continuous confidence of society in that process and a body of state power;

emphasizing the importance of strengthening the constitutional order of the Republic of Armenia and the necessity for establishing civic harmony established in the Preamble of the Constitution;

stating the fact that in the circumstances of the yet imperfect constitutional democracy, the election dispute, which is of crucial importance for the destiny of the state, also has a deep socio-political context based on lack of confidence and intolerance;

giving high importance to referenda and plebiscites as a special significant form of immediate democracy and realization of people's power, and of resolving issues of special importance for the state and establishing social confidence and people's consent;

to suggest to the newly elected RA National Assembly and the RA President, within one year, in the consonance to democracy and rule of law to bring the RA Law "On Referendum" in compliance with the requirements of the first part of unchangeable Article 2 of the RA Constitution and to select the organization of a referendum of confidence as an effective measure to overcome social resistance deepened during the presidential elections.

From the formal legal perspective, the Constitutional Court was not authorized by the Constitution to make any such recommendations whatsoever. This fact was later used by the pro-Kocharyan political cluster to question the legitimacy of the Constitutional Court's statement. In the meantime, the same argument was used by the pro-President Parliament to reject the opposition's initiative on upholding the Court's call for referendum.

Eventually, the binding part of the decision was in line with the common expectation that the Court would endorse Kocharyan. Still, the Court's unprecedented and creative call for a referendum resolving the political (rather than the legal) dispute between the two parties was unexpected and hard to be even imagined. Visibly, this call was unreservedly political and almost obviously intended at undermining, in an ambiguous way, the legitimacy of the "elected" President Kocharyan. Actually, in a situation where the political prospective of the pro-Kocharyan party at least for the nearest future was strong enough and where the Court would not invalidate Kocharyan's electoral win without expectation of an attack from the latter, the type of remark formulated by the Court in its recommendation was in fact a non-formal objection to the existing state of affairs, opening, rather than closing the door of a political contest on the issue. What was the puzzle of this decision?

Essentially, this case can be attributed to the rational behavior of the courts, as we earlier observed in this part of the thesis. If we look closely, the political situation of the electoral

season of 2003 was in fact near to a relative political uncertainty, even though the external signs were apparently for a clear predictability. The political situation was still marked by the tremendous volatility inherited from the dramatic reshuffle of the political framework in late 1999 and 2000,²⁸⁹ on one hand, and the damaged reputation of the running authorities, on the other. Although it was not apparent, the emergence of a mass public protest after the unpopular and highly discredited presidential elections was not unlikely. The Constitutional Court's controversial decision, thus, might have been a diplomatic and opportunistic way of pursuing two goals: official recognition of elections and a *de jure* approval of the incumbent President (who was most likely to stay in the near future but might be not strong enough to stay long), and giving a hand to the likely losers of today but potential prospective winners in the foreseeable future.

The analysis, in this light, benefits from a comparison with the case of 1996. In 1996, the presidential elections registered an even smaller, basically razor-thin margin between the candidates, and the political situation was tenser than it was to be in 2003. But the political uncertainty at the time of Constitutional Court's 1996 decision itself was less because the case was decided when the mass protest of opposition candidate's supporters was suppressed by means of military intervention exercised by the authorities and few would really doubt the long-term running of the existing political leader. Thus, although the political uncertainty in time of elections in 1996 was tenser than in 2003, the political uncertainty at the time of the 1996 court decision was already almost non-existent.

The decision in 2003, unlike in 1996, was made in a situation of an apparent relative certainty, but complete political vagueness and a true societal crack and disbelief in long-standing of the status-quo. The decision of the Constitutional Court, thus, may be interpreted as being motivated by the constitutional judges' keenness to support the official winners, but also to "give a hand" to the potential future winners. If so, the constitutional judges were brilliant political analysts. The Court must have calculated thoroughly before making this decision, as the decision appeared optimally suitable for both parties to the political confrontation: it was just masterly balanced in a way to allow a potential alignment with the opposition, but not sufficiently destructive for the incumbent to consider an attack on the Court.

Another question is intriguing in this context: if the rational Court's calculations showed even a relative prevalence of the President, why did this Court choose to create any potential partnership with the immediate loser at all if its unequivocal support of the winner would make the latter even more powerful? The political orientation explanation offers an answer. In line with the earlier assumptions, courts perform pro-democratically if the situation so allows. The

²⁸⁹ This was due to the terrorist attack on the Parliament where the leaders of the dominant political parties, respectively the Prime Minister and the Chairman of the Parliament, were assassinated.

Armenian Court's decision was as pro-democratic as the Court would afford in the existing circumstances.

More importantly, whichever consideration prevailed for deciding the case, the effect of the decision was eventually pro-democratic. In fact, the call for a referendum, despite its vulnerable legal competence, was used as a politically valid basis for raising subsequent democratic momentum. The call for the referendum of confidence has since been the centerpiece of the mass movement headed by the oppositional coalition. This political protest culminated in the year after the noteworthy ruling of the Court, when it became evident that the authorities did not intend to give a life to the referendum and that it will remain the sentimental yearning of the Constitutional Court or the political interests emerged out of its recommendation.

The political manifestation of the Constitutional Court, although not given a green light, produced an enormous democratic effect by instigating a mass public movement and probably seriously shaking the political monsters' self-confidence in the almightiness of their power. However, what is especially crucial for the conceptual framework of this discussion, the analysis of this decision gives us a chance to defend the suggestion about the political effectiveness of constitutional review and its pro-democratic orientation. Whether acting as strategic actors or guided solely by ideological and altruistic motivations, the Court members in this case produced a pro-democratic decision, something which seems to be the most likely outcome of judicial review in a time of political uncertainty where the pro-democratic prospect clashes with a typical post-Soviet quasi-authoritarianism.

*2008. A response to Maidan*²⁹⁰

Presidential elections were held on February 19, and on February 24 the Armenian Central Electoral Commission announced the official results giving victory to Serzh Sarkissyan, the incumbent Prime Minister and a close ally of President Kocharyan. The CEC counted slightly more than 52% of all votes given to Sarkissyan and 21.4% to his major contender Levon Ter-Petrosyan, the first Armenian President and the key contestant and running President in 1996. The latter filed a petition in the Constitutional Court challenging the constitutionality of the electoral practice, asserting ample abuse of power and irregularities during the voting process.

²⁹⁰ *Maidan* is a central square in Ukraine's capital Kiev where the opposition held its mass manifestations leading to the Orange Revolution in 2004. The word has now become a symbol of any electoral revolutions of the "colored" style (see Chapter 2). It is now my conviction that the Armenian incumbents' actions in 2008 were especially prepared to prevent the developments that once led to the defeat of the power-holders in Georgia, Ukraine and Kyrgyzstan. In particular, as it will be made explicit later in the text, the authorities were especially keen to prevent the Constitutional Court from leaning towards the opposition by eliminating any reasonable signs of political uncertainty. From this, I will argue, we can clearly deduct that the authorities had especially studied the case of Ukraine where the final decision in the confrontation was made by the Supreme Court under the pressure from the growing public protest and facing a complete political uncertainty. Here is why I call the actions of the Armenian government in 2009 to be a reaction to Maidan.

The case²⁹¹ was decided by the Constitutional Court on March 8, and the Court endorsed the election of Sarkissyan as President. Preceding the hearings, the political confrontation transmuted into continuous mass protests, largely imitating the familiar pattern of successful takeovers in Georgia, Ukraine, and Kyrgyzstan. The actions culminated in the dispersion of Ter-Petrosyan's round-the-clock demonstration by security forces and in entailing clashes between the protesters and the police, resulting in violent actions, reportedly from both sides, taking the lives of several people and resulting in the arrests of many oppositional activists. These circumstances, evidently, heavily influenced the outcome of the review by the Constitutional Court.

To begin, it needs to be mentioned that the judicial review of presidential elections in 2008 involved two episodes, which differ substantially by the degree of political uncertainty and hence they represent completely different patterns of rational behavior by the Constitutional Court. The first episode involved Ter-Petrosyan's pre-electoral petition to the Court,²⁹² challenging the constitutionality of the campaign run by the public television and other state-controlled media against him and requesting the Court to recognize these facts as an insurmountable obstacle for a presidential candidate. In particular, the candidate argued that the National Tele-Radio Company and especially the "Hailur" news program violated the legislation by regularly and consistently broadcasting materials against him during the three preceding months. This petition preceded the date of the elections and was filed in a typical situation of relative uncertainty where the lead of Sarkissyan was confirmed by a number of opinion polls, but where Ter-Petrosyan was overwhelmingly successful in mobilizing the oppositional parties and the resources of the huge protesting electorate.

The decision of the Constitutional Court in this case confirms the earlier developed hypothesis about the patterns of judicial behavior in a situation of relative uncertainty in which courts strive to officially endorse the expected winner but also to uphold, in a more equivocal manner, the other candidate. Specifically, the Court turned down Ter-Petrosyan's request to consider the biased media campaign an insurmountable obstacle, but acknowledged, in a roundabout way, the illegality of abuse of public media resources for the purposes of one of the candidates. By doing so, the Court in fact recognized the intrinsic validity of the applicant's argument in the case and the facts of violation of fundamental standards of equality by certain state bodies. Nevertheless, the Court abstained from properly adjudicating these (recognized) violations, referring to the limitations imposed on the jurisdiction of the Constitutional Court by the law.

The second episode, concerning the proper review of elections, represented a different political situation, where there was much less uncertainty. This was for several reasons. First, as

²⁹¹ See the decision DCC-736 of the Constitutional Court of Armenia of 8 March 2008.

²⁹² See the decision DCC-734 of the Constitutional Court of Armenia of 11 February 2008.

mentioned, the post-electoral developments ended up in the dispersion of demonstrations, mass arrests of Ter-Petrosyan's supporters, and the imposition of an emergency rule banning further demonstrations, as well as the activities of several opposition parties and mass media. These actions allowed the authorities to get rid of any expected opposition movements by the time the case was tried in the Constitutional Court. At the same time, these actions prevented the public pressure on the Court through continuous mass demonstrations a few steps from the building of the Court on the eve of the decision, an impact which was observed to be crucial in 2004 in Ukraine.

Second, the elections of 2008, unlike the earlier Armenian elections and those in other post-Soviet countries, were overall positively assessed by the international observers. By the time the Court decided, Sarkissyan also received a great number of fellow congratulations from abroad. These facts significantly enhanced the political legitimacy of the elections and equally undermined the legitimacy of further actions by Ter-Petrosyan, notably contributing to shrinking of political uncertainty. No less important is that in 2008 the democratic slogans were employed and the pro-democratic electorate was mobilized by Levon Ter-Petrosyan, the same politician who, being the President in 1996, tolerated the electoral fraud and ordered suppression of the democratic protest. This fact undermined the democratic credentials of the public movement in 2008 and apparently negatively impacted support of the movement by the international community.²⁹³

Finally, the actions undertaken by the authorities against the protests confirmed the readiness of the incumbents to commit to an oppressive rule for maintenance of their power. The political uncertainty suffered as it became obvious that the sitting political elite will stay either through democratic means or by terror. The Constitutional Court, exactly as in 1996, did not have a chance of defiance.

The saga of the three Armenian elections allows for consistent conceptualization of judicial behavior during political confrontations. The second episode of 2008 and the case of 1996 clearly represent the courts' attitude in a time of certainty about the future holder of the key political office. Here courts plainly support the expected winners. The case of 2003 and the first (pre-electoral) episode of 2008 represent judicial behavior in a time of relative uncertainty, distinguished by an ambivalent diplomatic stance of courts which are trying to please both sides of the contest and are leaving room for prospective alignment in the case of a takeover.

²⁹³ For example, New York Times (see *Dark Days in Armenia*, N.Y. Times, March 7, 2008) wrote: "This is not a case of pure democratic virtue against pure authoritarian evil. The defeated opposition leader, Levon Ter-Petrosian, is a former president who in the 1990s sent armored cars into the streets to crush demonstrators protesting his electoral manipulations."

Ukraine. From politics of revolution to politics of survival

Ukraine offers two particularly noteworthy cases of higher court involvement in bitter political confrontations. Remarkably, the two cases were decided by different courts as the Ukrainian Constitution does not empower the Constitutional Court to review electoral disputes. This fact, however, does not undermine our key hypotheses since the observed patterns relate to all higher courts, whether constitutional or general, in relation to their review of politically sensitive cases.

The first case to be considered concerned the presidential elections in 2004.²⁹⁴ To jump ahead, the case has earned the reputation of being the milestone pattern of judicial bravery in the post-Soviet area. An observer has called it “the landmark decision coming out of any judiciary in the former Soviet Union in the last thirteen years.”²⁹⁵ One US judge on the Court of Federal Claims in Washington compared the decision with *Marbury*²⁹⁶ and said that “the Supreme Court unequivocally restored the dignity of the entire judiciary and instilled hope in democracy.”²⁹⁷

The pre-electoral and post-electoral developments during these presidential elections have become the theme of numerous volumes²⁹⁸ but to briefly summarize, the chronological narrative of the major developments is as follows. The outgoing president is implicated in corruption and murder, and in line with the best post-Soviet traditions, he backs his favorite “candidate of the power,” Viktor Yanukovich. The latter is also backed by Russia’s Putin. The opposition unites around the joint candidate, Viktor Yushchenko, supported by democratic countries. The pre-electoral competition witnesses cheating and widespread manipulation of the ballot. On the eve of the elections Yushchenko is poisoned. As it was observed to be the pattern in the region, the elections process was flawed and the results were bitterly contested by the opposition. The official figures in the first round gave about equal 39% to both Yanukovich and Yushchenko, while after the second round Yanukovich was given 49.42% against Yushchenko’s 46.69%. The results were denounced as rigged by the opposition and a number of international observers, and Yushchenko challenged these in the Supreme Court. The Supreme Court decided to appoint a re-run of the second round finding that the widespread electoral violations gave no chance for an accurate recount. In the re-run, Yushchenko received 52% of votes, which brought him to the presidential office.

²⁹⁴ See the decision of the Supreme Court of Ukraine of 3 December 2004.

²⁹⁵ MacKinnon supra note 257, p. 205.

²⁹⁶ *Marbury v. Madison*, 5 U.S., 137, 177 (1803).

²⁹⁷ Bohdan A. Futey, article published in the Ukrainian Weekly, No. 50, December 12, 2004.

²⁹⁸ See e.g. Wilson, supra note 264, MacKinon, supra note 257, as well as Anders Aslund and Michael McFaul, *Revolution in Orange: the Origins of Ukraine’s Democratic Breakthrough* (Washington, D.C.: Carnegie Endowment for International Peace 2006).

To review the behavior of the Ukrainian Supreme Court in 2004, several observations made earlier in this chapter merit attention. It needs to be observed, first of all, that the political situation at the time of the decision can uniquely represent a state of complete uncertainty in which case a pro-democratic attitude by courts was predicted. Not only did the official results show an approximate balance, but there was also an evident equal division of strategic resources, with the Eastern part of the country and Russia clearly standing for Yanukovich and the Western regions of the country, coupled with the democratic world, predominantly backing Yushchenko. Legitimacy might well be the concern and the best prospect for defense for the judges in this situation. At some point, the judges might well have felt that the evidence of violations, confirmed almost unanimously by all democratic observers, was too strong and the margin between the official results between the two candidates too small for affording a flawed judgment that would rank them among the anti-heroes of the national-democratic movement in the case of Yushchenko's triumph. The factor of civic accountability makes the point more instructive. The situation when the Supreme Court was expected to decide on the case was described by a student in the following way:

When the opposition brought its hundreds of individual complaints of election fraud to the court, the regime paid no notice; judges on the top bench were political appointees who owed their career to Kuchma and his chief of staff, Medvedchuk. As a result, when Polish president Alexander Kwasniewski suggested during the round-table talks that the Supreme Court hearing should be televised, Kuchma agreed. But the instant Poroshenko's 5th Channel started broadcasting the hearings to the crowds on Maidan, the judges became as accountable to the people outside as they were to Kuchma and Medvedchuk.²⁹⁹

Evidently, the authorities in Kiev were overly confident about the Court's loyalty to them- an aspect which also merits attention in the context of our analysis.³⁰⁰ Their "court-project" should have been based on trust in the political partisanship of their appointees on one hand, and on the judges' fear of an attack on the other. Apparently, the project of power-reproduction by the Ukrainian ruling elite had cautiously launched a pre-electoral campaign of harassing judges to make sure that control over them could be assured.³⁰¹ But as we previously observed, the factors predetermining courts' agency to the incumbent power, absolutely effective during the regular tenure of incumbents, may no longer constrain the judges in times of political transition and uncertainty when the address of the power on the next day of the court's decision is not easy to guess or when the future power holder is decided by the courts themselves. The situation of political uncertainty, evidently, created its own rules and incentives for the Ukrainian players.

This entire analysis can be further tested by the next case from Ukraine. In April 2007, after the "orange" President Yushchenko's controversial decree dissolving the Supreme Rada (the

²⁹⁹ MacKinon *supra* note 257, 203.

³⁰⁰ Wilson *supra* note 264, 146.

³⁰¹ *Id.*

Parliament)³⁰² was appealed by the “blue” camp of then Prime Minister Yanukovych who enjoyed the support of parliamentary majority, the Constitutional Court justices found themselves unable to issue any judgment on the case. The developments with the long expected decision of the Court recalled a Hollywood thriller: constitutional justices, arguably loyal to either one of the camps, reported pressure from political powers; several judges reported threats; the Chief Justice filed resignation immediately after the Presidential decree was issued; the Parliament, which was meant to be dissolved, accused the President of putting pressure on the Constitutional Court; one of the justices was immediately accused of corruption by the President’s camp.³⁰³ Some other developments crossed the borders between reality (even the Ukrainian political reality) and the genre of blockbuster fantasy: at one point, some of the constitutional judges were physically prevented from entering the Court house by the supporters of one of the parties. Furthermore, Yushchenko dismisses three judges arguably loyal to the Yanukovych camp even before the expected verdict was released. As a reply, the Parliament issues an order dismissing five pro-Presidential judges. Not the end yet: the Presidential decree dismissing the three non-loyal justices gets invalidated by a provincial court of first instance; one of these three judges then becomes Chief Justice after the former Head of the Court finally resigns. At the end of the day, the Constitutional Court fails to decide on the case, and the conflict was resolved through out-of-court conflict settlement resulting in a political compromise on new elections.

At first glance, the case defects the earlier hypotheses of this analysis. In a new situation resembling political uncertainty, a court abstained from the supposed pro-democratic attitude, practically damaging its own legitimate mandate at the expense of its standing and reputation. This may, however, turn out to be a premature conclusion if we apply the observed patterns of judicial behavior to the political context accurately. To begin, necessary shifts in the paradigms, creating considerable differences between the political contexts in 2004 and 2007, have to be observed.

First, it is essential to differentiate between the types of political uncertainty in these cases for correctly predicting the fundamental construction of judicial behavior. The political uncertainty of 2004 was due to a contest based predominantly on a zero-sum setting of presidential elections where “the winner takes all” logic is embedded in the structure of the political game and its players’ psychology. On the contrary, the case of 2007 was to be decided in a political situation which was due to a long-running and predictably enduring political confrontation which involved a more comprehensive struggle for political dominance than a single campaign

³⁰² See the Decree of the President of Ukraine of April 2, 2007.

³⁰³ For these and other developments described in this paragraph, see the official press releases of the Ukrainian Constitutional Court (*Вісник Конституційного Суду України*) for the 2007, available at <<http://www.ccu.gov.ua>> in Ukrainian.

for the presidential office. Between 2004 and 2007, Ukrainian political life was dominated by the continuing consolidation of rivalry between the “orange” and the “blue” camps with the technologies of political contest now diverging from the presidential elections’ one-off zero-sum style. In particular, these developments witnessed a crackdown in the post-electoral “orange” camp, which allowed a further consolidation of the “blue”, with the latter gaining control over the Parliament, making President Yushchenko to appoint his earlier rival Yanukovych to the post of Prime Minister. In sum, the situation in 2004 was a complete political uncertainty related to the one-off political game of presidential elections, while the confrontation in 2007 culminated as a long-standing comprehensive political battle creating anticipation of a stable long-standing uncertainty. The newly-observed phenomenon of a predictably long-standing uncertainty reverses the paradigm of political opportunism typical of the uncertainty of zero-sum settings as in these new circumstances, as opposed to presidential elections, the expected winner of tomorrow will not necessarily coincide with the winner of the day after.

Another shift was due to the blurring of the democratic credentials of the rival camps. In comparison to 2004 when the game was constructed on a clear-cut delineation between the “orange” side as a pro-democratic liberal movement and the “blue” one as a rather moderate in its democratic programs, the confrontation in 2007 somewhat reversed the democratic paradigm with the blue camp now acting from the positions of the majority and in quite principal observance of democratic procedures and the constitution, while President Yushchenko was now attacked as the one abusing the power. This impression was especially strengthened by vulnerability of the constitutional grounds for dissolution of the Rada by the President.³⁰⁴ Evidently, the actions of the incumbents- in this particular situation the both camps holding a portion of executive functions- did not abstain from putting pressure and attempting attacks on the Court, of which the reports about threats, accusations, and dismissals of judges are proof.

Overall, the shifts in the major paradigms disable the key rational factors which would predetermine a specific conduct by a judiciary during most of the classic situations arising in post-Soviet states: political opportunism based on a rational evaluation of the political situation and prediction of the future winner, and legitimacy and public championing. Being deprived of these two major orientations, Ukrainian constitutional judges most likely faced a situation of

³⁰⁴ As a ground for dissolving the Parliament, the Decree attacked the practice of “migration” of MPs from one parliamentary coalition to another which is otherwise a fairly valid practice in a democracy. The decision of President Yushchenko was just another manifestation of the growing sympathy, by the new ruling political elite in the Ukraine, towards the institution of the imperative electoral mandate which has been constantly criticized for its non-democratic nature by several international organizations (for one, see the Resolution of the Parliamentary Assembly of the Council of Europe N 1549-2007 on “Functioning of Democratic Institutions in Ukraine”).

contingency where their choice was to resort to non-alignment through simple abstention guaranteeing survival but sacrificing reputation and legitimacy.

Kyrgyzstan. Non-consolidation of the executive and judicial defiance

Both noteworthy cases of higher court involvement in the politics of Kyrgyzstan took place in the few last months of 2007. In September, the Constitutional Court of this country ruled that the constitutional reforms adopted during the severe political turmoil in the months of November and December of 2006 were null and void. Three months later, several days after the parliamentary elections, its fellow Supreme Court overturned the ruling of the Central Electoral Commission that would let only one, pro-presidential, party to sit in the Parliament. Both cases were embedded in the leitmotiv of the long-standing political turbulence which was shaking the country for more than two years.

The Republic of Kyrgyzstan- reportedly the most progressive regional player in Central Asia³⁰⁵ - never saw such political turmoil as the one which started in 2005. In this year, the formerly Soviet republic's first and only President since the independence, Askar Akayev, had to flee the country after an uprising caused by rigged parliamentary elections.³⁰⁶ Since, the newly elected President, Kurmanbek Bakiyev, had failed to steadily consolidate the executive power, being involved over and over in numerous standoffs with the country's Parliament and strong oppositional movements. In the recent times, these confrontations especially reflected in the cause over the constitutional reforms which each of the parties pushed to echo their own political interests. In November 2006, the Parliament's majority had voted for constitutional amendments considerably shifting the country's political organization towards a parliamentary system that would heavily destroy the incumbent President's power. In only a month, however, the Parliament had adopted some new changes somewhat restoring the presidential prerogatives. While these political standoffs underwent yet another revival throughout 2007, the Constitutional Court suddenly decided to annul both reforms of 2006, restoring the constitutional status quo of the pre-revolutionary period.³⁰⁷ The Court soundly motivated its decision by the fundamental procedural requirement that constitutional changes be made only by a referendum thus finding the Parliament exceeding its capacity.

³⁰⁵ Brian Gill, "Aiding the Rule of Law Abroad: The Kyrgyz Republic as a Case Study", 29 Fletcher F. World Aff., 133, 133 (2005).

³⁰⁶ See Scott Radnitz, "What Really Happened in Kyrgyzstan", 17 Journal of Democracy 132 (2006); Henry Hale, "Democracy or Autocracy on the March? The Colored Revolutions as Normal Dynamics of Patronal Presidentialism" 39 Communist and Post-Communist Studies, 305 (2006).

³⁰⁷ See the decision of the Constitutional Court of Kyrgyzstan of 14 September 2007.

This decision by the Constitutional Court, arguably giving new additional opportunities for the opposition to resist the consolidation of the executive power, met the angry reaction of the fragmented Parliament which voted “no confidence” in the Court. The reaction from the President was more balanced and more constructive. He simply complied with the ruling by putting his own new project of constitutional reforms on referendum to be held in a month. Meanwhile, Bakiyev diplomatically used the moment for getting rid of the turbulent legislature by dissolving it for failing to resolve the ongoing standoff and stagnation. The new Constitution, voted for at the referendum, introduced at least one substantial change- a shift to a party-based electoral system which eventually would help the President to consolidate.

The new elections, held in December, proved Bakiyev’s acumen. The fragmented opposition failed to strongly mobilize in a short period before the elections. As a result, the pro-presidential party appeared to be the only contender which clearly passed the barrier, getting almost 50% of the votes. While its overall win was without doubt, the strongest oppositional parties were about to be excluded from the legislature at all though they passed the national barrier of 5%. This was due to an extravagant interpretation of the electoral code by the Central Electoral Commission which insisted on a regional barrier of 0.5% of all votes to be received in a single region, in addition to the main national barrier. The supposed regional barrier was not passed by any political party except the pro-presidential one. The Supreme Court over-ruled the decision of the Central Electoral Commission upon the petition by an oppositional party giving it a green light to the Parliament.³⁰⁸

The two cases confirm the premises of our analytical exercise. The political situation with a non-consolidated executive allowed the Courts to demonstrate considerably independent position deviating from the optimal outcome sought by the incumbent. This situation essentially departs from the earlier discussed Ukrainian pattern of stable contingent uncertainty which disabled rather than enabled the Constitutional Court. Unlike the situation in Kyrgyzstan, where the executive failed to consolidate but retained its monopoly on the government, the Ukrainian case shall be rather characterized by a consolidated double-executive where the executive power was divided between the President and the Prime Minister representing rival political camps and each holding considerable decision-making functions. This “double-executive” paradigm did not lift the constraints on the courts, but only doubled them.

In contrast, the single non-consolidated executive in Kyrgyzstan was just not strong enough for constraining higher courts in a way that it would not deteriorate its own shaky status. The relatively long-standing survival of the Kyrgyz political turbulence and the weak executive since 2005 had uniquely enabled a considerably free regime with a somewhat strong sense of

³⁰⁸ See the decision of the Supreme Court of Kyrgyzstan of 18 December 2007.

constitutionality, where the players had apparently adhered to the separation of powers and the democratic rules of the game. This observation supports the underlying thesis of this work that constitutional courts demonstrate due behavior unless they are subject to improper constraints from the political branches.

Another observation is in line with the conceptual framework drawn before. While the behavior of courts in both Kyrgyz cases deviated from the standard of dumb loyalty to the dominant political alliance, the deeper analysis of these cases may nevertheless confirm an archetypal performance typical to the situation of a relative political uncertainty. In the situation of a relative uncertainty the behavior of courts was observed to be balanced; the courts may decide contrary to the politicians' interests only in a way that is not destructive for the political agenda of the dominant party. The study of the political outcomes of both cases proves that these decision were not only not destructive for the President, but were also mostly in line with his main political plans. For example, one paper, written in the pre-electoral period, comments on the political consequences of the decision of the Constitutional Court in the following way:

Some conclusions can already be drawn out of the current political crisis: First, President Bakiyev has now the possibility to provide for a new parliament, which will be more obedient than the old one. He is likely to influence the referendum, the preparations for the elections, the elections themselves, or all of them. ... Secondly, and emerging from the first conclusion, the political scene in Kyrgyzstan might see some stabilization if the newly elected parliament would adopt a more conciliatory stand towards the government.³⁰⁹

The accuracy of this analysis can be confirmed by the very outcomes of the elections and by the post-electoral state of stability and consolidation of the executive that took place in the country. In fact, the decision of the Constitutional Court, apparently defiant, was well in the interests of the President Bakiyev. Not to be a surprise, the influential Chairwoman of the Court ended up leading the pro-presidential party's list in the parliamentary elections and was afterwards elected as the Vice Speaker of the Parliament. The decision of the Supreme Court, diluting the monopoly of the pro-presidential political party, did not undermine the party's forthcoming dominance and hence hardly posed any serious damages to the President's political interests either.

Strikingly, both decisions were intended to produce legitimacy and public appraisal for the courts. An analyst observed that by responding to the petition on the validity of constitutional reforms, the Constitutional Court and its Chair received a positive approval from the public.³¹⁰ Both decision were also largely in line with the best standards of constitutional democracy as one held the partisan constitutional reforms void and the other banned the one-party

³⁰⁹ Kyrgyzstan: Trends in Conflict and Cooperation, Fast Update Kyrgyzstan, No 4 (2007), available at <http://www.swisspeace.ch/>.

³¹⁰ See Erica Marat, *Another Constitutional Reform Looms in Kyrgyzstan*, Central Asia-Caucasus Institute Analyst for 20.09.2007, available at www.cacyanalyst.org/.

representation in parliament. This is also in line with the observation of typical patterns of judicial behavior during the time of a relative uncertainty.

The Kyrgyz cases confirm the hypotheses of this work but these cases originate from a so far unprecedented political regime tolerating judicial independence and respect for basic institutions of constitutional democracy. Although likely due to the failures in timely consolidation of the executive power, the atmosphere of constitutionalism and of a culture of political interaction enabling the judiciary as a relatively independent segment of the power is highly unusual in post-Soviet area. Whether or not this atmosphere becomes sustainable or it proves having lived only a short transitional period will get tested by the pending performance of Kyrgyz courts under by now an increasingly consolidating presidential authority.

C. Should there be political empowerment?

In April of 2007, after the “orange” President Yushchenko’s controversial decree dissolving the Supreme Rada (the Parliament) was appealed by the “blue” camp of Prime-Minister Yanukovich in Ukraine, the Constitutional Court justices found themselves unable to issue any judgment on the case.³¹¹

The “thriller” with the Constitutional Court’s judges would perhaps not become a wanted chronicle for political and constitutional analysts so much if the exciting developments ended up in the most essential deliverable that the court was expected to produce in the situation of political deadlock: a decision resolving the legal controversy over the constitutionality of the Presidential decree dissolving the Rada. Finally, was this not the primary responsibility of the Court?

The above narrative is paradigmatic for our discussion. In fact, it relates to issues which should be high on the agenda of constitutional scholars and which involve important items for constitutional designers. The reluctance of constitutional judges to come up with any decision and their readiness even to resign, sacrificing their career of chief judicial officers in the country, rather than to issue any decision, is not as anecdotal and accidental as it may seem. The record of political involvement of constitutional courts in post-Soviet countries proves to be not very encouraging for constitutional judges: as mentioned once or twice elsewhere in this work, the Constitutional Court in Russia was suspended by Yeltzin in 1993 after its overly activist interference into the severe battle between the President and the Parliament; the Court

³¹¹ See the narrative of the developments with this case in the previous sub-chapter.

in Kazakhstan, thanks to its political activism, was abolished by President Nazarbayev in 1995; in Belarus, Lukashenka forced the Court to resign in 1996. After all, how can the constitutional judges be sure of their own security when they witness widespread harassment, murders, plots, conspiracy and even poisoning³¹² of dissenting politicians and activists and when the future of political power, often so crucial for regional geopolitical fights, depends upon their mere decision?

Is it then a surprise that the judges in Ukraine do prefer to abstain from deciding on the case when any decision of the court would unavoidably upset one of the two influential and powerful sides to the confrontation? As already mentioned, avoiding politically sensitive cases was observed to be typical to the Russian Constitutional Court in its second incarnation.³¹³ Similar observations were made about the Ukrainian Constitutional Court too. It was said, in particular, that the Court had refrained from adjudication of matters containing major political disputes in the pursuance of its “survival strategy” in the uneasy controversy between the political actors.³¹⁴

There is another perspective on the discussion. Whether or not one should be too critical to such “strange” behavior of constitutional courts, “abstentionism” is in fact often the only way out for constitutional courts which find themselves confined in between their primary responsibilities imposed by constitutions and the considerations of personal well-being or political expediency. The paradox of the situation is formed by the massive mismatch between the institutional ideals of politically strong courts and the political environment in which these courts would need to operate. This political environment, as already emphasized in Chapter 2, proved to be distinguished by an intrinsic tendency to concentration of political power where any opposition to the self of the sole power center would be oppressed by any possible ways. The constitutional courts, in this context, largely stay constrained by politicians all over the region. Their status has not changed too much even in those countries where the democratic development got a political sponsorship, to which the Ukrainian case discussed above is a very good illustration.

The institutional design of politically powerful courts brings these tribunals close to the orbits of the vital interests of the super-strong politicians, which makes due performance of these functions by courts unrealistic. Being incapable to duly respond to political inquiries, courts face erosion of their legitimacy as a result of necessitated abstention from their responsibilities. Hence, the functions which were granted to constitutional courts to precisely make them strong

³¹² This was the case with now President Yushchenko of Ukraine in 2004, see Wilson, *supra* note 264, at 96.

³¹³ Epstein et al, *supra* note 187, p. 154.

³¹⁴ Wolczuk, *supra* note 192, p. 328.

eventually became the cause for their major weakness. I call this the “paradox of political empowerment”.

In light of the nearly axiomatic fact that the concentration of power and the imperatives for its reproduction proved to be and still remain the main independent variable impacting the relationship between state bodies, was it wise in the past and is it still wise now to insist on the political empowerment of post-Soviet constitutional courts?

Although not ever becoming a central theme of academic discussion, the question whether or not one should have opted for such generous political empowerment of constitutional courts in such vulnerable political environments as in post-Soviet countries has nevertheless been addressed by students of post-communist courts. Thus, having in mind especially the “sad” experience of the first Russian Court, which found itself in a trouble when involved in the political controversy between President Yeltzin and the retro-minded Parliament in 1993, Herman Schwartz warned against continuous insistence on both judicial activism and an institutional design of constitutional courts enabling unavoidable clashes with super-strong presidents (in particular, he argued against granting to constitutional courts a power to resolve electoral disputes and especially to verify the results of presidential election that is always associated with partisan politics and is full of a danger of the loss of the courts’ reputation and public standing).³¹⁵ An analogous argument comes from Epstein, Knight and Shvetsova who appreciate Russia’s “second” Constitutional Court’s way for becoming legitimate and strong actor by sustaining its legitimacy through a long process of compromises, abstention from deciding on issues which are within the limits of “tolerance intervals” of stronger political branches and thus avoidance of conflicts with them.³¹⁶ The opposition to the “political” responsibilities has been explicitly voiced also by several constitutional judges. For one, a justice from Armenia reported in a paper:

Certainly, during adjudication of these (political) cases the Constitutional Court gets involuntarily involved into politics. Constitutional courts have been used and they will be used as an instrument of political struggles. Despite their impartiality and objectivity, constitutional courts are obliged to act in between the provinces of law and politics. In such cases, any decision is having a negative impact on the reputation of courts and raises unavoidable political accusations. It is especially dangerous for young democracies where the institutions of constitutional justice are in the stage of consolidation, they are still very fragile and they do not enjoy the support of the citizens of the country who have not reached a sufficient level of constitutionality and legal and political culture.³¹⁷

The rationale behind these positions may be well-graspable: political empowerment of constitutional courts often makes them find a compromise between the real merits of a case and

³¹⁵ Schwartz, *supra* note 5, p. 244-245. Eventually, Schwartz suggested that “constitutional court should not have to deal with any nonconstitutional question except perhaps for the impeachment of the president.” It is, however, not made clear by him why should impeachments especially stay under constitutional courts’ jurisdiction and in which way are the impeachment cases less “dangerous” for these tribunals than the other politically sensitive cases.

³¹⁶ Epstein et al, *supra* note 187.

³¹⁷ Felix Tokhyan, *supra* note 212.

the need to please politically powerful litigants, and while the latter considerations predominantly take over due to the existing political reality, as previously described, the courts often have to sacrifice nothing less than their legitimacy and reputation by staying subservient to their political masters. Herman Schwartz's position stands for exactly keeping the courts away from political involvement which necessarily brings to either of destructive consequences for the constitutional courts: "commit a suicide" by sustaining their independence stance in a political question (and then get dissolved, or fall under the risk of personal attack), or lose their reputation and public standing by staying "loyal" to the existing political masters. The lesson for institutional designers might sound straightforward: let the constitutional courts be free from the duty to decide on the results of elections, conflicts between political branches and other "politically dangerous" cases by removing such "political questions" from the constitutional courts' agendas.

I hesitate for two major reasons. While the point about saving the constitutional courts reputation and standing by removing the political items from their agenda by means of institutional design is pretty much perceived, I consider the negative, destructive effects of designating politically disempowered courts on the prospects of contribution by constitutional courts to the process of democratic consolidation in post-Soviet countries.

Firstly, I respect constitutional courts' separation of powers responsibility as a key indispensable agency in consolidation of the institutions of constitutionalism.

In the first chapter we observed that genuine consolidation is a matter of fundamental support of respective institutions by the basic constituency, the society in case. The important determinant of the transition towards the desired political regime is the mental appreciation of the values of that regime, rather than a formal institutional transformation. How and in what way do the formal institutions matter? They do matter as far as they contribute to the intrinsic appreciation of the system: as far as the formal institutions transform the formal transplanted rules (of democracy or constitutional democracy) into internally accepted practices or, in other words, only to the extent that they are received by their constituency. Institutions thus make a change by becoming part of the local (political) culture.

We also observed that the capacity of formal institutions to change the culture is the principal opportunity for the aspiring democracies. Formal institutions become part of that culture through stable and legitimate performance, by shaping the "plastic" properties of the political culture. Their persisting performance generates *path dependent* inertia, which is then self-evolving or *self-reinforcing*.³¹⁸

³¹⁸ North, Douglas, *Institutions, Institutional Change and Economic Performance*, supra note 16, 93-94.

The lessons from institutionalist studies are easy to get translated into the language of our discussion. While the old structures pose the main limitation to the proper functioning of the institutions of the new generation in the post-Soviet countries (as we observed to be the case with let's say the tendency to concentration of power- a clear heritage of either pre-Bolshevik or Bolshevik legacies), the institutional engineering should in the first instance consider the formation and promotion of institutions of pluralistic government and power sharing which can in the best way break with the destructive legacies and facilitate the development of necessary new patterns within the societies in a long-term perspective. I consider this the first and foremost mission an institutional designer should bear in mind. This approach spells out the basic axiom of new institutional wisdom in social science that political institutions not only reflect the environmental context but also create them.³¹⁹

The classics of institutional theory by March and Olsen also provides in part that political institutions' major activity is "educating individuals into knowledgeable citizens."³²⁰ This overall logic is an enormously crucial guide for institutional design aiming at production of *intrinsic* support of a new regime. This role of institutions represents their fundamental responsibility in the regime change, in contrast to the "mechanical" impact of institutions on the level of political hardware. The virtue of institutions is in the ability to shape the "plastic" properties of political culture through a long and routine process when institutions prove to obtain the support of the political constituency enabling it with the necessary legitimacy for consolidation. Respectively, the virtue of the institutional design is in giving the stage to the institutional programs that will guide the long routine of cultural transformation in the designated direction. The kind of software-oriented strategy, given it is sustainable at the local context and functional by its hardware, shall entail a quality change in the level of support for democratic institutions and values that are the core of democratic consolidation.

The basic implication of such "software-oriented" strategies for the construction of the judicial review courts shall induce to consideration of the typical and well-represented political-cultural ills that the institution of judicial review could have cured, to mentioned but a few most destructive ones: inherent concentration of power as a typical heritage of older soviet and pre-soviet legacies of authoritarianism, lack of balancing by the separated branches of the government, ignorance of the judiciary as a guarantor of the constitutional power structures, and lack of respect for fundamental human freedoms and rights. And while the point on saving the constitutional courts' reputation by exempting them from the review of political questions has its obvious merits, in the larger context it stays unclear who should replace these courts, as key agents which are responsible for constitutionalism in general and controlling separation of

³¹⁹ James March and Johan Olsen, *supra* note 14, at 162.

³²⁰ March and Olsen, *id.*, at 161.

powers in particular, in their important role of shaping the “plastic”³²¹ properties of political culture and “educating individuals into knowledgeable citizens”³²².

The capacity of institutions to educate individuals- and first of all the individuals in charge of political power- into knowledgeable citizens is the major promise of institution-building. Let me refer to President Yeltzin- the same man who suspended a constitutional court in 1993, saying only after five years that the ruling of the Constitutional Court is binding upon him even though he dislikes it.³²³ Indeed, what would educate Yeltzin into a knowledgeable citizen and a constitution-abiding president if one opted for a politically weak court?

Secondly, political empowerment of constitutional courts is the only institutional format that allows significant democratic contributions by these tribunals in the strategic “Trojan-horse” fashion. This perspective was comprehensively discussed above in this chapter. Apparently perfect agents of the existing political regimes in such cases, in reality constitutional courts are genuinely discontent with the non-democratic state of affairs in their respective countries. Being aligned with dominant political parties by the force of informal constraints imposed on them, these courts are likely to become the Trojan horses of new, pro-democratic political parties if the political situation approaches equilibrium between the anti-democratic and pro-democratic candidates for the future government.

This strategic style of democratic contributions is especially related to the implementation of the political responsibilities. Electoral cases, referenda, cases on political parties and jurisdictional disputes appear to be the most sensitive and politically charged items in the list of functions of constitutional tribunals. Yet, these are the ones which especially allow investing of the inherent democratic potential of constitutional courts into the business of democratization.

However, the opposition to the political disempowerment does not itself address the paradox of political empowerment. How should the latter be resolved? Should we ignore the drawbacks of political empowerment for the sake of preserving the potential for democratic contributions by constitutional courts?

I offer an alternative perspective where the solution to the paradox of political empowerment is not seen in the abandonment of political responsibilities, but in revision of the constitutional courts’ institutional design. This discussion will proceed to the next chapter.

³²¹ Larry Diamond, “Political Culture and Democracy” in *Political Culture and Developing Countries*, supra note 48, at 9.

³²² James March and Johan Olsen, *supra note 14*, p. 161.

³²³ Epstein et al, *supra note 187*, p. 137

Conclusion

It was argued in this chapter that the political disempowerment of constitutional courts in post-Soviet countries would deprive these societies in transition of two main ways in which their constitutional courts can impact the democratic development. First, without mandates to resolve political questions, the courts would not be involved in the resolution of electoral and other conflicts in times of political uncertainty when they promise to become the allies of more pro-democratic parties. Second, the designers of the constitutions would deprive the countries of their strongest instrument of constitutionalism, which, although apparently not often effective due to executive monopolization of power, could ultimately prove to have its subtle albeit substantial impact on the political culture in the long-run institutional change that is brought about by the persistent functioning of formal institutions.

Regardless of how strong the position against political responsibilities of constitutional courts is, the two above-mentioned arguments should convince to look for other solutions to the drawbacks of political empowerment than eliminating it. Two points merit attention in this regard. Firstly, it is fairly obvious that politically empowered post-Soviet constitutional courts, though often discredited, are nevertheless better for democratic development than they would be if deprived of political functions and performed merely formal roles. Secondly, an institutional solution to a problem such as elimination of the responsibilities which cause this problem looks to be a resolution as simplistic and straightforward as the pulling of a tooth after the first signs of it causing pain. In a way, this approach assumes incapacity of institutions to adjust to the environments through modification and implantation, submitting to the bankruptcy of designer arsenal. In our epoch of institutional globalization, where the borrowings, transplants, hybrids and know-how dominate the agenda of institutional designers, this point of view does not sound convincing. The next chapter will attempt to offer an alternative to constitutional courts' political disempowerment which is instigated by the search for sound experimentalism in a quest to cure, adjust and implant this important institution instead of eliminating it.

CHAPTER 4
PROJECTING AN OPTIMAL DESIGN OF POLITICAL EMPOWERMENT

A. Targeting the constitutionalization of politics

In the previous chapter, it was mentioned that judicialization of politics is one of the most overwhelming trends throughout the world.³²⁴ This tendency proves innate wherever countries and societies make steps towards democracy. Whether in Asia, or the post-Soviet Eurasia, or still in Europe, democracy brings courts to politics which turn to become considerably bound by constitution and the courts: recently we witnessed the judiciary in Pakistan playing an important role in political developments in this country,³²⁵ the Kyrgyz Constitutional and Supreme Courts actively involved in the democratic processes in this country;³²⁶ higher courts in Central and East European countries, from Hungary to Ukraine, have to some considerable extent determined the course of political processes in post-communist Europe since the collapse of the communist regime.³²⁷ Against this background, it seems that the inferences about the democratic potential of the global spread of judicialization are well grounded,³²⁸ though the students of courts and politics hardly have only one opinion about this statement.³²⁹

That judicialization, or to be more precise, “judicial constitutionalization”³³⁰ of politics would be good for democratic development in post-authoritarian countries of my research, where the regimes used to tend and still keep tending to abusive concentration, is suggested by a strong intuition. After all, the political practice in these countries is so corrupt and discredited that any subordination of politics to a law or rules of game would be a great improvement. In light of the degree of lawlessness and political abuse in many of the subject countries since the beginning of the 90-ies and often up until now, this statement sounds convincing enough. However, if the

³²⁴ Supra note 235-236.

³²⁵ In particular, in 2007 the Supreme Court of Pakistan entered into a standing opposition to the country’s President Pervez Musharraf and assumed the interim leadership of the resistance to Musharraf’s growing authoritarian rule. The conflict between the Court and the President culminated in the same year after the latter made an attempt to resign the Chief Justice of the Court. But more to the point, the Supreme Court played an especially decisive role when it reserved the last word in Musharraf’s plan to impose an emergency rule and to get reelected as president while staying the chief commander of the army. See Whit Mason, “Order v. Law in Pakistan”, *World Policy Journal*, Spring 2008, Vol. 25, N 1, 59-71.

³²⁶ As discussed in the preceding chapter.

³²⁷ For Hungary, see footnote 5. For Ukraine, see the discussion on this country in the previous chapter.

³²⁸ Tom Ginsburg, supra note 196.

³²⁹ Ran Hirschl (see *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, supra note 235, is probably the most vigorous critique of the statements about democratic credentials of the widespread judicialization in our days. In *Towards Juristocracy*, he rejects the “mainstream” appraisal of the democratic nature of the worldwide expansion of judicial review by examining the political aspects of constitutional judicial review in Canada, New Zealand, Israel and South Africa, which brings him to a conclusion about the political origins of and strategic considerations underneath the trend towards *juristocracy* all over the world.

³³⁰ See Richard Pildes, “The Constitutionalization of Democratic Politics-The Supreme Court, 2003 Term”, 118 *Harvard Law Review* 29 (2004), at 34.

need of these societies was merely constitutionalism as order, one could observe a certain degree of “constitutionalism” being achieved in many of these countries. As an example, Richard Sakwa, a famous student of Russian politics, shows that the authorities in modern Russia are to a large degree bound by the frames of the Russian Constitution and that “the letter of the Constitution is the ground over which much of politics in contemporary Russia is fought.”³³¹

If so, what type of constitutionalism do we want for these countries? In essence, if we reduce constitutionalism to simply an order and if we reduce rule of law to simply effective law enforcement, one could speak of constitutionalism in present-day Russia and rule of law in the Soviet Union. I think of a completely different, a genuine image of constitutionalism, and I argue that praising formal constitutionalism, which one finds in many post-Soviet countries, does not make any sense because the type of “constitutionalism” in case is both misleading of the legitimate democratic value-system and is instrumentally accommodating for non-democratic abuse of power. As opposed to it, the desired order to arrive at should be the one based not on a *nominal* or a *façade* constitution,³³² but a constitution *proper*- a frame of political society for the purpose of restraining arbitrary power.³³³

In which mode of judicial interpretation can the judges better serve the needs of genuine constitutionalism and democratic development? To jump forward, my position shall be anchored on Ronald Dworkin’s ideal of constitution as a theoretical framework embodying moral rights against the state.³³⁴ If so, any one who is familiar with this theory will easily guess the leaning of my court project towards a compliment to activist judging by means of which the judiciary “must be prepared to frame and answer questions of political morality.”³³⁵

This chapter will start by arguing that when the existing legal culture “requires” judges to strictly follow the rules and procedures put down in laws and when these rules and procedures are fine-tuned to serve the needs of incumbent political elites- and plenty of evidence will be submitted to show that this is what we have in post-Soviet countries until now- the norms of democracy can not be upheld but only if judges activate the genuine meaning of the constitutions which are written in the language of modern democratic standards. Among the constitutional court cases discussed in the previous chapter, two are striking by the language and reasoning of courts which derive from the concepts and principles of constitutional democracy rather than from the rules and norms micro-regulating the activity of these courts and the outcome of their decisions. First, this is the case of the 2003 presidential elections in

³³¹ Richard Sakwa, *supra* note 172, p. 7.

³³² Giovanni Sartori, “Constitutionalism: A Preliminary Discussion,” 56 *American Political Science Review* 4 (1962), p. 861.

³³³ Sartori, *Id.*, p. 860.

³³⁴ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977), at 147.

³³⁵ *Id.*

Armenia and the judgment of the Constitution Court concerning the controversy over the results of the elections.³³⁶ As discussed at length, the Court, having upheld the results of presidential elections, submitted a non-binding recommendation addressed to the major political forces with a call to hold a “referendum of confidence” for overcoming the results of the social stand-off. Neither was the Court authorized *per se* to deliver such recommendations, nor did the laws of the country provide for the institution of the “referendum of confidence”. The Court’s manifestation was based on an inventive and creative interpretation of the Constitution, particularly of the Preamble to the Constitution with its general statements about civic harmony and democratic principles, though neither did the Preamble expressly provide for the option of the referendum as a means to overcome political confrontation. Second, it is the 2007 decision of the Constitutional Court of Kyrgyzstan invalidating the constitutional amendments passed by the Parliament of this country.³³⁷ Here too, the Constitutional Court was not expressly given a right by the Constitution or the laws to act in such a manner.

In an essay reflecting on the issue of judicial independence,³³⁸ Kim Lane Scheppele mentions the two techniques applied in these cases among the tools which courts in different countries are using for reacting to political pressure which often comes in the form of explicitly detailed laws: activating constitutional preambles,³³⁹ declaring constitutional amendments unconstitutional,³⁴⁰ changing the accepted rules of procedure and standing of the court,³⁴¹ recalling general principles of law or morality which are not mentioned in the text of the constitution.³⁴² Obviously, these adjudicative instruments contain a fair portion of constitutional lawmaking as they entail “modification of the constitution through adjudication (interpretation or application)”.³⁴³

Judicial activism comes to the fore, whether or not one is comfortable with the degree of controversy related with this phenomenon. To begin, the reactions of the politicians, the public, or the academics have not always been complimentary of it. There are perhaps not so many issues about the judiciary and its organization more controversial than the issue of judicial activism. The debate and controversy involve not only the normative questions about the legitimacy of this style of judicial practice, but also the term’s definition and its exact

³³⁶ Supra note 288.

³³⁷ Supra note 307.

³³⁸ Kim Lane Scheppele, “Declaration of Independence: Judicial Reaction to Political Pressure,” in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Stephen Burbank and Barry Friedman (CUP 2002).

³³⁹ Id. at 248. The landmark 1971 case of the French Conseil Constitutionnel (Décision n° 71-44 du 16 juillet 1971), which recognized the charter of rights embedded in the centuries-old *Déclaration des droits de l’Homme et du citoyen* to be the integral part of the Constitution, is referred here as the classical paradigm of “activating preambles”.

³⁴⁰ Id. at 251. On this, see also Gary Jacobsohn, “An Unconstitutional Constitution? A Comparative Perspective”, *Int’l J Con Law*, Vol. 4, No 3 (Jul 2006).

³⁴¹ Id. at 259.

³⁴² Id. at 257.

³⁴³ Alec Stone Sweet, “The Juridical Coup d’Etat and the Problem of Authority”, 8 *German Law Journal* 10 (2007).

meaning.³⁴⁴ In this work I should avoid attending the debate and its intricacies as this would obviously be beyond our intentions. In light of the observed variety of definitions of the phrase “judicial activism” and their divergence, the term, standing alone, does not mean anything unless one discloses the exact meaning in which it is going to be used.

For the purposes of this research, I will exclusively adhere to an understanding of the term “judicial activism” as a style of judicial interpretation which is intended at protection of constitutional principles and for this reason can depart from the existing precedent or the accepted interpretation of the original constitutional meaning- a perspective on judicial activism which has exclusively positive connotations related with the judicial protection of constitutional rights.³⁴⁵ At the same time, as a substitute to the term “judicial activism” in the mentioned meaning and in reference to what I want to advocate for post-Soviet constitutional review courts, I will interchangeably pass to alternative explications of the judicial interpretative method, these alternatives being the conceptual “moral reading” of Ronald Dworkin³⁴⁶ and the more specific but spatially relevant “taking critical distance on the statutes” of Kim Lane Scheppele.³⁴⁷ I will advocate a constitutional reading of a style which accepts a main line of understanding the essence of constitutions as basic, higher law, law of principles and moral values preceding the written law and the mere will of majorities.

My attempt, further on, will be to advocate the thick notion of constitution and constitutionalism and the respective interpretative methods from the perspective of the functional needs of transitions. Hence, I campaign that *constitutionalization proper* of politics through judicial activism is absolutely desired in post-Soviet societies for at least two essential functions that it could perform in a transition: it could indeed empower courts, strengthen their independence and promote separation of powers, but also, and perhaps above all, it would in effect help activating the genuine meaning of democracy and hence contribute to the core institutional learning and appreciation of democracy which we observed earlier to be the most essential pre-requisite for democratic consolidation.

Activating democracy

³⁴⁴ It is even impossible to give any comprehensive reference to the most noteworthy or important theories or definitions as there have been so many of them outlined by the most prominent practitioners and academics that not a single one can be given a special attention or preference. A good overview of the existing theories and controversies is offered by Keenan Kmiec, “The Origin and Current Meanings of “Judicial Activism”, 92 California Law Review 1441 (2004).

³⁴⁵ According to Kmiec (Id, p. 1451), the civil-rights-oriented understanding of judicial activism carries one of the most accepted connotations of the term, and in this accepted interpretation it is considered as rather a compliment.

³⁴⁶ Ronald Dworkin, *Freedom’s Law*, *supra* note 18.

³⁴⁷ Scheppele, *supra* note 338.

This paradigm takes us back to the discussion in the first chapter and to the most important, educational, aspect of democratic consolidation to which I referred elsewhere in this work. We discussed that democracy is new to the countries of this study, and that democratic consolidation depends on the intrinsic and inner learning, understanding and appreciation of the democratic value system and the democratic principles at the first place. The transition from communism in these countries has so far resulted in incorporation of the formal structures of the democratic system, its basic engineering and the written constitution, while little progress has been made in understanding the very core molecular structure to be underneath the formal democratic constitutions. As a result, democracy here has come to be understood mostly as a rough method of power generation and governmental empowerment, while the role of constitutions is understood to be in providing for essentially the crude rules of that process. Not being a surprise, in this light, the science of constitutional law in post-Soviet universities often remains to be “state law”, as in Soviet times, instead of “constitutional law”, or the two terms appear to be virtually synonymous and are used interchangeably as identical terms for defining the subject.

My criticism does not intend to claim that constitutions should be viewed only as collections of moral values and fundamental rights. The authority of the alternative statement that constitutions do and that they likely have to draw the contours of governments is not what I intend to challenge. Even the highly convincing anthropological analysis of Giovanni Sartori, having underlined the essential historical and institutional designation of a constitution being a fundamental set of principles which restrict the political power, suggests subsequently that the ideal of the constitution has turned to degenerate with time and that what the constitution means now is not only its original and essentially the most important element of bill of rights, but also simply a plan of government.³⁴⁸ What I suggest is rather that the constitution’s designation as an organizational chart for a government should not be viewed as its sole valid *raison d’etre*, as it is predominantly the main line of understanding of constitutions in post-Soviet societies, and that whenever we think of constitutions as organizational charts, the other, the “nuclear meaning”³⁴⁹ and the “telos”³⁵⁰ of constitutions should never be forgotten and should essentially be the proper underlying ideological framework for the government. I argue that this is exactly the mentality that is in a big deficit in the post-Soviet constitutional culture.

Where the democratic-constitutional culture is missing its basic grassroots understanding and where the ideal of the constitution ends up denoting a plan, chart or a procedure, the very fundamental principles of constitutions acquire a static declaratory function. Absent the mores of judicial elaboration on these principles, the substantial reading of fundamental law is left to

³⁴⁸ Sartori, *supra* note 332, p. 866.

³⁴⁹ *Id.*, p 860.

³⁵⁰ *Id.*, p. 855.

the sole responsibility of statutory explication. But can the allegedly explicit statutes fully express the genuine meaning of a constitutional principle which longs for a substantive evaluation in each specific situation? Hereby I will argue that the prospect of democracy in our countries is severely undermined by the incapacity of the legal order in place to perceive and make sense of such substantive evaluation, the “moral reading”. Instead, we will see that the “moral reading”, that is the reading of constitutions based on the essential value-system represented by the document, is replaced by what I would call “procedural reading”, which misinterprets the genuine meaning of democracy and constitution in several ways.

Let me elaborate on this a little more. To start, one should understand the enormously positivist and legalistic vision of the constitution and the law in general in post-communist environments.³⁵¹ In this legal culture the law has never been perceived as an objective virtue: *jus*, but solely as a man-made rule: *lex*, and the perception of the latter is said to have “seriously complicated the development of post-Soviet constitutional systems.”³⁵² As such, the law-*lex* should have never performed as an integral part of a concept, constitution, or any supra-statutory authority, but only as a procedure. In Soviet times, these procedures were put to describe how the state program of housing or the rules of inheritance, or the marriage and divorce, for example, work. By the strong and invisible force of cultural dependency, the higher principles of democracy, expressed in modern written constitutions, are given a solely procedural extension through the laws on, let us say, demonstrations and political manifestations, where the provision on the freedom of expression and freedom of assemblies of the written constitution is given merely a ceremonial shape: demonstrations and rallies can be held in this or that time, in this or that place, in this or that way and so on. The meaning of the law of assemblies ends up here.

Consider a case, A v. B,³⁵³ where the applicant A, a political party, goes to a general court with a complaint against the municipal body (B). B has repeatedly violated its constitutional freedom of assembly by refusing, for different reasons, to allow a demonstration organized by A to be held in the capital city. For several consecutive days, B had found different reasons to disallow the demonstration in the traditional place for political assemblies known as “Our Hyde Park”. After all, when no more “valid” reasons for refusing the demonstration could be thought of, B had authorized the demonstration to be held in another location while allowing the pro-governmental party’s demonstration to be held in “Our Hyde Park”. For the demonstration of A, B had “allocated” one semi-constructed square in a remote district, on the outskirts of the city and a nearby village. That square is still under construction, and the bulk of heavy

³⁵¹ William Butler, *supra* note 179.

³⁵² *Id.*, p. 59.

³⁵³ A v B is a hypothetical case which largely relies on patterns of political technologies observed during the campaign of 2007 parliamentary elections in Armenia.

construction machinery is occupying most of the area in a way that no big crowd can gather there.

In the complaint, A argues in part that allowing its pre-electoral public assembly only in a remote district of the capital city and in a square which is not appropriate for a political assembly is in breach of the fundamental constitutional provision on freedom of assembly. Meanwhile, A argues that the principle of equality is violated by the fact that “Our Hyde Park” was given to the pro-governmental party while it was refused to A.

The general court (GC), reviewing the complaint, finds that there is no violation, referring to an article in the law on assemblies which provides that the municipal body (B) can refuse holding of a political rally in a particular area if the latter is reserved for another public event. The GC also says that the law provides that if the requested area is already reserved for another demonstration, the municipal body can provide an alternative area for a demonstration. A argues that the article of the elections law implies that the “alternative area” should be an equally good place for demonstration but not a remote place on the brink of the city and the neighboring village and that the place needs to be appropriate for public gatherings. GC rejects this argument saying that the law does not expressly provide for this in which case B was free to assign any free area for the demonstration.

Through this pattern of legal formalism, the substantive constitutional law of political processes gets a status of a routine administrative law, which is governed by the letter of the statutory law, but never by the spirit of the law, not even speaking of higher law. Here, constitutionalism and democracy are reduced to the level of a procedure. I call this phenomenon the “procedural concept of democracy” and I consider it to be in the core of the “post-Soviet concept of constitutionalism”.

The depreciation of constitutional law to the level of a routine procedure was clearly the case in Kasyanov v. Central Electoral Commission³⁵⁴ which will be discussed in more details later in this chapter. In this case which came before the Supreme Court of the Russian Federation, the fundamentally constitutional and politically very sensitive and important case of barring the key oppositional candidate for the presidential elections in Russia ended up in a review of compliance of the formal process of nomination of the candidate with the scrupulously detailed routine provided by the law on presidential elections and by supplementary standards imposed by the Central Electoral Commission. In particular, the case was largely reviewed under the Law on the Elections of the President which provides for a detailed procedure for nomination of the candidates, including a list of bureaucratic and highly formalistic requirements. The

³⁵⁴ See the decisions of the Supreme Court of the Russian Federation dated 5 and 15 February 2008.

Central Electoral Commission, in its turn, has issued further standards for the procedure of compiling the required documents, and these also governed the case.

When the case of barring the candidate, who was accused in failing to properly comply with the formalities of the procedure for nomination, reached the Supreme Court of Russia, the judicial discourse concentrated entirely on the procedures stipulated by the law and the normative acts of the electoral commission in a complete detachment from the constitutional domain.³⁵⁵ In this way, the essentially constitutional province gets reduced to the level of routine procedures.

This “procedural legalism,” what is obvious, reduces democracy to a mere prescribed routine. The judiciary, and here, especially the constitutional judiciary, has an important mission to accomplish, if it is guided by the “spirit”, rather than by the “letter” of the law. Surprisingly enough, when a post-authoritarian society is missing its own insights and the inner sense of democracy or the rights discourse and when the new regime is failing to duly inject these virtues, an important mission of learning of the democratic way and the essential rights mentality is accomplished by (not to be a surprise!) courts. However, these are the foreign, mostly American courts, which spread a culture of rule of law through Hollywood action movies with their common references to the courtroom procedures.

The essential virtue of this mode of learning via judicial explication, as opposed to the inactive learning through familiarization with the formal institutional construction, is that the fundamental constitutional principles and rights come into view not in their original static and declaratory shape as they appear in the constitutional text or the laws (formal institutions), but they emerge as elaborated systems of conceptual judgments, applied to concrete life situations. Influenced by an integral reading of the higher law, spread via the TV, an individual facing a violation of his or her essential procedural rights is not solely declaring that he or she has a right to due process³⁵⁶ (one of few constitutional principles which strike by their “abstractness”)³⁵⁷ or that no search can be done without a probable cause,³⁵⁸ but that he or she has a right not to be arrested or detained without a reasonable belief that a person has committed a crime³⁵⁹ and that a mandatory warning has to be given when getting arrested,

³⁵⁵ For the detailed analysis of *Kasyanov v. CEC*, see the discussion at the end of sub-chapter B.

³⁵⁶ Provided for by the 5th and the 14th Amendments to the US Constitution.

³⁵⁷ The 14th Amendment reads in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

³⁵⁸ The Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

³⁵⁹ More precisely, the standard of the probable cause in the case of arrest nowadays requires that “the facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime.” *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989).

etc.³⁶⁰ In other words, this doctrinal rather than textual discourse, better than any other, teaches the people what the real constitution should mean- limitation of power and unacceptability of unduly interference in the liberty of the people.

This is equally relevant to the political domain. The decisions of constitutional courts must be the key sources of advancing a perception of a political constitution *proper*: constitution against a political abuse, one which would certainly consider improper hindrance of the political rally as an arbitrary interference in the political freedom of the people. Otherwise, the procedural treatment of democracy transforms into a handy instrument of unconstitutional reproduction and concentration of the political power. In the absence of the essential interpretation of what is fair or not, or what is equal or not in the process, the crude electoral law is being abused by the elites in possession of the political power for reproduction of their power through the electoral process, which is fine-tuned to produce the wanted results by sophisticated electoral technologies which apparently seem legitimate. For example, the incumbent authorities in Russia in the case of Mikhail Kasyanov, which we discussed recently, used the procedural treatment of elections law as a comode instrument for ruling their main oppositional rival out of the elections. Paradoxically and to the amusement of democratic theorists, this particular technology of power reproduction, which is unconstitutional in its core, is absolutely constitutional under the procedural-positivist reading of democracy.

This “politics of legalism”³⁶¹ has to do with the same one-sided proceduralist interpretation of the constitutional democratic process, according to which the political power is distributed in the results of elections, the process of which is explicitly described by the written constitutions and the laws. This line of argumentation is as simplistic and degenerating for genuine democracy as it is “legitimate” under the procedural reading: the constitutional prescription of the process says “take the power if you get more votes”, as simple as it is, without the due care of the fair and equal process with the due mechanisms of horizontal or vertical checks and limitations on the abuse of resources and power in the electoral process. In the minds of proceduralist constitutional readers, the major democratic principle is simply “take the power if you receive more votes”,³⁶² while the process of elections and the described violations, when

³⁶⁰ The rule of “Miranda warnings” requiring the US police officers to give mandatory warnings to suspects in custody before they can go on with criminal proceedings (originating from *Miranda v. Arizona*, 384 U.S. 436, 1966)- a legal procedure which can be seen in so many American action movies, is perhaps the most lucid illustration of how the specific constitutional law can get known more through the popular culture (in particular, through Hollywood movies) than through its professional application.

³⁶¹ By the term “politics of legalism” or “political legalism” I only highlight some patterns which were long ago observed to be inherent to the regimes in the former Soviet Union. See Steven Levitsky and Lucan A. Way, “The Rise of Competitive Authoritarianism”, *Journal of Democracy*, Vol. 13, N. 2 (2002), p. 53.

³⁶² For a critique of the crude, “majoritarian” vision of democracy in post-communist environments in general, see András Sajó, *Limiting Government: An Introduction to Constitutionalism*, Central European University Press (1999), Introduction.

revealed, are assigned to a different, non-constitutional, or sub-constitutional area, which is treated in a surprising detachment from the key constitutional domain.

In fact, here the positive law and the positivist legal culture are being used by incumbent political leadership for the purposes of its preservation and reproduction. The techniques of power preservation and reproduction in these scenarios rely not only on the immense abuse of power and use of administrative resources, but on the employment of a law-enforcement machinery based on a crude and legalistic treatment of a statutory law created by the same leadership. Interestingly, this practice, as a rule, tries to avoid political trials,³⁶³ as these are too obviously associated with terror and repression,³⁶⁴ while in line with the logic of imitation rather than denunciation of democratic practices,³⁶⁵ post-Soviet leaders avoid openly oppressing their opponents. Instead, they prefer to covertly undermine them. The typical “technologies” for the latter include banning opposition demonstrations and rallies because they are not authorized or did not comply with the procedures prescribed by law,³⁶⁶ closing down oppositional TV channels and other media referring to different instances of violation of law by them or by their owners,³⁶⁷ excluding candidates from elections because of non-compliance with the routines of the electoral process,³⁶⁸ prosecuting, on the grounds of tax law, business entities which are sympathetic to opposition parties,³⁶⁹ etc.³⁷⁰ - all these being done with the excuse of the *letter of law* which creates the illusion of “legitimacy” of these actions in the eyes of the people. This is what I call “political legalism”.

The above-mentioned case, A v B, illustrates how politicians resort to political legalism for the purposes of undermining the rival political movements. In A v. B, political legalism is reflected

³⁶³ With the exception of the most concentrated regimes (in Turkmenistan, Uzbekistan and partly in Azerbaijan but also in other countries at different times) where political trials are still common and there are regular reports about political prisoners by international human rights organizations. The statement above, however, needs to be taken with reasonable reservations: to say that most of the governments avoid political repression and trials does not mean to say that in respective countries no political trials have taken place. For example, the statement is generally true about Russia where not even the leaders of the 1993 Coup were subject to political oppression in the present meaning, but yet one can find random cases of what we could call a “political trial” (the case of Mikhail Khodorkovski, for example).

³⁶⁴ Judith Shklar, *Legalism: Law, Morals and Political Trials*, Harvard University Press (1964), p. 149.

³⁶⁵ See “The common patterns of governance” in Chapter 2.

³⁶⁶ This happens regularly in every country in the post-Soviet area. For one, the opposition in Armenia was refused to hold any public gatherings for as long as 45 days in the aftermath of the presidential elections in 2008.

³⁶⁷ Independent media was muted in Russia by means of persecuting the owners of the TV stations with biggest national audience after Vladimir Putin became President (see, Michael McFaul, “Sovereign Democracy and Shrinking Political Space”, *Russia Business Watch*, Vol. 14, N 2, April-June 2006); *AI+TV* barred before the presidential elections in Armenia in 2003 and *Gala TV* closed before the presidential elections of 2008; “*Imedi TV*” temporarily barred in Georgia right before the presidential elections of 2007.

³⁶⁸ See Kasyanov v. CEC (supra note 354) discussed further in this chapter. See also Skuratov v Russia, 21396/04, *ECHR*, 2007.

³⁶⁹ The Yukos Oil Company is believed to be subject to responsibility for “tax evasion” and other charges for the reasons of its opposition to the incumbent political elite in Russia; “*Sil Group*”, one of the biggest corporations in Armenia, acquired tax problems immediately after backing the oppositional presidential candidate in the elections of 2008.

³⁷⁰ For one, see Gusinskiy v Russia, 70276/01, *ECHR*, 2004, where the European Court of Human Rights acknowledged that the prosecution of Vladimir Gusinskiy, one of Russia’s richest men who controlled the most influential independent media group, was used to intimidate him rather than for bringing him before the court for committing a crime.

in B's actions and reasoning. B, the political agent of the incumbent power-holders, finds a number of "legalistic" excuses for reducing the effect of the expected demonstration of the political party A. Firstly, B rejects A's application to hold a demonstration in "Our Hyde Park" justifying its rejection by invalidity of the application submitted by A which is due to technical omissions in the application form to be submitted prior to the demonstration. Next, on the following day, B refuses to allow a demonstration in "Our Hyde Park" because the Park has been reserved for a public recreational show to be held on the requested day- worth to note that the recreational show has been initiated and approved by B itself right on the same day. Finally, A's is being refused access to "Our Hyde Park" on the last day of the pre-electoral campaign because the square is now reserved for the political rally of the pro-governmental party. The "alternative place" in which B allows A's demonstration, as mentioned, is not good for gatherings.

One way of reaching the same political end, that is making obstacles to effective political campaign by a rival political group, would be to ban the opponent's demonstration in an obvious violation of constitutional and statutory requirements. However, the legalistic technologies, to which the incumbent politicians resort, create an additional value to the enterprise of power-holding: an external illusion of legitimacy of the action. This legalistic reasoning gets the compassionate support of the judiciary which is generally well-familiar with and is used to the same style of formalist legal reasoning.

However, the legal formalism of this type is primarily exploited by the political elites in power for their partisan purposes, while their reference to these methods presents a signal to courts about the preferred way of interpretation of the concerned law in case of a potential complaint. This habit represents a typical pattern of Soviet-time practices of political instruction on the outcome of judicial cases, commonly referred to by the term "telephone justice".

One way or the other, the legalistic constitutional culture here performs an immoral role of the involuntary agent of political abuse. The prospect for democratization is aggravated by a perception of the legitimacy of such abuse by the public, which can often be persuaded by the apparent constitutionality and legitimacy of the political power reproduction. This makes clear for us that the type of constitutionalism, which we are witnessing in the part of world in case, exactly exemplifies the opposite of what genuine constitutionalism should mean: limitation on power. In effect, the described, post-Soviet, vision of constitutions and constitutionalism does not mean restricting, but right the contrary- enabling the power.

What I call the abuse of political power through a procedural vision of constitution would probably be noticed by Sartori as an essential feature of nominal constitutions - the ones which serve as merely "collection of rules which organize but do not restrain the exercise of political

power in a given polity”.³⁷¹ Disclosing the nature of “nominal constitutions”, Sartori refers to the following definition, found in another work: “The constitution is fully applied and activated, but its ontological reality is nothing but the formalization of the existing location of political power for the exclusive benefit of actual power holders.”³⁷²

Perhaps I would not be able to find a better definition for what I was portraying in the proceeding paragraphs and what I consider to be a substantial threat to democratic development. In such circumstances, any written law, including written constitutions, are subject to manipulation by self-selecting political elites for the purposes of reproduction of their power. Obviously enough, this obstacle to democracy is hard to fight until some stronger agents pursue activating of democratic constitutions in genuine meaning- objective democratic constitutions which exist regardless or beyond the written law. The courts, and constitutional courts in the first place, have a crucial role to perform here, I believe.

I do not argue that courts are the only or the best promoters of the genuine contents of the democratic way. But I argue that they are one of them, if not the most effective one. The 2003 decision of the Constitutional Court of Armenia³⁷³ and the 2004 decision by the Ukrainian Supreme Court³⁷⁴ (discussed in the previous chapter) should have had an enormously educative effect on the society. They were among the rare sources of insight opening for the public that democracy is not only about who gets the majority of the electoral vouchers with his or her name marked on them- because democracy is not something that we may reduce to mere arithmetic- but that democracy is essentially about the fairness of the entire process, legitimacy, confidence, and support of the political power by its principal, the people.

Separation of powers

My next argument- that judicial activism empowers courts- may be tested in a range of ways. For one, the assumption flows from the reflect statement that positivist legal orders disempower courts as they provide little room for judicial independence because, in a nutshell, courts in these cases do nothing more than follow the directions of political branches which take forms of laws.³⁷⁵

One should be inherently aware of the degree of illegitimacy of many political regimes in post-Soviet countries to let this argument proceed despite the apparently enormous vulnerability of

³⁷¹ Sartori, supra note 332.

³⁷² Sartori, supra note 332, p. 861.

³⁷³ Supra note 288.

³⁷⁴ Supra note 294.

³⁷⁵ Kim Lane Scheppele, supra note 338.

this statement from the point of view of normative democratic theory. According to democratic theory, the laws are exactly supposed to be produced by a political branch representing the electorate and the way in which these laws get legitimacy is their emergence through a democratic legislative process. But here, as once previously in this discussion, we can see that the normative question at stake would be better answered by an empirical investigation. If “positivism binds law to politics”³⁷⁶ in a way that it is difficult to make sense of the core democratic process as such, then the validity of the democratic pre-condition turns to be dependent on the empirical material to such an extent that one of its core normative propositions (if the counter-majoritarian difficulty can ever be qualified as such) has to give precedence to alternative conceptions. Being bound to American, European or Russian politics is something of huge difference here, and the discussed practice of political abuse of the positivist legal culture in Russia and elsewhere in the region may serve as a clear illustration for this case. If the law shall be bound by politics at all, then one should pre-suppose the politics to be necessarily legitimate.

But this elaboration, though relevant, seems to depart from what Kim Scheppele wants to emphasize at first place: whether or not we approve of law’s subordination to the political branches or to politics, the main insight remains that the judiciary which is used to positivist attachment to that law is more dependent on these politicians and politics than the judiciary which “takes a critical distance on statues.” The talk here is about judicial independence, and this is the line of argumentation that I now need to advance after having the essential normative problems somehow left behind. The dependence on the explicitness of the law produced by another branch of government leaves not much at the disposal of judges for challenging the political authority and the validity of its action. The judge in this case transforms into a simple endorsing function.

A new perspective on the question may open from the angle of judicial politics, though the two perspectives often intermingle. The courts’ interpretative discretion creates uncertainty for those affected by their decisions. Constitutional courts’ interpretative discretion thus empowers judges by making the concerned politicians dependent on them. In this way, it is argued, judges acquire power- a political power.³⁷⁷ This point merits elaboration in light of the described mechanisms of post-Soviet reproduction of power where the incumbent politicians employ apparently legitimate legal instruments for reaching essentially illegitimate, unconstitutional purposes. The confidence of the politicians in the rational validity of such enterprises has to be fully reliant on the rule-centric legal culture in the judiciary which is not thought to challenge these laws based on an integral reading of the constitution. In fact, the politicians do not even

³⁷⁶ Id., p. 238.

³⁷⁷ Carlo Guarnieri and Patrizia Pederzoli, *supra note 235*, at 157.

need to bother to attack the courts for reaching their ends: the courts' dependence on the politicians is pre-set by the deeply positivist order in place.

But let us now suppose that the politicians would be aware of the courts' predisposition to subject the laws in case to a critical, extended and integral constitutional review. This would certainly lead not only to politization of courts, which I would argue is unavoidable in any case, but also to their political empowerment and greater independence.

The two essentially different perspectives about how judicial activism may empower courts confirm the strong intuition that "creative" judges are obviously more independent than the ones which are not. What is really essential for this work in what was suggested by both of these extraordinary positions is the clear indication of the limitations of the roman-style, positivist, explicitly regulative law and its destructive consequences for judicial independence. But the two positions represent the different ends of the same argument: positivism disempowers and activism empowers the courts. This hypothesis will guide the discussion further, in a more applied context, throughout the next section.

B. Designing constitution of principles

I take the earlier reflection on the limitations of the roman-style "explicit" law and positivist legal culture in general as a starting point and hereby proceed to advocate the virtues of a constitution to be primarily written in the language of principles, not rules and procedures. This basic proposition shall ensure to avoid potential misreading from the very beginning. Arguing only that constitutions should contain written provisions as abstract as possible would be potentially not that constructive, and possibly unprofessional as well. I would think in stead designing a constitution-principle (as opposed to a constitution-puzzle that an "abstract" constitution would become for a society that only starts making sense of the basic democratic phenomena) should envisage principles laying down not merely some potentially controversial axioms, but politically valid concepts which are backed by a certain institutional vision.

To say that this position refers to the paradigmatic American Constitution will be possibly correct, but not wholly sufficient. It is believed by many people that the American Constitution is written in an unclear or vague language. Apparently, this seems to be obvious when reading especially the Bill of Rights. But what one intuitively suggests when referring to the words "unclear" or "vague" in relation to constitutions is a rather negative connotation, since the intuitive proposition about the constitutional law, as any other law, is that it ought to be clear and straightforward in defining the foundations on which to build a society. However, a critical

analysis may offer that what one may think as carrying those described negative connotations can, in fact, be attributed to the greatest virtues of this Constitution.

In my view, this latter perspective is more than persuasively demonstrated by Ronald Dworkin, who, once again in this chapter, offers indispensable insights for my project. His elaboration on the virtues of the language of the American Constitution proceeds by a subtle analysis of constitutional *concepts* as opposed to *conceptions*- the two representing a crucial distinction which, in his words, has not been properly appreciated by constitutional lawyers.³⁷⁸ Concepts, according to Dworkin, appeal to moral virtues, such as fairness, equality, and so on. Conceptions, rather, explicate the meaning of concepts. For example, conceptions could provide that the concept of equality means the same school for both white and black children and not school segregation, and that the ban on carrying head-scarves in schools is not discriminatory and is not jeopardizing the concept of freedom or if it does, then it is for the purposes of protecting some other important values and only in a way that the key concerned values coexist in a harmonic balance. In this context, the apparently vague constitutional clauses of the American Constitutions are, as Dworkin puts it, “appeals” to moral concepts, which, as I think to be suggested by the logic of this theory, should not be made explicit by constitutions for the clear reasons that they are unfeasible for unilateral and uniform explication. If so, Dworkin says, the abstract constitutional concepts cannot be “more precise by being more detailed.”³⁷⁹

This theory denotes a tremendous wisdom for the science of constitutional law and constitutional engineering by its delicate and philosophically prudent reference to the pluralism, on one hand, and dynamism, on the other, of the human society and its ideological tendencies, beliefs and moral judgments. The soundness of such statements can be illustratively confirmed by recalling the same, American, constitutional history and the great many instances of controversy proving the virtue of the Constitution being written in the language of concepts, not conceptions- the problem of race being perhaps the most illustrative indication of the remarkable movement in the American conception of equality since the birth of the Constitution. The design of a constitution-concept, as opposed to a constitution- conception, thus, for the most part can also be a valid answer to what might be viewed as one of the most profound oppositions to the moral justification of constitutions and constitutionalism- the conflict between the “ancients” and the “moderns”, the paradox of “precommitment” and the

³⁷⁸ Dworkin, *supra* note 18, p. 134.

³⁷⁹ *Id.* at 136.

natural reluctance of the modern generations to live under and be guided by constitutions created by their passed predecessors.³⁸⁰

I attempt an analogous application of Ronald Dworkin's theory to the domain of government and its constitutional design. Just as Dworkin draws the border between concepts and conceptions in relation to constitutional human rights- certainly the key part of a constitution, I offer a similar distinction of constitutional provisions for the institutional design of the government. A necessary introduction needs to be drawn about the distinction between principles on one hand and procedures and rules on the other. Principles, in this context, represent the substantial notion and meaning of either concepts (mega-principles) or conceptions (principles), while procedures and rules represent the particular configuration and the mechanism of concrete conceptions.

Earlier, in the first chapter, we observed that one of the greatest virtues of institutional design, especially in a transitional country, is its responsiveness to change. In particular, we tried to argue that optimality of institutional design requires dynamism: what may seem to be optimal today can appear to be no longer so tomorrow. This is, above all, due to the recognition of such phenomena of human societies as their constant evolution or being otherwise subject to continuous changes, as well as their fallibility.³⁸¹ It was observed, in addition, that transitional societies and countries are subject to these in a much more intensive way.

At the same time, I have also discussed the apparent conflict between the two desired attributes put for optimality of the institutional design in these countries: durability and capacity to adapt to changing circumstances. The paradox of this supposed conflict, which we only hypothetically mentioned previously, is getting an answer by the framework of concepts and conceptions translated into the "language" of constitutional institutional design. Just like the moral concepts such as justice, fairness or equality perform as the basis for durability and the respective conceptions carry out the burden of adaptation and change, the principles and procedures of the design of the democratic government shall respectively ensure the concurrent durability and robustness of the constitutional design.

The apparent intricacy of this argument is concerned with the differentiation between the principles on ones side and procedures and rules on the other, as well as with the question how we shall separate between these often fused categories in relation with the government? After all, if the constitutional concepts in the discussion with human rights acquire their sources from universal moral values and, as such, they can be derived from objective moral principles (however controversial the latter can be), the institutional architecture does not seem to have

³⁸⁰ See Stephen Holmes, "Precommitment and the Paradox of Democracy", in *Constitutionalism and Democracy*, edited by John Elster and Rune Slagstad (CUP, 1993).

³⁸¹ Robert Goodin in *The Theory of Institutional Design*, supra note 25, at 40.

similar sources of inspiration and apparently looks to be dependent on the accumulated institutional experience and wisdom which is missing in the case of transitional countries.

These issues may appear complex, but they are resolvable, I believe. The democratic form of government may seem to have by now offered so many variations and configurations of institutional designs, based not only on reasonably diverse models, but also, to a large extent, on quite dissimilar core (mega) principles. This may be true, and the earlier proposition that constitutions in our cases should leave the choice of this or that particular democratic form to the discretion of the internal logic of the societies and also, perhaps, to the incremental process of institutional learning, may as well be. However, all these suggestions do not purport to reject that the basic democratic form nevertheless insists on certain fundamental principles which, although hardly claim objectivity, may however be assigned to the realm of constitutional mega-principles due to their fairly stable and time-proven record of functional excellence: separation of powers, independence of the judiciary, etc.

The major difficulty with this premise lies in the realm of definitions of categories and their fusion. After all, the inclusion of the above-mentioned mega-principles is suggested by their very unquestionable authority and the indispensability of the institutions for the democratic way. But the list, afterwards, can be followed by many other principles, and some would have an underlined indication of a certain procedural form rather than a concept underneath. For example, what should be the institutions of, let us say, judicial review or civil service which are in many cases essential for the democratic institutional organization? Indeed, in practice constitutions virtually everywhere have to include also some principles which are pointing on several very specific conceptions, such as the principle of judicial review, which is in fact neither universal nor indispensable for the democratic form.³⁸² Let us call these “principles embodying the basic macro-political conceptions”. More over, it is also possible that in many cases constitutions will need to contain also some provisions of purely precise and often procedural nature (rules or procedures). How then to separate these categories in our case?

To answer, it is the time to note that the argument which I try to defend here does not claim any methodological preciseness, and neither do most of the other theoretical frameworks in the discipline which we represent. The categories of principles and procedures, at least with respect to the domain of institutional design, carry a considerable portion of relativity. The problem of definitions, then, does not look to be a big difficulty for the overall argument, if not only from

³⁸² UK is the most paradigmatic case of a good democracy which does not have judicial review. This comes to confirm the earlier-mentioned suggestion of Ronald Dworkin that by what means the democratic conditions are best met is an empirical, rather than normative question (see Ronald Dworkin, *supra* note 18, at 34). Based on this proposition, it is fair to suggest that the country does not have to have judicial review in order to be a decent constitutional democracy. In the same logic- and this can be confirmed by the great majority of cases from transitional countries- the country does not become a constitutional democracy if only it has judicial review in its constitution.

the perspective of doctrinal fundamentalism or a scientific tenet purporting to arithmetical preciseness in social science analysis, to which I do not subscribe.

The important issue should be related not with how to formally define these different categories, but with the task of “selection” in view of the acknowledgement of a series of cases where the rule that constitutions should lay down principles as opposed to procedures, has to be subject to exceptions. Obviously, in this light, the argument should in no case be that constitutions must bring only mega principles, or only principles, or that they should not include procedural frameworks at all. On the contrary, such a categorical claim would destroy, rather than build the argument. Furthermore, this argument can offer no a clear-cut methodological guideline and formula and has to rest on the premise that the tasks of differentiation and selection must completely rely on the common sense and the experience and the wisdom of constitutional designers.

The only reasonable formula that this “theory” can suggest is that (transitional) constitutions would be better off if they 1. rested on the premises of institutional mega-principles and gave them priority over the other items; 2. identified the principles outlining the basic macro-political conceptions; and 3. referred to routine rules and procedures, explicating institutional configurations within the chosen macro-political conceptions, only in the presence of reasonably necessary justifications. The mega-principles should embody the very “nuclear meaning” of constitutions,³⁸³ as well as the basic political foundations of the society. These underlying principles should bind the ensuing frameworks and arrangements. Principles representing the basic macro-political conceptions should be identified and stipulated with utmost care, as they will lie in the heart of the organization of government, will bind the configuration of the government, and will not be easy to change. The stipulation of the very model of judicial review (diffuse or centralized) and its fundamental construction, with which this work is concerned to some large extent, would fall in this category. The principles in this (second) category shall be made as conceptual as possible, and a big effort should be made to avoid subjecting them to explicit regulation in the text of the constitution.

Procedures and rules shall be avoided in the constitution, unless their inclusion is excused by a strong reason. Their regulation on the sub-constitutional level should be desired in order to avoid depreciation of the ideal of constitution and shall ensure the elasticity of the institutional design of macro-political conceptions. Inclusion of rule-like provisions in the constitution may subsequently require frequent revisions of constitutions leading to the downgrading of the ideal of the fundamental law. Alternatively, it may result in impossibility or impracticality of revising the design due to the difficulties in changing the constitutions, whereas transitional

³⁸³ Giovanni Sartori, *supra* note 332.

societies often find themselves having opted for “wrong” architecture and their amendment procedure often needs to be easy.

The constitutional stipulation of judicial review, therefore, should require provision on the essential features of this institution (as the one which is to be proposed subsequently), while such settings as the exact configuration of the courts’ mandate, tenure, qualification of judges, standing and so on would need to be subject to constitutional regulation only in the face of exceptional, well-reasoned circumstances.

The constitutional principle of political empowerment

Now I shall make an effort to apply this (so far largely theoretical) framework to the discussion of this chapter. I will take my earlier discussion about “political” responsibilities of post-Soviet constitutional courts as the occasion to meditate further on the proposed scheme, as well as to try to arrive at an idea of optimal design of political empowerment of these courts.

The subject of the pending discussion, as we can see, is not about the choice between the known macro-political conceptions of the institution of judicial review- that is between the Kelsenian and diffuse systems. It is about the constitutional prescription of a particular configuration of the institution of judicial review concerning the specific scope of the responsibilities granted to constitutional tribunals. All that said, the post-Soviet Kelsenian tribunals’ institutional settings of political empowerment can be identified as a certain, explicit procedure expanding on a particular unique model of constitutional review. If so, this construction quite visibly matches the description of the items which normally do not fall within the domain of constitutional priorities in the meaning of the argument about principle-based constitutions which I just developed. At the end of the day, the institutional design of constitutional courts’ political empowerment, as it is found in post-Soviet constitutions, hardly claims universality or any other reasonable cause for being taken as granted.³⁸⁴ Rather it is largely a post-communist constitutional experiment which had a certain political agenda at the time of drafting of the constitutions.

The political rationale behind constitutional stipulation of certain “important” prerogatives of constitutional courts, such as the review of electoral results, adjudication of jurisdictional disputes or banning of political parties, was in creation of a new powerful instrument of constitutionalism which was empowered with extraordinary responsibilities for protecting constitutionalism from certain actions which conventionally threaten it. The adjudication of

³⁸⁴ Sadurski, *Rights Before Courts*, supra note 2, p. 13.

electoral disputes was then intended for preventing electoral falsifications, the adjudication of jurisdictional disputes- for preventing concentration and abuse of power, etc. Fairly enough, this design has been provisional for exactly these reasons: it clearly addresses some particular threats which are typical to the stage of political transition. If so, one expects, this design should have allowed considerable plasticity for developing in line with the dynamic change of the transitional period.

In essence, a question meriting attention in the context of our discussion is why to provide for the micro-regulated form of political involvement of constitutional courts as a constitutionally prescribed construction and are there sufficient justifications for constitutionalization of the latter? In other words, why the specific “marginal” responsibilities of constitutional courts, such as their responsibilities with review of presidential and other elections, political parties, etc., need a special regulation by constitutions? If this question was put before the constitution-drafters at all, then most likely the answer would have been given by a reference to the same rationale for creation of strong defenders of constitutionalism, as mentioned above. Did these expectations come true? The obvious “no” to this question may seem to be the correct answer, but it may turn to be misleading in a certain perspective.

Indeed, on the one hand, nobody probably will deny that none of the post-Soviet constitutional courts were able to emerge as self-sufficient independent actors in a way that they would become an adequate limit on the government, as it was envisaged by constitutional fathers. Nevertheless, I strongly oppose that this test is used as a criterion for assessing the quality of the institutional design of political empowerment. In my opinion, the competence of such a test would fail from more than one perspective.

First, the attempt at blaming the institutional design of political empowerment in not having resulted in politically independent and influential actors would not pass if we considered the larger failures on the way of building constitutional democracies. In this obvious perspective, the failure of the design of political empowerment of constitutional courts is simply one particular fragment of the overall failure of democratic institutions. It is not only the constitutional formula for the political empowerment of constitutional courts that failed but so did most of the other democratic institutions, and they all did so, in the most part, notwithstanding their particular configuration and design.³⁸⁵ Second, the test would fail if we acknowledged the relatively successful application of the model in East European non-Soviet countries where the similar design of courts could be said having resulted in the constitutional

³⁸⁵ Previously I spoke skeptically about the political science literature which has been categorical in stating the failure of the democratic development in this region: see supra note 13. My above-mentioned reference to the failure of democratic institutions is not a sign of controversy in my arguments. Here I rather refer to the interim failures of the institutions and democratic practices or the failures only in expected optimal performances, but as the reader can guess from the entire text of this work, I never consider the prior experience of the institutions as totally counter-effective or the failures as chronic.

courts' emergence as independent and relatively strong supporters of constitutional democracy. Finally, I consider such ideal-form-oriented inquiries to be largely reductionist and populist, and that is why I principally abstain from using this particular test, despite the fact that it would formally confirm my basic propositions.

By stating that it is not the overall success or failure of a macro-political institution or its particular element that should be considered the criterion for optimality in our case, instead I construct my critique of the existing constitutional design of the political empowerment on realistic criteria. My result-driven test for the optimality of the existing design of political empowerment proposes to look at whether or not this design helped the courts to adapt to the harsh political context in which they were put to work- a political context which would hardly allow politically powerful courts in case of any institutional design. This test suggests a rather different inquiry. Instead of the questions such as whether or not the courts reached effective independence vis-à-vis political branches and could effectively confront the politicians or if they performed as expected in cases with presidential elections, (these questions one would find in an "ideal form test"), the questions to ask should be whether or not these constitutional courts have appeared in possession of a sufficient resource for having the possibility of a political performance realistically closest to the expected ideal performance.

If so, one particular query to make should be whether the constitutional courts have preserved their legitimacy in situations when they had a duty to decide on politically sensitive cases but at the same time when proper law-based decisions would be contrary to the interests of the powerful executives?³⁸⁶ Another question might be if the constitutional courts were in possession of a sufficient institutional resource for strategic competition with the political challengers? At last, a question from the perspective of formal institutional empowerment has to be posed: did the "special" design politically empower constitutional courts or did it rather disempower them?

In fact, the preceding discussions in this chapter submitted that this "realistic result-driven test" would probably produce the same final "no" as would the "ideal-form result-driven test" which we rejected. A brief summary of the findings of this work merits intervention. The institutional design of "political empowerment," purported to strengthen the "political" arsenal of constitutional courts, has resulted in a "model of partial and specific jurisdictions" which is associated with both formal and practical limitations on the exercise of effective constitutional judicial review. On the formal level, the explicitness of the list of acts and specific matters subject to the constitutional courts' jurisdiction is definitely a limitation if compared to the

³⁸⁶ See Chapter 3: "Should There Be Political Empowerment?"

“unlimited” jurisdiction granted by the diffuse system³⁸⁷ or compared to those “Kelsenian” models which provide for a working synergy between the separated segments of the judiciary.³⁸⁸ In particular, post-Soviet constitutional courts’ supervisory functions are limited to only the cases which are provided by constitutions and these courts cannot handle cases which are not, even if these cases contain intrinsically constitutional issues.

Then, the designation of a separate constitutional tribunal in the manner it was done in post-Soviet countries has developed a “complex of jurisdictions” in post-Soviet courts. Here, general courts abstain from adjudicating conceptual constitutional problems in the cases under their review, while constitutional courts often appear to be barred from review of matters which technically fall under the jurisdictions of general courts, even if these cases contain important constitutional queries. This conclusion looks especially convincing if we consider the impact of the emerged legal culture which quite formalistically separates the provinces of constitution and the province of other law.

The model, afterwards, stipulates limitations in terms of judicial leeway to adjudicate both matters of law and matters of facts.

Finally, another limitation, associated with the existing model, relates to the exercise of constitutional review in a predominantly abstract fashion and in sound detachment from the inherently judicial conflict-resolving milieu.

All these paradigms will be reviewed in more details later, in the context of the elements of the alternative design, to be proposed soon. But to conclude this interim synopsis, the overall model, limiting rather than strengthening the courts, has ended up resulting in political disempowerment instead of the expected political empowerment.

Our findings also submitted that although inherently pro-democratic due to both institutional and rational reasons, post-Soviet constitutional courts have not been able to confront the political abuse of power, serving as loyal agents of political incumbents, except in situations of political uncertainty and transition. This has brought a diminishing of constitutional courts’ legitimacy,³⁸⁹ which is in large part due to the institutional prescriptions which generously and invariably empower these courts with a duty to serve as arbiters in the most sensitive political cases. The institutional design of political empowerment, in this light, has considerably constrained the courts’ facility to avoid damage to their reputation and legitimacy by making

³⁸⁷ Where the responsibilities of the court of constitutional review is not limited to designated, constitutionally prescribed items, but instead the court can review any matters of concern from the point of view of constitutionality with only those exceptions stipulated by the court itself.

³⁸⁸ Where the specific matter, which the constitutional court is officially barred to review, can be nevertheless subject to a different court and eventually the judiciary, in one way or the other, is functionally able to address the violation. See more forthcoming.

³⁸⁹ Herman Schwartz, *supra* note 315.

the courts to confront situations where their only choices are associated with violation of the laws either by deciding in favor of political incumbents and validating their anti-constitutional practices or by abstaining from decisions in violation of their duty to decide. In essence, the existing institutional design of political empowerment of constitutional courts represents a typical paradigm of idealistic designing which provides for formal institutional architecture with no a due regard of its harmonious coexistence with the embedded rules and practices of political institutions.

I reasonably concede that this critique of the existing conception of the institutional design of political empowerment can proceed only if provided with an outline of an intelligible alternative. But I base on that very critique for starting to construct the contours of an alternative design.

Obviously enough, the alternative should abandon the constitutional micro-management of the domain of political empowerment which happens through nominating those “marginal”³⁹⁰ responsibilities which we widely discussed in the previous chapter. We saw that this project, which initially intended at strengthening of “political” responsibilities by underlining the most important ones, has resulted in limiting the courts’ competency to these items. As opposed to such overly technical micro-regulation, the institutional design of constitutional review courts would better rest on a single constitutional super-principle of *universality of constitutional judicial review*, recognizing the general competency of these courts (regardless of the fact whether it is a specialized tribunal only or all the courts in the system) over any and all issues of compliance with constitutions, including the “political” items, but not limited with them. This mega-principle shall contain the following essential elements, each represented by the particular fragments of its statement: 1) *universal review*- constitutional review court(s) can review any statutes, acts and decisions on their compliance with the constitution and application on review can be submitted by any person or entity with a legitimate interest in the issue, 2) *judicial review*- constitutional review courts shall not be denied the intrinsically judicial function of acting as arbiter in a case; their competency in concrete cases shall not be limited only to setting of a background that would ideally pave the way for another body to handle the particular conflict resolution.

This basic principle of *universality* has several elements. The principle of *formal subject matter universality* shall ensure review of all relevant laws, acts and decisions issued by any bodies, including courts. This should address the practical difficulties caused by the limitations on formal subject matter imposed by the existing models. As a rule, presently the post-Soviet constitutional courts’ jurisdiction is extended only to review of constitutionality of specific acts

³⁹⁰ Wojciech Sadurski, *Rights Before Courts*, *supra* note 2, at 13.

the list of which is explicitly provided by constitutions. These lists include laws (statutes), government decisions, and also often other categories of normative and other acts, though the settings vary from country to country.³⁹¹ The lists do not provide for the review of courts' decisions but in the majority of cases an indirect constitutional (but not judicial!) review of these can be done when parties to concrete cases request a review of constitutional compliance of the acts on which the particular court's decision has been based.

Substantial subject matter universality shall mean that constitutional review courts have jurisdiction over any cases concerning compliance with the constitution, and their jurisdiction shall not be limited to any specific area or designated items of review. This principle should respond to the limitations imposed by the explicit listing of specific types of cases included in constitutional courts' authority, such as jurisdictional disputes, electoral disputes, or political parties. The application of the general standard of universality in the proposed design should provide for constitutional courts' right to review absolutely any and all acts and matters of compliance with the constitution, including the ones which are currently specified as these courts' exclusive prerogative. The standard of constitutional courts' restraint (such as a doctrine of political question) should be developed by the courts themselves rather than be provided by law. These proposals should contribute to the real empowerment of these courts and to the effectiveness of constitutional review in general.

Conceptual subject matter universality means that constitutional courts should be able to adjudicate cases both in terms of matter of facts and in terms of matter of law. Disputes on presidential elections, for example, can contain either one, or the other, or both. The Constitution of Armenia, for example, enables the Constitutional Court as a judge of fact in these cases as the Court is empowered to decide on the results of elections whether or not the dispute in case concerns a matter of law per se. As opposed, in Russia and Ukraine, where it is not the Constitutional Courts that adjudicate electoral disputes, these Courts may practically review only matters of law, that is whether or not the law, which was applied by another court dealing with an appeal by a presidential candidate, is in compliance with the Constitution.

Universality of standing shall mean that standing and access should not be defined by law but shall be subject to the general principle that any person or entity which has a legitimate interest in the case should be able to submit an application. The standard of permissibility and the doctrine of legitimate interest in this case shall be worked out by the court itself and not by law. This principle still can be defined in such general terms that it can allow later variations

³⁹¹ In Kazakhstan, for example, the Constitutional Council is empowered to review only laws, but not the acts of the President and the Government (see Art. 72 of the Kazakh Constitution). In contrast, the Court in Georgia can review not only laws, but also the normative acts of the President, the Government, as well as the "higher state bodies" of autonomous republics within the country (see Art. 89 (a) of the Georgian Constitution). In Armenia, the constitutional amendments of 2005 allowed the Court to review the acts of local self-government bodies (see Art. 100 of the Constitution).

allowing reasonable exclusions, such as exclusion of the general public from bringing of abstract claims.

The existing “model of partial or specific jurisdiction” is associated with both formal and practical limitations on the exercise of effective constitutional review. On the formal level, the explicitness of the list of acts and specific matters subject to the constitutional courts’ jurisdiction is definitely a limitation if compared to the unlimited jurisdiction granted by the alternative formula which is proposed. More importantly, the existing model brings to practical limitations and difficulties.

In particular, constitutional courts’ supervisory functions are limited only to the cases which are provided by constitutions and these courts cannot handle cases which are not, even if those cases contain intrinsically constitutional issues. For example, the Constitutional Court of Russia or Ukraine cannot adjudicate cases on presidential elections and the Constitutional Court of Armenia cannot resolve jurisdictional disputes because these items are not listed in the respective Constitutions. This is regardless as to whether or not the particular cases contain intrinsically constitutional matters: the Constitutional Court of Ukraine, for example, cannot review the results of presidential elections even if the elections fall short of basic constitutional standards and there is a party legitimately interested in constitutional review.

It may be argued that despite this, the respective violations of the constitutions can anyway reach constitutional courts or that the particular electoral violation can anyway become the subject of judicial review. In the presidential elections cases, for example, a presidential candidate’s petition in Russia or Ukraine can be submitted to another court’s judicial review which will give a resolution to the particular electoral dispute (as it in fact happened in Ukraine in 2004), and then there will be a chance of constitutional review of the subject law also in the constitutional court if the law applied by general court is alleged to be unconstitutional.

This may well be correct. But the entire model momentarily lacks efficiency if we look at it from the perspective of constitutional courts’ empowerment which is the key subject of this discussion. Dividing core functions between different systems of adjudication is obviously not to strengthen the function itself but to weaken it.³⁹² This is especially so if we consider the far not easiest relationship and the competition between the two separated fragments of the judicial system (constitutional and general) in post-communist countries.³⁹³ But before all this, the model in case also brings to essential practical difficulties if we transit back to the realm of a judicial culture which quite formalistically separates the provinces of constitution and the province of other law. Let us take forward the case with presidential elections in those countries which do not assign the electoral disputes to the domain of constitutional courts. Here, the

³⁹² See more on this in the next chapter.

³⁹³ See Sadurski, *supra* note 2, p. 21; Schwartz, *supra* note 5, p. 24.

resolution of these disputes is falling within the domain of general and not constitutional courts, as noticed. Given the formalism in separating the domain of constitution on one hand and other laws on the other and the widespread culture of procedural legalism discussed earlier, the general court will adjudicate the presidential elections case under the law, but not the constitution, because of their being “courts of laws” but not constitutional courts and the general habit of procedural reading. Treating the case “under law” may look normal if the petition brings an issue of fact, for example a matter of vote counting. But what if it is an intrinsically constitutional issue, let us say a matter of violation of the standard of equality or abuse of power by the “candidate from the power”? A procedural treatment of the constitutional issue will be the most probable outcome in our hypothetical case if we trust the conclusions reached in the earlier discussions. But there is also ample empirical evidence supporting this hypothesis. Some brilliant evidence is offered by the latest cases with presidential candidates Mikhail Kasyanov of Russia and Levon Ter-Petrosyan of Armenia which will be discussed soon.

The *principle of judicial review* in the meaning of the proposed alternative implies an exercise of constitutional review not only in an abstract fashion (or not only in a predominantly abstract fashion) but also in the intrinsically judicial conflict-resolving milieu. The word “only” in its first use in the last sentence should be emphasized. It shall mean that the idea, which I develop, does not imply a clear-cut zero-sum choice between abstract and concrete review. The idea rather allows room for both.

The rationale behind activation of the intrinsic judicial competency is to deal with the limitations of the design of constitutional courts where the abstractness of review by these courts dominates their mandate. One illustration of this is that constitutional review tribunals do not perform the essentially judicial function of an appellate jurisdiction but rather carry out a review of concrete cases largely for the purposes of identifying unconstitutional elements in the law applied in these cases. This is common to the systems based on the Kelsenian model in general.³⁹⁴ As evidence, constitutional courts are said in a handbook published by the European Commission for Democracy through Law of the Council of Europe (Venice Commission) not to be conceived to perform as appellate tribunal if a constitutional complaints is raised but that their mandate should be restricted to “scrutinizing the challenged act as to the violation of constitutional rights and not as to its lawfulness in general.”³⁹⁵

The limitations of this model, investigated in the context of post-Soviet environments, are associated with the arising regulatory inability of constitutional tribunals and the judiciary in general to address the particular violation of the constitution and to offer a practical redress to

³⁹⁴ For one, see Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, supra note 21.

³⁹⁵ Helmut Steinberger, “Models of Constitutional Jurisdiction”, supra note 20.

the injured party. The case of the models which do not assign electoral disputes to constitutional courts is a good example also for this argument. As we discussed, in all the cases of electoral disputes where the issue in case is substantially a matter of constitutional law, the cases nevertheless must be reviewed by the general courts, while the constitutional courts can only have a mere theoretical chance of an abstract review if a party then appeals the decision of the particular general court. Even in this case, the constitutional courts are not in a position to essentially address the constitutional violation, but they can only issue a judgment about the constitutionality of the law which was applied by the general court for reaching its conclusion.³⁹⁶ For one, it is not only the law in case that can be unconstitutional, but also the decision of the court elaborating on a law, the last itself being constitutional.

Consider again the hypothetical case A v. B.³⁹⁷ We speculated that after encountering what we called “political legalism” from the part of B, A went to the general court with a complaint that the municipal body B has violated its constitutional right of equal opportunities during the elections by allowing her pre-election demonstration only in a remote district of the capital city while approving the demonstration of another candidate to be held in the central square where all political demonstration are normally held. The general court (G), reviewing the complaint, found that there was no violation, referring to the article in the law on elections which provides that municipal bodies (Bs) can provide an alternative area for a demonstration if the requested area is already reserved for another demonstration. The court G furthermore rejected A’s argument that the article of the elections law, to which the defendant and the court referred, implies that the “alternative area” should be equally good place for demonstration but not a remote place on the brink of the city and the neighboring village. G said that the law does not provide for this. Hence, A goes to file an application in the Constitutional Court (C).

The model under our review allows the C to review only the subject law on the issue of its compliance with the Constitution. But the law in this particular case seems to be perfectly constitutional. What does not look constitutional is not the law, but B’s and then G’s interpretation of it, for the review of which C does not have a direct mandate. The absolutely legitimate complaint of A, then, finds itself unable to reach a constitutional review.

³⁹⁶ For example, according to the Constitution of Armenia, when filing an individual complaint the applicant can challenge only the constitutionality of the particular law applied by the court in the concrete case (see Art. 101/6), and according to the Constitution of the Russian Federation (Art. 125/4), in concrete cases based on individual complaints or court referrals, alleging constitutional rights violation, the Constitutional Court is authorized to review the constitutionality of the law which has been applied or is to be applied in the case.

³⁹⁷ *Supra* note 353.

The limitations of defective empowerment in the practice of courts

The two cases, which I will discuss, most starkly demonstrate the array of presented practical limitations of the currently active model of constitutional review.

Kasyanov v. the Central Electoral Commission of the Russian Federation³⁹⁸ was a review of an appeal on the decision of the Central Electoral Commission (CEC) to decline registration of the key oppositional contender and the former Prime Minister Mikhail Kasyanov as a candidate in presidential elections in Russia in 2008. In its decision, the CEC referred to irregularities in the procedure of collection of pre-electoral signatures, which are required by the Russian legislation from a candidate for being promoted as a nominee, as a ground for voiding Kasyanov's registration. The Law of Russia on the Elections of the President in the best Soviet traditions provides for routinely detailed procedures for nomination and registration of the candidates, including highly technical description of each of the required procedures to be completed and "spravkas"³⁹⁹ to be supplied. The decision of the CEC was reviewed twice by the Supreme Court of Russia as the Russian Constitution does not provide for the review of electoral disputes by the Constitutional Court. Both times, the Supreme Court (once in its plenary seating and then as the Supreme Cassation instance) declined Kasyanov's appeal and confirmed CEC's decision.⁴⁰⁰

Mikhail Kasyanov was the only liberal contender for presidency and the staunchest critique of President Putin. CEC's rejection of his registration was widely believed to be the Kremlin's conspiracy for "legally" barring him from the campaign. Whether or not the grounds for this "legal" action were present and justified, the case finely illustrates a number of patterns which we observed in this chapter.

To begin, the charge in fabrication of signatures in support of a candidate excellently illustrates the legalism and proceduralism of the political process and the judicial culture tolerating it. Not only the requirement of such a ceremonial procedure as signature collection is highly formalist, but the arguments of the CEC for disqualifying the potential presidential candidate due to some technical irregularities with the signatures on that candidate's behalf do sound unjustifiably

³⁹⁸ Supra note 354.

³⁹⁹ The infamous Russian word for various requirements to take a written form, such as confirmations, validations, approvals by and for completing administrative procedures, widely associated with the highly bureaucratic system of administration.

⁴⁰⁰ Such formalism may be said to be in best traditions of the Russian Supreme Court. On 4 December 2003, for example, the Court upheld the decisions of an electoral commission and a lower court rejecting registration of Yiriy Skuratov, the former Prosecutor General of the country, as candidate to the State Duma (Parliament). This rejection was on the grounds of submission of "inaccurate personal information". In particular, the Court accepted the reasoning of the electoral commission that the candidate had failed to provide proper information about his employment by not mentioning the fact that he had a second job of a professor at a university in Moscow. See Skuratov v Russia, supra note 245.

formalist too. For example, one of the reasons for invalidating the signature-votes collected for the candidate was that the signatories failed to provide their full address by not indicating the federal unit where they were registered, as it was required by a standard signature collection form issued by the CEC.

It is worth mentioning that both the CEC and the Supreme Court admitted that the required number of signatures has in fact been supplied in favor of the candidate and that the signatories personally put their signatures; their position was based on the facts of technical deviations in the process of signature collection. In his later comments of the case, Mikhail Kasyanov has emphasized that the Supreme Court has confirmed that the CEC is right in what relates to the technique of compiling of the designated forms for the signature collection, while the fact of the huge number of signatures collected in his support and the political will expressed in this way did not concern the Court.⁴⁰¹

Besides the symptoms of procedural legalism serving as a “legitimate” tool for the abuse of genuine democratic pluralism and an instrument of concentration and reproduction of power, the case also starkly exposes the judiciary’s susceptibility against such cases of violation of basic constitutional principles. Consider the fact that the Supreme Court of Russia, when reviewing Kasyanov’s appeal that the alleged irregularities with the signatures can not become a valid reason for declining his constitutional right to run in presidential elections, did not treat the case in the constitutional context at all but rather simply checked on the validity of the facts and on the compliance of the CEC’s decision with the routine of the procedure provided by the law. I am convinced that in this case we witness a typical paradigm of a general court acting (or preferring to act) in its legitimate capacity of a court of laws (as opposed to court of constitution) which has a limited mandate of checking on the conformity with the statutes, whatever the content of the statute is. It is then especially odd that this is not a regular general court but the Supreme Court of Russia (which after all has the mandate on review of electoral disputes) that reduced the intrinsically constitutional case of a paramount political significance to the level of compliance with the requirements of the routine standards supplied by law or by an act of the electoral commission.

The positivist legalism of the system at large shall only be partially blamed for this. The situation is also largely the result of the separation of the jurisdictions of constitutional courts from that of other courts with not providing a due care of effective working synergy between the two and by the formalism in separation of the provinces of constitutional law and other law. Notably, the Supreme Court has been unequivocally recognized as the last jurisdiction that could effectively restore Kasyanov’s right to run in the elections. Both the involved party and

⁴⁰¹ From an interview published in “Новая газета” on February 2, 2008.

the observers had considered it useless to appeal to the Constitutional Court most likely from the same considerations: the Constitutional Court of Russia does not have a mandate to review disputes and this case might have been “cured” by this Court only if the law which was applied was unconstitutional; but the law itself was not. It is obvious that the abstract review of the subject law, if an individual complaint was submitted, would appear to be a largely symbolic measure instead of becoming an efficient instrument for addressing the peculiar insistent violation of the fundamental constitutional law.

In re Ter-Petrosyan,⁴⁰² the Constitutional Court of Armenia reviewed on February 11 2008 the request of the presidential candidate Levon Ter-Petrosyan about considering the campaign run by the public television and other state-controlled media against him as an insurmountable obstacle arisen before the candidate for the presidency. In particular, the candidate argued that the National Tele-Radio Company and especially the “Hailur” news program have violated the legislation by regularly and consistently broadcasting materials against his candidacy during the three preceding month. The application, which was submitted several days before the day of the presidential elections, thought the mentioned state-run campaign as an illegitimate and unconstitutional interference by the state into the presidential race which created an “insurmountable obstacle” for Levon Ter-Petrosyan as a ground for suspending the presidential elections, as envisaged by the Constitution of Armenia.

In its decision on the case, the Constitutional Court found that the provision of the Constitution to which the appellant refers (Art. 52) is implying two cases of insurmountable obstacles for a presidential candidate: first, in case of impossibility of further personal participation in the presidential elections owing to a situation which causes incapability of a candidate to do so (an institution originated in the French constitutional practice, according to the Court), and second, in case of the death of one of the candidates. The Court held that neither of these situations matches the case of the appellant.

However, alongside with the decision to decline the request of the appellant based on the above-mentioned “legal” justifications, the Constitutional Court further elaborated, in a non-binding dicta (as it has become the tradition of especially the Court in Armenia), that according to the Electoral Law the state ensures the equality during the pre-election campaigns and candidates should enjoy equal access to mass media, and that the National Television Company and the National Radio should provide equal conditions to the candidates. Furthermore, the Court observed that “the news programs broadcasted by the National Television and National Radio should provide impartial information on the campaign of the candidates and should refrain from assessing the information in order to ensure observance of the fair and equal

⁴⁰² See the decision of the Constitutional Court of the Republic of Armenia dated 11 February 2008.

conditions”⁴⁰³ and by referring to the responsibilities of the public institutions for complying with these provisions. The Court also observed the fact that there exists a procedure for appealing the respective violations in the administrative court and that the appellant has in fact submitted another application to the administrative court.

The Constitutional Court concluded by saying that the appellant’s actions are lawful and that above-mentioned organizations and the administrative court have a responsibility to prevent the violations of the laws. By doing so, the Constitutional Court in fact recognized the intrinsic legitimacy of the applicant’s argument in the case and the facts of violation of fundamental standards of equality by certain state bodies. Nevertheless, the Court abstained from properly adjudicating these (recognized) violations due to the limitations imposed on the jurisdiction of the Constitutional Court.

In both of the above-discussed cases we could witness the practical limitations of the model of constitutional review with strictly separated jurisdictions of constitutional and other courts and with ensuing strict formalism in separating the provinces of constitutional and other law. The case of Kasyanov is an excellent illustration of the general courts’ refusal to review constitutional issues under the constitutional principles proper where the institutional design otherwise fails to guarantee a proper access to constitutional review of the political action restricting realization of a fundamental political right. In the case of Ter-Petrosyan, the Constitutional Court in Armenia found itself incompetent to decide on a complaint about essentially constitutional violations due to the jurisdictional limitations imposed by the Constitution even though these violations were recognized by the same court as falling short of the prescribed constitutional standards of equal access to state-controlled media. After all, we witness well-illustrated evidences of the limitations of the design of intended political empowerment resulting in a factual disempowerment of both fraction of the judiciary in light of their divided and limited responsibility over the constitutionality of elections.

C. Coping with the paradox of political empowerment

The proposed mega-principle of the universality of constitutional judicial review, as we already noticed, can host the ensuing rules and procedures of constitutional review in probably the most optimal way. Its generic standard can allow the type of conceptual accommodation which the

⁴⁰³ Art. 20/3 of the Electoral Code of the Republic of Armenia.

constitutional concepts are enabling in Dworkin's model.⁴⁰⁴ The limit on over-regulation of this generic principle should also ensure that constitutional judges accommodate their procedural doctrines to the most optimal standards, rather than those standards being stipulated by political regulators by means of constitutional or legislative rules. In particular, this would enable constitutional judges to set up the most suitable standards of judicial discretion, let us say, in politically sensitive issues, where the micro-regulatory style currently requires a mandatory action on these issues. This paradigm is discussed below. I believe, meanwhile, that the successive analysis will demonstrate that what I advocated in the preceding discussion is not merely a pompous and speculative theory, but that it competently applies to practical situations and can offer down-on-earth working solutions to existing difficulties.

The paradox of judicial-political empowerment, as we discussed earlier, resides in the conflict between the designation of politically powerful courts in the manner as it has been done in the post-Soviet constitutions, and the constraints on due performance which are put on these courts by the political branches. Back in Chapter 3 we discussed that the political empowerment of post-Soviet courts has been and keeps being a double-edged sword: not empowering constitutional courts would be detrimental for the democratic prospect, while empowerment is associated with the prospect of political attack, abstention from deciding on political cases and hence erosion of the courts' legitimacy.

As early as in 1995, Herman Hausmaninger's synopsis of the Russian constitutional court's way for success outlined a strategy which was largely shared by the academic community in succeeding works:

The Court must refrain from political involvement, and individual justices must avoid public posturing if the Court hopes to affect and protect an emerging Russian legal culture. Since its suspension on October 7, 1993, the Constitutional Court has had ample time to ponder past mistakes and reflect on a future course of action. It may have concluded that it should both signal and practice judicial restraint as its guiding principle until by solid legal work it will have learnt that level of respect and legitimacy which will enable it to move forward to the sort of legal activism exhibited by other constitutional courts in other political systems. The Russian Court has yet to learn the skills and become aware of responsibilities of a judicial activism practiced in the public interest, as well as the art of interacting with other governmental organs in a functioning democratic society....⁴⁰⁵

The sort of "solid legal work" which Hausmaninger probably has in mind extends to the domain of human rights cases which are mostly within the area of tolerance of the executive and are for the most part safe for the courts to decide upon, unlike the political issues, as Epstein, Lee and Shvetsova would underline later⁴⁰⁶. But both Hausmaninger's and Epstein et al's position, unlike that of Schwartz's, does not stand for a concrete prescription about how it

⁴⁰⁴ Supra note 378.

⁴⁰⁵ Herbert Hausmaninger, "Towards a "New" Russian Constitutional Court", 28 Cornell International Law Journal (1995), at 386.

⁴⁰⁶ Lee Epstein, Jack Knight and Olga Shvetsova, supra note 187.

shall be done that the courts don't interfere into political questions when they are supposed so under the law. If their position is different than that of Schwartz, then it perhaps stands for what we have now: courts should abstain from deciding on political issues even though they are obliged to decide by the law. And while this approach, at least for me, makes even more sense than simply cutting off the political questions from the courts' repertoire, the recent case in Ukraine (2007, discussed in Ch. 3) should become an alarm about the potential threats of "abstentionism" which brings to the diminishing of constitutional courts' reputation to such an extent that even the most "solid legal work" and human rights activism would not be able to cure.

If "abstentionism" was really the intention of analysts like Hausmaninger or Epstein et al (their positions stands for court restraints for the sake of gaining necessary legitimacy, but it does not specify if the courts should avoid deciding on political issues or they should be deprived of the right to decide on them by the law, thus one is not sure if it was), the hidden message in these recommendations can be translated into the call for a more flexible, or to be more precise, strategic behavior vis-à-vis their "partners" in the other governmental branches. In fact, the above-quoted paragraph by Hausmaninger leads to such interpretation almost literally, referring to the "art of interacting with other governmental organs."⁴⁰⁷ Is the mode of interaction with "governmental organs" not prescribed by the constitutions?

If all this is what the above-mentioned political scientists prescribe, then such recommendations refer not to the institutional designer, but to the courts and their members. But there is at least one item which is in the domain of institutional designers. Is there a way to institutionally enable strategic behavior? The answer may be "yes" if one is convinced in the potential for strategic behavior which the "political question doctrine" creates for the US Supreme Court.

The notorious doctrine of *political question* of the US Supreme Court distinguishes between legal questions which can be resolved by the US Supreme Court and political questions which cannot be subject to judicial review. The doctrine provisionally separates the province of the judicial branch from the same of the other branches and calls for "*respect due coordinate branches of government.*"⁴⁰⁸ But separating the provinces of law and politics seems to be a task so susceptible both from the normative and from the practical perspectives. Is it possible to draw any comprehensive criteria for judiciary's involvement in politics at all? It is obvious that when deciding in a fashion which is easily labeled as political activism, courts do not want to coin money or conclude treaties, nor to enact laws, levy taxes, and appoint presidents. However, it is hardly correct to say that courts never interfere even in the above-mentioned issues as there is hardly any issue which lies beyond the scope of constitutions. Treaties can be

⁴⁰⁷ Supra note 405.

⁴⁰⁸ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

(found) unconstitutional and so can the laws. Taxes and currency regulations likewise can be considered unconstitutional, and the presidential elections can be corrupt and illegal. So, what makes some issues more political than others?

The duality of the *political question doctrine* is obvious, so is the history of its application. During its activity, the Supreme Court of the United States has from time to time entertained a number of issues of public policy with an underlined political context and has equally inconsistently abstained from entertaining others which fit in the criteria imposed by the then existing standards. The controversy of the *political question doctrine* has developed well since *Marbury*, and the debate over its legitimacy has been reviving each time of the Court's involvement into issues of political significance. The unavoidable dichotomy of the *political question doctrine* is not a happenstance but an exact mirror image of the existing ideological uncertainty. In his classical essay on the US Supreme Court, Robert Dahl says: "As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it is a political institution and not quite capable of denying it; so that frequently we take both positions at once."⁴⁰⁹

But what is the instant rationale behind the doctrine after all? From the normative perspective, the *Baker* criteria,⁴¹⁰ which still define the standard, fail to address the central moral issue behind the conflict in between the *doctrine* and the concept of judicial review: if the basic normative premise of the latter stands for all and any questions of society being subject to scrutiny on the matter of their compliance with constitution as higher law, what may justify exceptions to this?

The "classical" (or "constitutional") theory of the *political question* is based on the expressed or implied language of the US Constitution.⁴¹¹ But its implied reference to a concept as ambiguous as the separation of powers hardly diminishes the usual perplexity of the doctrine, while adding no value to its normative worth. Eventually, the reference to a textual assignment of some cases to a non-judicial branch while having accepted the legitimacy of the judicial review reduces the status of the higher law against some cases of extra-constitutional importance and discriminates against human rights. Finally, this places separation of powers above the higher law.

⁴⁰⁹ Dahl, Robert, supra note 274.

⁴¹⁰ *Baker v. Carr* provides for the following six criteria for a case to qualify as political: 1. "textually demonstrable constitutional commitment of the issue to a coordinate political department", 2. the lack of "judicially discoverable and manageable standards" for the resolution of the dispute, 3. "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion", 4. impossibility of decision without the "lack of the respect due coordinate branches of government", 5. "an unusual need for unquestioning adherence to a political decision already made", 6. "the potentiality of embarrassment from multifarious pronouncements by various departments on one question". 369 U.S. 186, 217 (1962).

⁴¹¹ Rachel Barkow, "The Rise and Fall of the Political Question Doctrine", in Nada Mourta-Sabbah and Bruce Cain (editors), *The Political Question and the Supreme Court of the United States* (2007), at 24.

That the only “valid” justification of the political question doctrine may be offered only by a utilitarian excuse is suggested by a strong intuition. The “legal” criteria for the judicial limitation imposed by the *political question doctrine* is itself political and the borders which are somewhat vaguely provided for judiciary’s political involvement are rather drawn by the degree of political activism that the Supreme Court can afford and wants to demonstrate in particular time. In this view, the rational account of the *political question* is offered by its “prudential” doctrine- a judicially created method for avoiding certain constitutional questions⁴¹²- which stands pretty frankly for the strategic rationale behind the application of the doctrine. The validity of this concept and also the extent of its importance for constitutional design studies entail from the prudential concept’s honest quest for legitimacy through the utilitarian premise of an optimal design of institutional interaction, rather than a normative justification. The premise of the prudential doctrine is not in the constitutional text and its construal but in a rational recognition of the sensitive institutional “interests” of the separated branches and the danger of their potential conflict, and in commitment to abstaining from decisions on certain issues from exactly the considerations of saving the Court’s legitimacy and avoiding such possible conflicts with the political powers.⁴¹³

That kind of a tool for strategic use for the sake of preservation of the institutional legitimacy, one might see, was exactly what the Ukrainian Constitutional Court lacked in its last political engagement when the Court simply abstained from deciding on the case of the dissolution of the Parliament because of the political sensitivity of the case, thus immensely damaging its own legitimacy. Having found itself in between the two troubles- one for each possible outcome of their prospective decision- the Court in the Ukraine preferred just to keep silent by violating all prescribed norms of material law- constitutional, higher law of the land- in order to stay safe. If the Constitutional Court was equipped with a doctrine of (prudential) political question- a famously known technique of judicial abstention⁴¹⁴- its largely perceivable silence would have its legal and legitimate justification.

The necessity of a doctrine for a legitimate abstention from judicial review in the cases when the designer has opted for a political empowerment has been brought up as early as in the beginning of the 90-ies. However, hardly any efforts to push for a sound “political question” doctrine survived the overriding ignorance by the mainstream scholarship and constitutional engineering which in sum equaled to a mute denunciation of the doctrine. One American scholar wrote in 1993 that the Russian Constitutional Court should have invoked the political question doctrine to avoid the Communist Party case which, in his words, presented a zero-sum

⁴¹² Rachel Barkow, “More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy”, 102 Colum. L. Rev. 237 (2002), at 237.

⁴¹³ Id. at 253.

⁴¹⁴ Yet in 1964 Alexander Bickel advocated this tool as a desired way for courts to avoid “rampant activism” and keep away from certain issues: Bickel, Alexander, *The Least Dangerous Branch*, supra note 237, pp. 251-254.

choice between deciding for the Communist Party and the law or the President and the political expediency.⁴¹⁵ That the Court should have invoked the political question rule granted by the law is also suggested by another American researcher of Russia's constitutional transition of early 90-ies.⁴¹⁶ More over, there is evidence that the adoption of "a strict political questions doctrine" by the Russian Constitutional Court has been continuously advocated by legal academics.⁴¹⁷ After all, nobody even recalls now that the notorious 1991 law setting up the Constitutional Court in Russia indeed envisaged a clause saying that the Court does not review political questions⁴¹⁸ and furthermore it is not even discussed that many of the modern laws on constitutional courts in post-Soviet countries include provisions which could be classified political question clauses.⁴¹⁹

But what the common-law trained jurists often propose may hardly get clearly perceived by continental lawyers. Continental lawyers need the discourse translated into the language of legal routine. This would appear to be the crux of the matter. Regardless of how strong my criticism of the positivism of the post-Soviet legal culture, one simple truth should be that any innovation or institutional transplant has to be adapted to the dominant setting, and not the setting should adapt to the transplant. In fact, the judicial discretion, such as the political question doctrine, does not and can not go along with the conventional style of judicial empowerment in which the certain items, on the implementation of which we would like to assign judicial discretion, are designated as the duties of courts. In this deeply civil-law setting, any exemption from duties is perceived only in case of being expressly provided by the law, while a canon as generic and controversial as the political question doctrine would hardly ever fit in such a framework. The way out is not in the laws' routine but in changing the overall logic of constitutional legal culture from the one based on rules and procedures to one based on concepts and principles.

The paradox of the "political empowerment" gets resolved in this way: political empowerment shall be bestowed not as the duty but as the opportunity of the constitutional courts within its universal general jurisdiction over all constitutional issues.

⁴¹⁵ Robert Sharlet, *supra* note 222, at 17.

⁴¹⁶ Robert Ahdieh, *supra* note 183, at 83.

⁴¹⁷ See Robert Sharlet, "The Russian Constitutional Court's Long Struggle for Viable Federalism" in *Russia and its Constitution: Promise and Political Reality*, edited by Gordon Smith and Robert Sharlet (2007), p. 31.

⁴¹⁸ See the Law of the Soviet Socialist Federative Republic of Russia (12 July 1991) on the Constitutional Court, Art. 1/3.

⁴¹⁹ For example, the current Law on Constitutional Court of Russia provides in section 7 of the Art. 7 that the Court "reviews exclusively issues of law." Similar clauses can be found also in the Art. 1 of the Law on the Constitutional Council of the Republic of Kazakhstan.

Ending up where? The American model revisited?
Conclusion

Once we learnt the lessons from the preceding discussion and the last cases, it becomes evident that the institution of constitutional judicial review can be implemented most effectively if it combined the separated fragments of conceptually the same function in one decision-making centre or system as opposed to its current design of limited and not well-connected jurisdictions delivered between separate bodies. That is to say that constitutional judicial review will be better if the particular decision-maker on constitutional issues (whether it is always the same single tribunal or different courts) is in a position to do both abstract and concrete review, to review both question of law and questions of fact, and to fully perform as a valid comprehensive appellate jurisdiction in all cases which raise constitutional issues.

In fact, this is to suggest that the design of constitutional review should make a step forward towards the initial and simplest conception of the judicial check on the conformity with constitutions. This original conception, born in the United States and later subjected to fundamental modification by Kelsen, envisaged constitutional review as a universal function of the judicial competency implemented through concrete and substantial review of judicial controversies. This simple but fundamental principle built up the entire mechanism of constitutional judicial review. Kelsen's conception was a deviation from this paradigm in many respects.

First, the designation of a separate constitutional review tribunal was clearly a deviation from the earlier standard of constitutional review as a judicial prerogative. Indeed, whether or not one considers Kelsenian tribunals as courts, the judicial personality of continental constitutional courts can be doubted on many grounds. As noticed elsewhere in my thesis, the continental conception does not even attempt to oppose this perspective. According to Cappelletti, principally due to the political nature of this function European systems refused to grant this power to the judiciary generally.⁴²⁰ In this light, European constitutional courts, as intended by Hans Kelsen, are designated as primarily political institutions. Some of European constitutional courts involve very closely in the legislative process, sometimes through *a priori* review, hence, no surprise they are often called quasi-parliamentarian institutions or third chambers of parliaments.⁴²¹ After all, the key institution of abstract review, which is the dominant function of the Kelsenian courts, not only makes these courts parties to the political process and policy

⁴²⁰ Mauro Cappelletti, *supra* note 21, p.137.

⁴²¹ Alec Stone Sweet, "Complex Coordinate Construction in France and Germany", in Tate and Vallinder, *The Global Expansion of the Judicial Power*, NYU Press (1995), at 225.

making, but also makes them to depart from their legitimate status of conflict resolving courts, in the meaning of Martin Shapiro.⁴²²

The latter paradigm constituted the other departure of Kelsen from the earlier image of judicial review by essentially abandoning the standard of concrete review. It is not only due to the reality that abstract review is the dominant function of the Kelsenian courts while concrete review is found only in some countries and even in these systems it is limited in its scope and purpose. It is also due to the acknowledgement of the overall abstractness of separate constitutional courts' intervention also in concrete cases where constitutional courts' mandate is often limited to the review of the law governing the case rather than the particular action under the law, which is well represented by the earlier discussed hypothetical case of A v. B.

My reference to the American model does not imply that its design has to be taken as a literal transplant. Elsewhere in this work I have noticed that the transplant of the American model without a substantial adjustment to the local context, as well as the same of the continental model, is likely to end up in an "idealistic design". I refer to the American model only as far as it is a major archetype of constitutional review implemented in a judicial fashion where the authority of the court is not limited in its scope and jurisdiction. The variations within this broad standard may differ in regard to many other important settings.

A system enabling constitutional review in an all-out judicial fashion may still provide for the two most essential elements which distinguish Kelsenian courts and which are missing in the American model: abstract review and concentrated review. Firstly, the alternative can manage to abstain from introducing a diffuse system. Constitutional review can be implemented in a judicial fashion by a single court on the top of the judiciary if this court is empowered as the single highest judicial instance with a sound appellate command over the decisions of the other courts in the system. Secondly, the alternative should necessarily make clear that it does not purport to abandon the institution of the abstract review. The institution of abstract review, in essence, does not become a matter of trade off as it might seem, and it may keep operating under a special regime (concerning restricted standing, for example). What this suggestion rather implies is that abstract review should be viewed as a supplementary function implemented by constitutional courts, though this does not imply any subordination of the abstract review to the concrete or vice versa but an institutional setting where constitutional courts essentially perform in a court fashion while the function of abstract review is added to that conceptual setting. In other words, if the classical paradigms were to serve as examples, one should designate not the Kelsenian court to perform also concrete review functions, but a classical court to perform also an abstract review function.

⁴²² Martin Shapiro, *Courts: A Comparative and Political Analysis*, Chicago, University of Chicago Press, 1981.

CHAPTER 5

THE PITFALLS OF THE KELSENIAN MODEL REVISITED

A. Why a special tribunal?

Why a special tribunal? There is hardly any discussion about the emergence of the constitutional judicial review in new democracies that has avoided this inquiry. The rationale behind the separation of the judicial review into a special quasi-judicial institution may be attributed to a series of explanations.

The “legal families” explanation, deriving from the earliest conceptualization of the concentrated system by its founder, Hans Kelsen, and later scrutinized by Mauro Cappelletti,⁴²³ may attribute the choice of the Kelsenian model to the civil law family background of the post-communist legal systems. The choice of these countries can also be suspected as deriving from the other conventional reasoning for the constitutional courts- the civil law traditions’ commonly acknowledged distrust in general judiciary.⁴²⁴ In the post-communist area, the desire to create a separate court was supplemented by the countries’ natural willingness to break with the communist-time legacies in the very early years of the transition by creating an institution of a new generation, which is emblematic of constitutional democracy.⁴²⁵ There has been, meanwhile, a very active debate about the credentials of the model from the perspective of its legitimacy and the democratic capital.⁴²⁶

This chapter, equipped with the insightful guidelines from these preceding works, offers a somewhat different perspective about the expediency of the transplant of the Kelsenian design. This view is based on a rather pragmatic evaluation and comparative analysis of the trade-offs between the pros and cons of the possible institutional combinations relying on the variety of specific “local demands” and the political environments in the target countries.

To start by fitting this discussion into the conceptual theoretical framework offered in the first chapter, the threshold question should be: was the choice of the Kelsenian model an optimal design for the countries of this study? The rationale behind the separation of the constitutional court from the general judicial function apparently seems sound if we consider the expected impact of the emerging system on the development of political and legal culture in the new

⁴²³ Mauro Cappelletti, *supra note 21*, p. 141.

⁴²⁴ *Id.*

⁴²⁵ For one, see Sajó, András, "Reading the Invisible Constitution: Judicial Review in Hungary," *supra note 6*, at pp. 253-254.

⁴²⁶ For one, see Wojciech Sadurski, *supra note 2*.

regimes. The constitutional courts have been created with a major purpose in mind: to build a new instrument of constitutionalism, which will stay away from the Soviet judicial practices and the old-fashioned and corrupt general judiciary. In fact, the consideration of breaking with the destructive legacies of communist constitutional and judicial traditions and founding the new ones speaks exactly for the virtue of separate constitutional courts.

However, this line of argumentation demonstrates a quite one-sided and excessively optimistic vision of the political path of the future to be taken by the transitional governments, as well as of the prospective local demands in the ex-Soviet countries. This is perhaps due to the over-estimation of the role of the formal institutional arrangements, the somewhat naïve trust in the “devotedness” of the agents, judges on one hand and the politicians on the other, as well as the general belief in the capacity of the new institutions to resist the constraints created by the legacies and actors. Could the constitutional courts triumph over such constraints, even if they were generously empowered and were composed of the most competent and decent judges? Not only have the constitutional courts proved being unable to stay immune from the corruption of the entire political system, but so has the function of the constitutional review in general, subject to pressure from the dominant actors in the political dimension, failed to emerge as an institution of its own according to the best expectations of the institutional designers. And while the “noble” motivation of separating the judicial review in a special tribunal seems now totally undermined in light of these circumstances, the existing major local demands stay pretty much unaddressed by the Kelsenian design of the constitutional judicial review.

My position stands for the fairly “ideal type” properties of both the Kelsenian and the American models if these were transplanted into the post-Soviet systems without any reasonable adjustment to the local environments, while the hypothetical optimal design may only be the one aiming at a balanced formula fitting the local demands. This work considers consolidation and strengthening of the judiciary to be the key local demand and the objective in today’s post-Soviet countries where the development of independent judiciaries, capable of “competing” equally with the other branches of power for the sake of constitutionalism and for assuming the foremost role as the guarantor of the rule of law, has clearly lagged behind the similar processes in the now EU-member post-communist countries. Hence, this work aims at justifying the rationale of the “consolidation of the judiciary” through an institutional merger of the constitutional courts and the courts of general jurisdiction in a way which would rationally contribute to the independence and strength of both segments of the currently separated judicial authority in the formerly Soviet states.

B. Courts: the Achilles Heel of post-Soviet democracies

I see the most topical demands of current post-Soviet states in developing truly independent and effective judicial systems. I “rank” post-Soviet courts in the very top for the role they are expected to play in the struggle for democratization and rule of law, and in the very bottom for their very low capacity to achieve this presently.

We may depart from the drastic discrepancy between the law on books and the state of their implementation, or between the ideal constitutional order envisaged and the actual political order in place. While fundamentally democratic and law-governed on the books, all of these countries are neither democratic enough, nor governed by law in reality. As already mentioned in the Chapter 2, as of 2007 among the 12 countries in the post-Soviet land only Ukraine qualified as a free country (in the 2005 survey, Ukraine was still among the partly free countries). Four countries were partly free: Armenia, Georgia, Kyrgyzstan and Moldova. The rest were not free countries: Azerbaijan, Belarus, Kazakhstan, Russia, Tajikistan, Turkmenistan, and Uzbekistan. The scores on democratic parameters for these countries were also shown back in Chapter 2. As for judicial framework and independence, the former Soviet countries’ scores were: Armenia: 5.00; Azerbaijan: 5.75; Belarus: 6.75; Georgia: 4.75; Kazakhstan: 6.25; Kyrgyzstan: 5.50; Moldova: 4.50; Russia: 5.25; Tajikistan: 5.75; Turkmenistan: 7.00; Ukraine: 4.25; Uzbekistan: 6.75. Bulgaria’s score was 3.00, Macedonia’s 3.75, Croatia’s 4.25, Estonia’s 1.50, Lithuania’s 1.50, Poland’s 2.25, and the Czech Republic’s 2.25.

This data provided by Freedom House is a useful tool for a comparative analysis of judicial independence in transitions despite the widespread recognition of serious difficulties in measuring judicial independence. In a comprehensive overview of the existing methodology and tools for comparative assessment of judicial independence, Christopher Larkins undertakes a scrupulous analysis and critique of the accepted methodology for gauging judicial independence.⁴²⁷ His critique could well be related to the methods applied in the Freedom House’s study of nations in transit where numerical ratings are assigned to each country’s performance in the area of judicial framework and independence based on assessments by expert consultants (who are selected from among country or regional specialists recommended by “recognized authorities”) and academic advisors. Proceeding by pointing out the problems in interpreting evidence of impartiality, insularity and the structural data on the courts’ independence, Larkins addresses the drawbacks of positivist methodology in assigning numerical scores to judicial independence which was supposed to overcome the mentioned

⁴²⁷ Christopher Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” 44 *American Journal of Comparative Law*, 605 (1996).

difficulties.⁴²⁸ He finds that “the component concepts of judicial independence do not automatically lend themselves to rigid scientific analysis” due to one or more of specified reasons, such as the unreliability of formal data which is normally employed in such analyses and the arbitrary nature of assigning numerical scores.⁴²⁹ In addition, Larkins criticizes the method of assessing judicial independence via the polling of various neutral public commentators, such as social scientists.⁴³⁰ His criticism is based on the analysis of a 1976 study of Latin American courts by Kenneth Johnson⁴³¹ where the author undertook polling of 84 social scientists for their expert views on the independence of Latin American courts and the consequent ranking of these courts based on the poll results. Larkins labels this classification as “arbitrary” and refers to a quote by a fellow social scientist⁴³² qualifying the applied methodology as “hearsay.”⁴³³

The reliability of the above-mentioned “positivist” ranking undertaken by the Freedom House might likely be subject to similar criticism by a Larkins-style analyst. Still, the methodology applied by the Freedom House, compared to the majority of academic studies on judicial independence in transitions, has at least two major virtues which, in the meantime, strongly resist the main critique of the above-mentioned kind. The first merit of this methodology is that it does concentrate on factual indicators as opposed to many academic works that rely extensively on formal indicators which principally lead to considerably different conclusions. As mentioned, Larkins mentions the reliance on formal indicators as one of the major drawbacks in determining judicial independence empirically. He tackles a 1975 study by David Clark who attempted to measure the effectiveness of Latin American courts by using such indicators as tenure and salary guarantees, appointment and removal, etc.⁴³⁴ Arguably, by using such data Clark overstated the real independence of some countries’ courts ranking them before Costa-Rica’s, which was universally accepted as the most independent in the region.⁴³⁵ Larkins’ criticism of such methodology has merits. The reliance on formal indicators of judicial independence is very unlikely to produce the desired outcome due to the very big discrepancy between written laws on the books and the actual application of these laws in transiting countries.

⁴²⁸ Id., p. 614.

⁴²⁹ Id., p. 615.

⁴³⁰ Id., p. 617.

⁴³¹ Kenneth Johnson, “Scholarly Images of Latin American Political Democracy in 1975,” 11 *Latin American Research Review*, 9-40 (1976).

⁴³² Keith Rossen, “The Protection of Judicial Independence in Latin America,” 19 *University of Miami Inter-American Law Review*, 1 (1987).

⁴³³ Larkins, supra note 427, p. 618.

⁴³⁴ David Clark, “Judicial Protection of the Constitution in Latin America,” 2 *Hastings Constitutional Law Quarterly*, 405 (1975).

⁴³⁵ Larkins, supra note 427, p. 615.

It can be appreciated that this is also true about post-Soviet countries. In their article on the relationship between judicial review and the independence of courts, political scientists Erik Herron and Kirk Randazzo reasonably demonstrate considerable discrepancies between official (formal) and factual indicators of independence of the post-communist courts.⁴³⁶ They criticize the reliability of formal data such as on court activism which has been often used as an indicator of independence. This study argues, for example, that formally fairly active constitutional courts in both Belarus and Azerbaijan have been subject to manipulation by the presidents in their political interests, and that these courts' record of activism almost equals the review and invalidation of legislation undermining the presidential authority.⁴³⁷ Therefore, while according to formal indicators Belarus and Azerbaijan have the most active constitutional courts, the relevance of this factor to these courts' independence should have been doubtful due to the highly authoritarian nature of regimes in both countries.

The second merit of the study by the Freedom House is its assessment of the judicial system of particular countries in wider political perspective with essential reference to all the indicators concerned. This approach allows for contextual evaluation of phenomena based on all their multi-faceted aspects and the inter-dependence of different factors. In contrast, many academic observers concentrate on a particular phenomenon among the vast number of issues which determine the status of judicial independence.

Larkins does not leave this methodological tendency unattended either. His critique of studies concentrating on one of the characteristic features of an independent judiciary, such as impartiality, insularity and authority, assumes that "some of these traits could be exhibited by non-independent as well as independent judicial branches."⁴³⁸ This is why he concludes that "evidence of one but not all of them does not decisively indicate the existence of judicial independence."⁴³⁹ Larkins harshly criticizes these noticed tendencies in one-sided appraisal of courts, referring to the evidence of the studies of courts in Spain under Franco⁴⁴⁰ and Chili under Pinochet.⁴⁴¹ While such "specialized" perspectives are important for revealing the overall quality of judicial independence, they are insufficient by themselves for arriving at a consolidated evaluation of a judicial system. As to the criticism of the polling method, Larkins' point seems to be a little bit overstated: regardless of the number of deficiencies which the results of polling may have, this method contains some essential merits, such as impartiality

⁴³⁶ Erik Herron and Kirk Randazzo, supra note 8, 2003.

⁴³⁷ Id., p. 425.

⁴³⁸ Larkins supra note 427, p. 611.

⁴³⁹ Id., pp. 611-612.

⁴⁴⁰ Jose Toharia, "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain," 9 *Law and Society Review*, 475-496, (1975).

⁴⁴¹ Larkins supra note 427, pp.612-613.

and professionalism, which make it a valuable resource compared to other existing methods of evaluating judicial independence in a cross-country context.

The Freedom House's data may have some other deficiencies. One of them is arguably the reliance on single popular cases in evaluating the overall quality of the judiciary. Thus, improvement in Ukraine's score in 2006-2007 was based on the single case of the 2004 post-election decision of the Supreme Court⁴⁴² which hardly represents a general trend in the whole judicial system in this country. As we could see in the previous chapters, the courts in Ukraine still stay constrained by the executive. Likewise, the drop in Russia's score can hardly be justified by only the single politically-motivated case of *Mikhail Khodorkovski* whereas there has always been evidence of the widespread practice of political prescriptions for the resolution of certain cases in the Russian courts.

Taken as a whole, however, the Freedom House's evaluation is a reliable and, overall, a truthful source for comparative analysis of courts in transiting societies. At the end of the day, this is the only available cross-country assessment of judicial frameworks and independence which allows comparative analysis of various groups of countries with visual numerical scores attributed to each one. Moreover, these cross-country evaluation tables are supplemented by separate annual country reports with summarizing narratives on each country's state of affairs and progress in democratic governance. Notably, in all the reports concerning post-Soviet countries, the Freedom House's experts underline deficiencies in the judicial independence in their overall appraisal of countries' democratization. The report on Armenia confirms my earlier assumption about the discrepancy between the law on the books and its enforcement and about the lack of independence of the judiciaries for overcoming this problem:

Despite constitutional provisions guaranteeing a full range of basic human rights, in practice there remain substantial barriers to effective protection of said rights. The judiciary enjoys little independence and is unable to fulfill its role as a guarantor of law and justice.

The Russian report refers to the courts' manipulation by the state. Political pressure on courts is reported in Georgia despite the drastic progress in democratization and the rule of law since the triumph of the pro-democratic movements in 2004. The Belarusian court system is reported to be subordinate to the presidency. Similar are the statements about Kazakhstan, Tajikistan, and other Central Asian countries. The report on Kazakhstan submits:

Kazakhstan's judicial system has lost much of its credibility by acting in full compliance with the regime's interests rather than stepping in to protect civil liberties.

⁴⁴² See the discussion in Chapter 3.

In Moldova, Freedom House reports political pressure on the Constitutional Court. In allegedly the freest country in the post-Soviet area, Ukraine, the judicial branch is reported to have provided little help in guaranteeing the rule of law.

We may refer to various other sources for identifying the real state of affairs with judicial independence and the effectiveness of courts in post-Soviet nations. On the level of constitutional judicial review, the survey of the recent politically-sensitive cases, undertaken by this work in the previous chapters, showed the constitutional courts gravely dependent on political leadership. In Ukraine, the Constitutional Court appeared incapable in 2007 to decide on the case of the dissolution of the Supreme Rada as any decision in that case would produce a strong counter-reaction from either of the divided executives.⁴⁴³ In general, the courts in this country have regularly reported pressure from the executive power.⁴⁴⁴ In Russia, the Constitutional Court could not find enough courage to counter President Putin's constitutional project eliminating the elections of the governors.⁴⁴⁵ In Armenia, the Court was unable to effectively address the violations before and during the elections of 2008, though the Court observed the fact of these violations in one of its decisions.⁴⁴⁶

After all, being involved in electoral markets and political games by virtue of the constitutional imposition of arbiters' functions in electoral and other political matters (as discussed above), constitutional justices have to cope with the pressure coming from the political actors. Decisions of constitutional courts in such situations represent an inherent "institutional survival" strategy⁴⁴⁷ by which constitutional judges are being guided. In this light, it is not surprising that sustaining the current executives' will, in the manner of the Belarusian and Azeri courts as described by Herron and Randazzo,⁴⁴⁸ demonstrates the typical pattern of the constitutional courts' behavior in the former Soviet countries.

There is, meanwhile, abundant evidence of the currently "low" status of the constitutional courts in newly democratizing countries, of their damaged standing and reputation among both the public and the state authorities. Hence, usual ignorance of the constitutional courts' decisions is observed. Herman Schwartz mentioned the difficulties with the implementation of the Constitutional Court's orders in the Russian Federation as "one of the Court's most troubling problems."⁴⁴⁹ This problem in Russia clearly goes back to its noteworthy Tatarstan case as early as 1992 when the Constitutional Court considered as unconstitutional a question in the regional referendum containing statements on the sovereignty of Tatarstan. This decision

⁴⁴³ See Chapter 3.

⁴⁴⁴ *Supra* note 365 and Chapter 3.

⁴⁴⁵ See the discussion in Chapter 3.

⁴⁴⁶ See re Ter-Petrosyan, *supra* note 402, and Chapter 4.

⁴⁴⁷ See *supra* note 22 and Chapter 3.

⁴⁴⁸ *Supra* note 8.

⁴⁴⁹ See Herman Schwartz, *supra* note 5, p. 160.

of the Court, as well as the Court's subsequent references to the Russian Parliament and the President, though, were ignored by the Tatar government which succeeded in proceeding with the concerned question on the referendum despite the Constitutional Court's judgment.⁴⁵⁰ There have been many cases of noncompliance after the Tatarstan case.⁴⁵¹ Schwartz cites a Russian Constitutional Court's justice complaining about the executive's and the prosecutor's low motivation for enforcement of the Court's decisions.⁴⁵² In addition, noncompliance with the Constitutional Court's decisions is "widespread above all in ordinary courts."⁴⁵³

Meanwhile, Klaus von Beyme's remark in his article on the Russian Constitutional Court suggests that ignorance of constitutional courts' decisions is not typical to Russia only: "A non-consolidated democracy has always initially the problem of enforcement of legal sentences. Legally the Court's decisions are binding- but who secures this?"⁴⁵⁴

Indeed, the problem seems to be related to virtually all post-Soviet countries⁴⁵⁵ and not really only in the early years of their transition. As Epstein, Knight, and Shvetsova argue, this reality is clearly a by-product of the previous regime where no neutral and independent check on the governmental activity might be implemented and thus this newly-established function seems very odd to political institutions.⁴⁵⁶ In Armenia, the local media labeled the Constitutional Court as a powerless creature which reminds a publishing house that prints flamboyant books on legal studies.⁴⁵⁷ There are some reasons for such a treatment: since 2004, for example, the decision of the Constitutional Court holding unconstitutional the Government's program on the alienation of private property for the reconstruction of the city center in Yerevan was not followed by the Government which continued with its program after the Court's decision. A more noteworthy decision of the same Court, which was mentioned in the previous chapters, calling for the acting National Assembly and the President of the country to organize a referendum of confidence within one year after the obviously unfair elections, was likewise ignored by both the Parliament and the President.⁴⁵⁸ Schwartz reports about regular ignorance of the Constitutional Court's rulings by President Lukashenka in Belarus.⁴⁵⁹ It is not a surprise, in this light, that the public reputation of the courts would decline considerably since the time it

⁴⁵⁰ See Lee Epstein, Jack Knight and Olga Shvetsova, *supra* note 187.

⁴⁵¹ See, e.g., Angela Di Gregorio, "The Evolution of Constitutional Justice in Russia: Normative Imprecision and the Conflicting Positions of Legal Doctrine and Case-Law in Light of the Constitutional Court Decision of 16 June 1998", 24 *Review of Central and East European Law*, 387 (1998).

⁴⁵² Schwartz *supra* note 5, p. 31.

⁴⁵³ Angela Di Gregorio, *supra* note 451, p. 415.

⁴⁵⁴ Klaus von Beyme, "The Russian Constitutional Court in an Uneasy Triangle Between the President, Parliament and Regions" in *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, edited by Wojciech Sadurski (Kluwer Law International, 2002), p. 324.

⁴⁵⁵ Though it is more difficult to collect respective data on the rest of the countries because these are not as scrupulously studied as Russia.

⁴⁵⁶ Epstein et al, *supra* note 187, p. 126

⁴⁵⁷ See e.g. *Aravot Daily* for April 19th, 2006.

⁴⁵⁸ See the discussion in Chapter 3.

⁴⁵⁹ Schwartz *supra* note 5, p. 238

became clear that this new institutions, which were created for the promotion of constitutional justice and human rights and which therefore enjoyed a large public support at the beginning, proved to be incapable of performing independently and were viewed as mere proxies of the executive power.

Even worse is the situation with general courts which enjoy even less legitimacy and public support and which are subject to pressure from the part of a variety of actors, including national and regional authorities, and even powerful individual actors, such as representatives of local business elites, etc. One researcher submits a symbolic quotation from President Lukashenka saying that the judiciary is essentially a part of the Presidency and that though the courts are supposed to be independent, it is the President who appoints them and thus can so manipulate them.⁴⁶⁰ Such treatment by the highest political officials in the formerly Soviet states is not typical only to the emblematic though a bit extreme example of Belarus. In Russia, one should not go deep to see elements of “telephone justice” in a number of politically-sensitive judicial cases, such as the *Yukos* trials, where the addresses of the main screen-writers of the respective judicial decisions can be traced to the highest offices of the country.

Among the *Yukos series*, the case with the last Chief Executive of the company is illustrative. In a nutshell, in 2005 the newly appointed senior manager of the former oil giant, Vassili Aleksanian, who publicly announced his plans for consolidation of the assets and rehabilitation of the company which was since the last two years under the special attack from the Government, was subject to criminal persecution by the Prosecutor’s office. The criminal charges against him were initiated immediately after his appointment to office and his mentioned announcements, whereas the alleged offences of his were previously subject to scrupulous investigation and could have been dealt by the prosecutors well before he would become the key manager of the company. The *Simonovsky* court of the Russian Capital endorsed these charges brought by the Prosecutor’s office, giving the sanction for Alexanian’s detainment.⁴⁶¹ As of 2008, no official indictment against Alexanian was presented, while his custody on pre-trial detention, without access to basic medical care despite his life-threatening condition, has continued up to the present time.⁴⁶² Not surprisingly, there is hardly one incident when the different courts would not endorse the prosecutors’ charges in the number of *Yukos* cases since 2004. In such or other ways, through its central or local proxies, the state in the former Soviet world administers and controls the legal system, including the courts.

I undertake this “journey” to properly verify the accuracy of my assumptions about the very low credentials of judicial independence in post-Soviet societies, following Larkins’

⁴⁶⁰ See e.g., Luu Tien Dung, “Judicial Independence in Transitional Countries,” UNDP Oslo Governance Centre Paper Series (2003), available on-line at www.undp.or/oslocentre/docsjuly03.

⁴⁶¹ See *Kommersant*, N 62 for 8 April 2006.

⁴⁶² For one, see the Reuters report at <http://in.reuters.com/article/worldNews/idINIndia-31480420080118>.

recommendation to concentrate on the evidence of dependency of courts rather than that of independence (which he considers a methodological substitute to the criticized options).⁴⁶³ This is in spite of the fact that in some sense such a scrutiny may seem to be excessive: after all, the fact of “judicial dependence” in the formerly Soviet countries on both constitutional review and general levels is patently obvious, and there is hardly anyone familiar with these societies who would strongly disagree with such assessments.

The observed deficiencies of the judicial system currently create the biggest barrier to these countries’ path to development and this is virtually in all areas. It is obvious that no real progress in democracy building can be achieved without serious achievements in judicial independence as no democracy can exist without the rule of law. Likewise, there may hardly be any significant economic growth founded on a poor rule-of-law environment. In this light, the judiciaries can be characterized as the Achilles heel of the post-Soviet transitions.

Obviously, the communist legacies are the main explanation for the current state of affairs in post-Soviet judicial systems. For any observer with a more or less clear perception of the judicial practices in communist times, there should not be any major doubt about it. Like in communist times, the majority of the judiciary in the now independent post-Soviet countries stays subservient to the major political actors in their countries in almost the same manner as they were under the communist regime. This is, largely, due to the incredible difficulty in overcoming the inherited structures existing in the whole generation of judicial officers and legal professors who, as a rule, still dominate in both the judiciary and in the law schools training future judges.

However, apart from the legacy explanation, there is another factor to keep in mind. In such political environments, as in the countries under review, the judicial bodies and especially the individual judges, who comprise the major body of the judiciary, stay functionally and institutionally unprotected *vis-à-vis* their main “oppressors” who are endowed with real power and resources. There is something about the institutional design of the judicial branch at large that one can view as making this inequality obvious. Given the reality of the post-Soviet judiciary and judges being subject to various pressures from other branches of the power, I do not see any real powers being given to the judiciary as a separate institutionalized branch for resisting such pressure. In this situation, the individual judges, of whom the judicial branch is mainly composed, appear as powerless functionaries who can hardly feel the strength of the judiciary as of a compelling, consolidated institutional entity behind them when confronting pressure from, let us say, the prosecutor’s office or the local governor. If all or only one of

⁴⁶³ Larkins, *supra* note 427, p. 618.

these arguments makes sense, then the institutional design, aiming at a better consolidated judiciary, should have particular attention paid to it.

All this having been said, does the Kelsenian model offer such a design?

C. The Kelsenian model and the consolidation of judiciary

I argue that in the post-Soviet environment, the separation of the two judicial functions—constitutional and general, considerably weakens both. In contrast, the well-designed consolidation of constitutional and general judicial bodies would enhance the independence and the standing of the judicial power. The reasoning for such an option does actually go beyond the visual attractiveness of this statement.

Let us consider, firstly, whether the emergence of the two separate fragments within what we can conditionally call judicial power is not detrimental to the overall strength of the judiciary. Then, it will be worth looking at whether, besides such assumed negative consequences of partition, there may be arguments found by which the consolidation would rather add to the independence and effectiveness of both these functions.

The perils of separation

This inquiry is worth starting with the evidence of conflicts between constitutional and general courts, a reality which obviously does not support an image of a consolidated and strong judicial body. While my proposition about destructiveness of such conflicts was originally based on a rather intuitive suspicion, this concern was confirmed by a series of interviews which I had with acting and former justices from the post-communist area.

Answering my question about the virtues of the Estonian model of judicial system, which is, first of all, distinguished by the absence of a separate constitutional court, the Justice of the Constitutional Review and the Administrative Chambers in the Supreme Court of Estonia Juri Pold emphasized the importance of judicial integrity, enabled by their system, which excludes the possibility of a conflict between the particular segments of the judiciary.⁴⁶⁴ While at first glance I was quite surprised that this argument was particularly pointed out from among the many others, which are normally brought in support of the Estonian model, my later inquiries came to convince me that this experienced judge and constitutionalist should have had enough evidence of the destructive consequences of such conflicts in all over the neighboring region.

⁴⁶⁴ Interview with Mr. Juri Pold, Justice of the Supreme Court of the Republic of Estonia, 12 April, 2006, Tartu, Estonia.

Indeed, there may be hardly any country found in post-communist Europe which had avoided the clash between constitutional and general courts over the constitutional review prerogatives in their judicial competency.⁴⁶⁵ The former Chief Justice of the Polish Constitutional Court, Marek Safjan, in an interview in 2007⁴⁶⁶ observed that the tension between the Constitutional and general courts in Poland is still in place and that the consequences of this clash have a significant negative impact on the performance of the judicial system at large.

The conflicts between constitutional and general courts have sometimes been so uncompromising that it has led observers to speak of the “war of the courts.” Notably, such a conflict is said to be typical of virtually all the post-authoritarian states which decided to create a separate tribunal for adjudicating constitutional matters.⁴⁶⁷ In the post-Soviet countries which have not avoided the “wars of the courts”,⁴⁶⁸ the Russian courts’ clash has probably been the most uncompromising. It arose as a result of the country’s two highest judicial bodies—Constitutional and Supreme Courts’ differing visions on the review of constitutional issues by the general lower courts. The first was the Supreme Court’s persuasive clarification of 1995, addressed to the lower courts, which provoked the conflict. In this clarification, the Supreme Court recommended⁴⁶⁹ that the courts disregard any laws which they would deem as unconstitutional and in such cases directly apply the provisions of the Constitution unless the courts have doubts about the constitutionality of a law in which case they would need to refer the case to the Constitutional Court.⁴⁷⁰ The reaction of the Constitutional Court followed in 1998: the Court reaffirmed its exclusive competency over constitutional matters at both the federal and regional levels.⁴⁷¹

At a glance, this is reminiscent of an ordinary juridical dispute. But there is evidence to the contrary showing a real rivalry between the courts, which goes beyond the ordinary dispute over a technical legal matter. Herman Schwartz considers the conflict between the two judicial segments as the cause of the very few referrals to the Russian Constitutional Court from the general courts.⁴⁷² If this really is the case, then the conflict between the two segments of the judiciary seems to involve a much harsher confrontation and mutual antipathy than we would expect the results of a simple legal contest to be. At the same time, Schwartz, who calls the relationship between the Russian courts “troubled”, quotes a constitutional judge reporting

⁴⁶⁵ Sadurski, *supra* note 2, p. 20

⁴⁶⁶ Interview held on April 20, 2007 in Florence, Italy.

⁴⁶⁷ Sadurski, *supra* note 2, p. 21.

⁴⁶⁸ Schwartz, *supra* note 5, p. 24.

⁴⁶⁹ In fact, such clarifications are considered as a legitimate source of law in Russia. This is yet another heritage of the Soviet law.

⁴⁷⁰ See the Decree N8 (31 October 1995) of the Plenum of the Supreme Court of the Russian Federation.

⁴⁷¹ See the Decision N 19-II (16 June 1998) of the Constitutional Court of the Russian Federation.

⁴⁷² Herman Schwartz, *supra* note 5, p. 161.

rather a series of jurisdictional disputes between the Constitutional and the Supreme Court in the context of the above-mentioned jurisdictional dispute.⁴⁷³

A student, who specifically devotes an entire article to this essential conflict between the Russian Constitutional and Supreme Courts, submits that the Supreme Court, in contrast to the Constitutional Court, enjoys a greater authority and prestige among the judiciary.⁴⁷⁴ This remark, made in the context of the Russian “war of the courts” in a sense indicates the delineation between the Constitutional Court on one hand and the rest of the courts on the other. After all, we can imply from these comments that the widespread disregard of the decisions of the Constitutional Court by the ordinary courts, as mentioned above, is largely a result of the “war of the courts.”⁴⁷⁵

Do such “wars of the courts” threaten the independence of the judiciary? I look at this from the perspective of the overall image of the judiciary as a separate power and an institutionalized, integrated body. In light of the specific transitional demands in post-Soviet countries, which I now consider, this issue is much more important than even the “coordination problems when allocating jurisdiction”⁴⁷⁶ or the problems with “dual constitutional jurisdiction”⁴⁷⁷ produced by the separation of the constitutional review from the general judicial function. The problem looks particularly worrying from the perspective of the US judicial tradition where the troubled relationship between the judicial fractions is viewed first of all from the standpoint of the judiciary’s composite capacity *vis a vis* the other branches: for example, the main concern expressed by a former US judge of the US Court of Appeals for the District of Columbia about the systems which divide the judicial functions between constitutional and other courts, is that “the concentration of the highly visible constitutional issues in one court, which would then tell other courts what the constitution meant and how to apply it, would diminish their stature, particularly before the executive and parliament.”⁴⁷⁸

Meanwhile, we should ask whether the general environment of distrust, apathy and psychological dissatisfaction within the courts is not detrimental to their independence and strength. Wojciech Sadurski notes that the separation of judicial functions raises problems of “professional pride” and “sense of dignity.”⁴⁷⁹ Angela Di Gregorio submits that the creation of the Constitutional Court “has hurt the pride of the Supreme Court.”⁴⁸⁰ I believe in the destructive effects of such unhealthy contests and “jealousy” between the different courts. At

⁴⁷³ Id.

⁴⁷⁴ Angela Di Gregorio, *supra* note 451, p. 388.

⁴⁷⁵ Id., p. 414.

⁴⁷⁶ Tom Ginsburg, “Economic Analysis and the Design of Constitutional Courts”, 3 *Theoretical Inquiries in Law*, 50 (2002), p. 66.

⁴⁷⁷ Schwartz, *supra* note 5, p. 161.

⁴⁷⁸ Id. at XIV ff.

⁴⁷⁹ Sadurski, *supra* note 2, p. 19.

⁴⁸⁰ Angela Di Gregorio, *supra* note 451, p. 409.

the same time, this is not the best way of curing the extremely poor fame of the judiciary, which is, in many instances due to the long-standing reputation of corrupt and dependent courts- a reality which it is important to improve rather than avoid.

The separation of the “elitist” constitutional courts from the other courts clearly emphasizes this contrast. On the contrary: the accepted image of the constitutional courts as “elite” bodies in general and the reputation of its intellectual and respected members should rather add to the reputation of the general judiciary whose popular image is more that of a corrupt and limited Soviet-era bureaucrats. While the conventional wisdom has been, since the collapse of the Soviet ideology, to keep the newly created institutions away from the infamous judiciary, I would argue that a better-thought policy should have, at some point, been concerned to upgrade the judiciary’s stature and the consolidation of the judiciary, which as I principally advocate in this chapter, is the proper institutional device for addressing the problem.

After all, there are other problems too. The decline in the ordinary courts’ referrals to the constitutional courts, as concerned above, threatens the very core idea of constitutional adjudication in the countries which introduced the mechanism of concrete review by means of referrals from general courts. The other essential problem is the level of constitutional culture among the general judiciary. Herman Schwartz brings a set of evidence to indicate the very low awareness of constitutional issues among the ordinary judges in the post-communist countries in general.⁴⁸¹ Where the ultimate prospect of constitutionalism in transitional countries is concerned, the problem is of significance. At the end of the day, as Wojciech Sadurski notes, “it is the ordinary courts that are the front line, so to speak, of the application of the law.”⁴⁸² The dissenting opinion of the Russian constitutional judge Gadzhiev from a Constitutional Court’s decision of 1998 is very illustrative:

Decisions of the ordinary courts which have identified a conflict between a law and the Constitution, and have declined to apply the law, without repealing them, represent the birth of judicial law, the development of which is particularly indispensable to the Russian legal system in its search to avoid positivist approaches.⁴⁸³

All this said, the “wars of courts” should have become a tormenting alarm for those who worried about the overall capacity of the judicial branch in its uneasy fight against the other institutions in the aggressive turmoil of post-authoritarian power structures.

The virtues of consolidation

⁴⁸¹ Schwartz, *supra* note 5, p. 236.

⁴⁸² Sadurski, *supra* note 2, p. 20.

⁴⁸³ Quoted in Sadurski, *supra* note 2, p. 21.

Let us now consider how the consolidation of the separated judicial functions would augment the independence and strength of the judiciary. As an illustration and a sample for developing a hypothetical analysis of alternatives, let us consider a situation where a court is confronted with deciding a case where a private interest of a powerful governmental actor is concerned. Typically in such situations in a post-Soviet country, a judge would likely decide in line with the interests of the political litigant, regardless of the real merits of the case. The conventional explanation for this reality is simple: as I said before, the individual judges, who perform justice in the vast majority of cases, in the absence of the essential cultural setting for the respect of the judicial office and the rule of law in post-Soviet countries, are quite powerless against the mighty “opponents” from the executive branch who put pressure on them in search of a favorable outcome in their case. The problems of financial, administrative, logistical, and other dependence of the courts on the other institutions are central, and it comes as no surprise that these are extensively addressed by a variety of studies and practical guides on judicial independence.⁴⁸⁴ The “verdict” in such cases is clear: to provide for real independence, these powers of other institutions to constrain the judiciary should be cut to the minimum.

However, another aspect is worth consideration in this context- if the other institutions in fact possess powers (in fact, so many of them) by which they are able to constrain the courts, which are the respective powers under the judiciary’s possession that would help them to “balance” the power structures? One would agree that these powers are vested mainly in the constitutional courts which, as we could see, do not in any sense share these assets with their fellow colleagues from the general judiciary. If the institutional actors from the other branches of government or individuals or groups associated with them are supposed to pose the main constraints on the courts, as is the case in the countries of this study, then what are the special guarantees for the independence of the conventional judiciary under this conception of the separation of powers principle?⁴⁸⁵

I argue that the political function, currently vested only in constitutional courts, can largely add to the strength, and therefore, to the independence of regular courts. Look at the conclusion to which political scientists Herron and Randazzo arrived in their study of the judicial independence and activism in post-communist countries:

⁴⁸⁴ See e.g., Luu Tien Dung, *supra* note 381.

⁴⁸⁵ Or does this specific setting with separate constitutional courts exclude the general judiciary from the separation of powers framework? At the end of the day, given the functional division of general and constitutional judicial tasks, as we can see the case in post-Soviet countries to be, what checks and balances instrumentality is granted to the judiciary if not the constitutional review? The current state of affairs, based on separate constitutional courts, essentially alters the basic concept of separation of powers between legislative, executive and judicial powers. In such circumstances as the ones discussed, only constitutional courts possess mechanisms balancing the political branches, and these do not factually belong to the rest of the judiciary due to functional alienation of the constitutional court from the judicial system. If so, which is the right institution that we should associate with the “third power” that should care of the checks and balances over the legislative and executive powers?

Courts with a constitutionally-invested power of judicial review are arguably more independent than courts without a formal grant of judicial review or courts whose authority outlines in an easily amended statute. Without the power of judicial review, courts have substantially limited authority to make decisions opposing the actions of political branches of government.⁴⁸⁶

In this context, unlike most of the academic writers on constitutional courts in post-communist countries, I am strongly in favor of the exercise of activist political functions by the courts especially in the former communist countries. While the political nature of the main functions implemented by constitutional courts is universally recognized, judicial activism by post-communist courts is rarely justified by these experts.⁴⁸⁷ Although one should be worried about generalizations, I principally disagree with them for two main reasons.

First, references to constitutional courts almost always produce plenty of democratic effect that is among other things is a strong engine for promotion of a culture of democracy. As a rule, this effect is not possible to reach if the courts do not step over the standards put together by the dominant political elites through the process of law-making. Take, for example, the decision of the Constitutional Court of Armenia on the results of presidential elections in 2003, discussed in length in the third chapter. It may be recalled that the case related to the controversy between the presidential candidates over the results of two-round elections in 2003.⁴⁸⁸ The application was submitted to the Constitutional Court of the Republic of Armenia by the presidential candidate Stephan Demirchyan on the results of the second round of the elections. In particular, the petitioner had alleged essential violations committed during the election process, including mass stuffing. The outcomes of the adjudication are known to us. The ruling of the Constitutional Court had upheld the results of the second round, recognizing the re-election of acting President Robert Kocharyan. The decision of the Constitutional Court, however, contained another statement, a non-binding recommendation, which proposed to overcome the political controversy over the elections by holding a referendum within one year “as an effective measure to overcome social resistance deepened during the presidential elections.”⁴⁸⁹ Despite the Constitutional Court’s legally vulnerable argumentation, containing a call for a “referendum of confidence” to overcome the complexities of the disputed elections, the decision, reached through judicial activism, provoked the strongest democratic momentum in this country.

⁴⁸⁶ Erik Herron and Kirk Randazzo, “Judicial Institutions and the Evolution of Independent Courts in New Democracies,” Michigan State University Center for European and Russian/Eurasian Studies Working paper.

⁴⁸⁷ Such are the positions of Epstein et al, Herbert Hausmaninger, and Herman Schwartz, to mention a few from amongst the researchers of post-communist courts.

⁴⁸⁸ In fact, there have been two petitions on 2003 presidential elections, one after each round, but for the purposes of this study we want to review the one on the results of the second round of elections.

⁴⁸⁹ See the Decision of the Constitutional Court of the Republic of Armenia of April 16, 2003 On the case of the dispute on the results of the elections for RA President held on March 5, 2003.

By the same token, even the widely criticized political involvement of the Russian first Court, I believe, has greatly enhanced the political culture within the society in general and within the political leadership in particular. One symbolic indication is provided by Epstein, Knight and Shvetsova quoting President Yeltzin, who suspended the Constitutional Court in 1993, saying only after five years that the ruling of the Constitutional Court is binding upon him even though he dislikes it.⁴⁹⁰ In sum, I hypothesize that the greater the involvement of post-Soviet constitutional courts in politics, the better is the prospect of democratic consolidation.

Second, political involvement is a primary guarantee of the courts' independence. Kim Lane Scheppele calls this the "liberating effect on judges of the ever increasing constitutionalization of politics."⁴⁹¹ Her extraordinary point of view stands for "judicial empowerment" precisely for the benefit of promoting judicial independence. The wealth of empirical evidence supporting this account is provided from the post-communist constitutional courts' experience which is not a surprise if we revisit the exclusive competency of these bodies in exercising constitutional review in former communist lands. Having employed this concept, I apply its main propositions to support my main argument for the independence of the judiciary in general. The remarkable inventory of judicial techniques listed,⁴⁹² which Scheppele views as "tools that activist courts are using to constrain the political branches"⁴⁹³ may equally be utilized to enhance the arsenal of the judiciary in general if a reasonable level of judicial integration is reached that allows a power-sharing to take place between the general and constitutional judicial functions.

In this perspective, consider our hypothetical case already in a situation where the ordinary courts in general, either directly or through their functional integration with the constitutional review court, possess the entire list of functions which are now set quite clearly aside in the constitutional courts, including invalidation of laws and governmental acts, verification and validation of elections, right to impeach executives, as well as the legal empowerment methods through "expansion of constitutional-judicial domain," that are mentioned by Scheppele. I argue that there is considerable empowering potential of such a design. Added the prospect of "non-positivist" approaches in application of law and the "birth of judicial law", as Justice Gadzhiev puts it, the institutional empowerment would enable the judiciary to possess a serious instrumentality virtually in any areas of public relations and law enforcement. Scheppele shows a direct correlation between the exercise of judicial discretion in interpreting the law and judicial independence.⁴⁹⁴ This would stand for another potential instrument in the hands of

⁴⁹⁰ Epstein et al, supra note 187, p. 137.

⁴⁹¹ See Kim Lane Scheppele, "Declaration of Independence: Judicial Reactions to Political Pressure," in *Judicial Independence at the Crossroads*, supra note 338, (Sage Publications 2002).

⁴⁹² Id., p. 248.

⁴⁹³ Id., p. 269.

⁴⁹⁴ Id., p. 228.

courts, to “balance” the other institutions: “Empowered by constitutional principles, judges can (and some judges often) bend the positive law to a judicial conception of what the law should be, thereby challenging the political branches for the final word on what counts as law in the first place.”⁴⁹⁵

As I emphasized before, another important issue in this context is to sustain the judiciary’s consolidated image vis-à-vis the other branches. This would be a serious investment in promoting separation of powers and providing guarantees for constitutionalism through enhancing the judicial independence on the institutional level. A fair portion of the causes for “inequality” between the judicial and the other institutions is due to the mostly individualized character of the judicial system in general where the supposedly independent individual judges are in the core of the system. In a sense, without the function of the constitutional review and not regarding the relatively few cases heard by higher general courts’ benches, the “judicial power” is chiefly an abstract ideal for individual judges who are selected and appointed individually, who are responsible and accountable individually, and who confront political pressure individually. While this reality seems to be hardly possible to change on any conceptual grounds, any arrangements, which would enhance the institutionalization of the judiciary and its functional consolidation, should be paid special attention.

I argue that the merger, in any well-designed fashion, of the constitutional review court with the general judiciary would fundamentally enhance the overall weight of the judicial authority and its image among the other institutions and the public. In association with the “asset of political function,” we can call this the “asset of a consolidated judiciary’s image.” Larkins observes that the more institutionalized judiciary is more independent.⁴⁹⁶ His reference to a study of judicial institutionalization in India⁴⁹⁷ better articulates my point. Here he says that the more “coherent” judiciary “can speak with a more united voice to regulate the legality of state behavior and, with this, the judicial branch may be better able to assert itself *vis-a-vis* other institutions.”⁴⁹⁸

Unlike the “asset of political function,” which may bring additional strength to the general judiciary as the constitutional courts already “enjoy” the fruits of political empowerment, the “asset of consolidated judiciary’s image” can add to the independence of both the general and the constitutional review fractions. At the end of the day, constitutional judicial review, as we could see, suffers strongly from the same ills as the general judiciary does in its struggle against political institutions, which strive to constrain its independence as much as possible. Apart from the collective strength of the various judicial functions, the consolidation of the judiciary

⁴⁹⁵ Id.

⁴⁹⁶ Larkins supra note 427, p. 621.

⁴⁹⁷ George Gadbois, “The Institutionalization of the Supreme Court in India,” in *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Theoretical Analysis*, 11-42 (1987).

⁴⁹⁸ Larkins, supra note 427, pp. 620-621.

would essentially eliminate the self-perception of the constitutional review courts as a functionally limited specialized body with a quite unclear vision as to its own genuine type and place in the intricate constitutional framework.

Last, but not least, the consolidation would also help to address the issue of “legal legitimacy” of the constitutional review courts. What is at stake is the legal competency of the constitutional courts which are often argued to be quite detached from the general legal discourse due to their narrow specialization in strictly constitutional matters. While this view is, as a rule, that of general judges and can be challenged on a number of grounds, the problem is worth attention if we care about the harmonized relationship between the judicial segments and the prospects of due respect and proper application of constitutional judgments by the rest of the courts on the one hand, and about the overall quality of the legislation in a country as far as the harmonization of the legal norms is concerned, on the other.

Di Gregorio’s article, mentioned in this chapter, shows, in an illustrative way, in a number of cases concerning the Russian Constitutional Court, how judgments of a constitutional review court would fail to fit in the existing legal body and would create essential problems for ordinary judges who are called to applying these provisions in their daily practice. Such “detachment” of the constitutional courts from “the realities of ordinary courts” and the alleged “abstract nature”⁴⁹⁹ of their decisions seems to be the common syndrome of all post-Soviet systems, at least so from the perspective of general courts. While this problem has generally been attempted to be solved by such requirements as the legal education of the constitutional courts’ members,⁵⁰⁰ its causes should rather be searched for in the practical detachment of the judicial functions from each other which essentially bring alienation of both the constitutional judges from the general legal framework in a country, as argued in this paragraph, and the alienation of ordinary judges from constitutional issues, as argued earlier.

This has been a complex argument and it may be worth to summarize it. This section provided a series of evidence to show that in the post-Soviet countries the emergence of the constitutional courts, separate of the general judicial system, has resulted in a drastic delineation between the two judicial functions (constitutional and general courts) both in terms of institutional partition and in terms of functional and even psychological failure to collaboration. It was argued that this reality essentially weakens the positions of both the constitutional review and general courts as far as the independence of courts in general is concerned. It was furthermore argued that the combination of the “asset of political functions,” enabled by the raise of activist “judicial law” and the “asset of a consolidated judiciary’s image” can substantially improve this state of affairs and largely add to the independence of

⁴⁹⁹ Di Gregorio, *supra* note 451, p. 388.

⁵⁰⁰ For a more “contextual” critique of the requirement for legal education, see Sadurski, *supra* note 2, p. 39-40.

courts under an institutional design providing for a functional merger of the separated judicial segments. If so, the proposals on reconsidering the “institutional divorce” indeed require an urgent attention.

However, another examination is crucial before we attempt to make normative conclusions and this is whether or not there are proper institutional models that would provide for the proposed ideal of the consolidation.

D. In search of an optimal design of judicial integrity

What are the institutional solutions which allow one to experiment with such hypothetical notions as the “consolidation of the judiciary” to which I so often referred in my previous section?

If the Kelsenian model and especially its post-communist version, where these courts are even more removed from traditionally disrespected ordinary courts, failed to secure this then the proposed concept has to run into an uneasy search for institutional alternatives to the continental model. This prospect may seem to be unpromising only at first glance.

Would the diffuse system be an idealistic design?

It is hardly any more the conventional wisdom that there exists a direct correlation between the legal tradition of a country and the system of judicial review it can have, an opinion which goes back to Hans Kelsen. Kelsen referred to the difficulties with unified application of law in the systems lacking the effect of *stare decisis* as one of the main arguments in favor of his creation—the centralized system.⁵⁰¹ This hypothesis, based more on Kelsen’s hypothetical analytical exercise, as no one could test its validity on empirical grounds at that time, was apparently confirmed by later experimentation with both of the major judicial review systems in Western Europe. Thus, Mauro Cappelletti refers to the experiences of the Weimar Republic and post- II World War Italy which tried to adopt a diffuse system, which he says “fully revealed the unsuitability of the decentralized method for civil law countries.”⁵⁰² In his study, Cappelletti mentions three major causes which, he believes, stand for the adoption of the centralized system in the civil law world.⁵⁰³ The first is the continental conception of the separation of powers with its arguably rigid refusal to grant any political functions to the “anti-democratic”

⁵⁰¹ See Allan Randolph Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge University Press, 1989), p. 129.

⁵⁰² Cappelletti, *supra* note 21.

⁵⁰³ *Id.*, p. 137.

judiciary. Then, in line with the hypothesis of Kelsen, it is the absence of the *stare decisis* in the civil law tradition, which as argued, threatens the consistency of the legal system if in combination with the diffused judicial review. Finally, it is the unsuitability of the traditional civil law courts which “lack the structure, procedures, and mentality required for effective constitutional adjudication.”⁵⁰⁴

Despite the fair amount of common sense in these arguments, the verdict of unsuitability of the diffuse system to civil law countries does not sound so deterministic in light of the many experiences on the European continent, as well as elsewhere in the civil law world, which provide evidence to the contrary. The diffuse system of judicial review has existed in Greece since 1847. Although this country has, since then, extensively experimented with particular elements of this system, the review of the constitutionality of laws has been, up to now, implemented by the general courts regardless of the major trends in European legal tradition to which Greece seems to be closer in all other respects. The continental model has also not been adopted in the Scandinavian countries and Finland which are, in general, distinguished by their strong attachment to the civil law traditions.⁵⁰⁵ Whilst in Finland the existing constitutional framework does not provide for judicial review of legislation as such, the latter is recognized in Sweden and Norway and at least the Norwegian judicial review model is said to be among the most “comprehensive” ones if judged by the legal setting.⁵⁰⁶ The diffuse system continues to be the model also in Japan, which despite Cappelletti’s negative appraisal, combines this form with its civil law traditions. Finally, the American tradition of judicial review is set on the foundations of the majority of the Latin American civil law countries, which in many different variations preserve the main characteristics of the diffuse review.

In the meantime, the main arguments developed by Cappelletti may be challenged on both analytical and empirical grounds in the context of post-communist countries. Wojciech Sadurski undertakes a comprehensive critique of the conventional wisdom in his major study of constitutional courts in Central and Eastern Europe.⁵⁰⁷ Equipped with empirical evidences from both the Western, and Central and East European countries, this study challenges the absolute validity of the legal tradition arguments, labeling them as “justifications for the maintenance” of the widespread acceptance of the Kelsenian model.⁵⁰⁸ Summarizing his comparative and, to a large extent, empirical analysis of this view, Sadurski notes that it is not the separation of powers framework and neither it is the authority of precedents that predetermine the choice of

⁵⁰⁴ *Id.*, p. 143.

⁵⁰⁵ Neil MacCormick and Robert Summers (eds.), *Interpreting Precedents: A Comparative Study* (Ashgate-Dartmouth 1997), p. 3 in the Introduction.

⁵⁰⁶ Allan Randolph Brewer-Carias, *supra* note 501, pp. 173-174.

⁵⁰⁷ Sadurski, *supra* note 2.

⁵⁰⁸ Sadurski, *supra* note 2, p. 41.

the Kelsenian model in post-communist countries.⁵⁰⁹ Similarly supported by detailed empirical evidence is this study's critical reaction to the argument about the incompetence of judges in post-authoritarian countries, one mentioned *inter alia* by Cappelletti. The author, who doesn't have a lack of first-hand experience on post-communist countries, notes:

Neither were the judges of constitutional courts in the regions quite "purified" of their old habits and ideologies, nor were the ordinary judges as hopelessly immersed mentally in the "preceding period of dictatorship" as to offer no likelihood that they would dispense justice in accordance with the new axiology of the law.⁵¹⁰

Notably, this study does not shy away from proposing to "re-open the debate surrounding the relative merits of the US style review and its future prospects in the region."⁵¹¹

The virtue of hybrid systems

The analytical exercise in the previous section was not intended at proposing the diffuse system as an optimal design for the post-Soviet countries. Not any deviation from the Kelsenian model necessarily brings to the mere reproduction of its conventional alternative- the American diffuse system- in its proto-type form. As already mentioned for several occasions in this work, the optimal design of constitutional review has to be elaborated with a serious effort at refusing to view the standard forms of the classical models in the foundations of the institutional settings of constitutional review systems in the new democracies. The emergence and the success of the so-called *mixed* or *hybrid* systems in Europe or elsewhere speak to this. Such systems are reported to function quite successfully in Portugal, Switzerland, Colombia, Brazil, and Peru.⁵¹² At a closer glance, some unique alternative elements can also be noticed in the common-law India, and finally, in the post-Soviet Estonia, as it will be discussed later. To explore the vast variety of institutional peculiarities behind all these models, one should note the enormous room for "improvisation" which can be afforded by a constitutional designer.

All this having been said, I should abstain in this part from attending the major debate about the judicial review systems and from exploring, in-depth, the large variety of particular institutional models which could be set up in post-Soviet countries. Leaving this essential study to my following research, my intention now is to tackle one particular alternative model among the variety of theoretical models, which may empirically substantiate the expediency and practicality of my suggestions. I choose the Estonian engineering, which is optimal for this exercise for a number of reasons: first, it is a deviation from the Kelsenian model; second, it offers insights from a post-communist, and even more than that, from a post-Soviet country

⁵⁰⁹ Id., p. 45.

⁵¹⁰ Epstein et al, supra note 187, p. 137.

⁵¹¹ Sadurski, supra note 2, p. 42.

⁵¹² Brewer-Carias, supra note 501, p. 263.

despite the fact that that Estonia is not considered among such for the purposes of this research; finally, as I will argue, it suggests some optimal solutions for the shortcomings of the Kelsenian system and for the functional consolidation of the judiciary.

Are there lessons to be learnt from the Estonian experiment?

Among the post-communist countries, Estonia's design of the constitutional judicial review is unique due to its refusal to introduce a separate constitutional court. The function of judicial review is nevertheless present in this country, unlike in Finland, and yet, this does not mean that the Estonian scheme is a decentralized American type system.

The function of the constitutional review is mainly vested with the Constitutional Review Chamber in the Supreme Court of Estonia, which is the single highest judicial body in the country. The Constitutional Chamber consists of nine judges, appointed to office by the *Riigikogu* (the Estonian Parliament) for life tenure. All of the judges at the Constitutional Review Chamber serve also in the other specialized chambers of the Court.⁵¹³ The Chief Justice of the Court is the *ex-officio* Chairman of the Constitutional Review Chamber. As a rule, the Constitutional Review Chamber hears cases in panels of five judges.

It is noteworthy that the Constitutional Review Chamber is not the only legal forum for deciding on constitutional review matters. The latter category of issues can also be subject to review by the Supreme Court *en banc*, which is the highest legal instance, comprising all the nineteen members of the Supreme Court, as well as ordinary lower courts which are vested with a power to decide on constitutional matters. This is a peculiarity of the Estonian model which gives me another chance for emphasizing the functional rather than merely the structural and visual distinctiveness of the Estonian judicial system and for stressing the latter's merits from the perspective of the consolidated judiciary (as I will try to argue later).

At the first look, the Estonian model's only deviation from the standard choices of the region is the formal title and the address of the constitutional review court. Herman Schwartz notes about Estonia that the reason for its declining to create a separate constitutional court has been more economic in nature than philosophical, political or historical, having in mind the small size of the country and the expectation of too small a load to justify the expense of a separate court.⁵¹⁴

⁵¹³ These other chambers are the Administrative Law, Civil Law, and Criminal Law Chambers.

⁵¹⁴ Schwartz *supra* note 5, p. 24.

Apart from the fact that this statement can hardly be taken as the whole truth,⁵¹⁵ its main propositions create the impression of the visual rather than the functional significance of the failure to create a separate court. Notably, this was also my impression of the opinions on the Estonian paradigm of other experts on post-communist constitutional law. My deeper observations of the Estonian model and the particular mechanisms which it employs recommend though that a closer look at this model reveals an extra value of declining to have a separate court. Let's consider some perspectives.

Primarily, the very fact of vesting the two judicial powers within one highest court is by itself supportive of the idea of judicial consolidation due to its effective coping with such shortages of the Kelsenian design as those discussed in the context of the "wars of the courts" and related technical and emotional clashes between the judicial segments. Meanwhile, the fact of combining these functions in one court has the very potential for promoting the "consolidated judiciary's image" and thus strengthening the judicial independence. It may be opportune at this point to review some expert views. In a regular report of the European Commission on Estonia's Accession to the EU for 2000, for example, it was said of the country's judicial system that the "the Supreme Court serves as Constitutional Court and is therefore fully independent."⁵¹⁶ Likewise, another expert report concerning with the state of affairs on judicial independence in the accessing countries provided: "Vesting judicial review in the ordinary courts (as in Estonia) eliminated the risk that other branches will influence the judiciary through this channel."⁵¹⁷

But the virtues of the system, which we are discussing, do not merely stem from the emergence of a merged highest court. One should notice the peculiarities of the whole system. In particular, there are some essential elements of the substantive and procedural kind, which in my view are highly supportive of the overall independence and strength of the judiciary. Here are some major reflections.

- *The Supreme Court en banc*

As I already mentioned above, the Supreme Court *en banc* is the highest judicial echelon in the country, which *inter alia* reviews matters of a constitutional nature. The constitutional issues which are entrusted to it include cases referred to it by the Constitutional Review Chamber

⁵¹⁵ This was my overall impression from the series of interviews which I held in the Supreme Court of Estonia and in the University of Tartu in April, 2006. In particular, although all of my interviewees did agree that the economic reason was taken into consideration during the design of the judicial review system, they all noted that this was not the only and even not the major rationale for opting to this system. Among the other causes of this choice were mentioned the institutional patterns existed in Estonia before the war, the influence of the Scandinavian systems, and after all, the overall logic of the model which emerged in the post-communist Republic.

⁵¹⁶ *Regular Report of the European Commission on Estonia's Progress Towards Accession*, COM (2000) 704F, 13373/00.

⁵¹⁷ *Judicial Independence in the EU Accession Process*, Report by the EU Accession Monitoring Program, Open Society Institute, available on-line at http://www.eumap.org/reports/2001/judicial/sections/overview/judicial_accession.pdf.

though there is a distinct category of cases which can be heard only by the Court *en banc*. This last category of issues includes such matters as petitions to declare a member of the Parliament, the President or the Chancellor of Justice incapable of performing their duties, to terminate the mandate of a member of the Parliament, or to suspend the activities of a party.

The answer to the question of how this construction enhances judicial integration is, in a sense, self-evident. After all, it is obvious that the constitutional matters in this country are not entrusted to a sole specialized body which is set so evidently far apart from the general judiciary. To return to the existing impression of the Estonia's failure to introduce a separate constitutional court as a formal, visual deviation, this construction submits strong argument to the contrary. More importantly, while symbolizing, by itself, the unity of the judicial function as such, it provides for efficient cohabitation and collaboration between various judicial prerogatives.

- *The composition of the Constitutional Review Chamber*

As said above, the members of the Constitutional Review Chamber of the Supreme Court are selected from among the Justices of the other Chambers of the Court. More particularly, the Justices of the Constitutional Review Chamber are appointed by the Supreme Court *en banc* from among the Supreme Court members appointed to office by the *Riikogu*.⁵¹⁸ This fact by itself excludes the possibility of individual clashes between the constitutional and general judicial functions as both, in this case, are implemented by the same people. The model also offers a solution to the problem of the “legal legitimacy” of constitutional review courts, as discussed earlier. Most importantly, it is also emblematic of judicial integrity and existence of a single judicial function, similar to what I noted in the case of the Supreme Court acting *en banc*.

Based on this prototype, one should not abstain from proposing alternative models of a consolidated highest court. Consider, for example, the model of a single highest court composed of judges who decide on the entire variety of legal cases before it without being divided into specialized chambers. Such a court could perform equally well as both the court of general jurisdiction and that of constitutional review. While the majority of conventional type arguments against such a court would likely be answered by the reference to the Estonian paradigm, the assets of such a judicial body are obvious from the perspective of the judicial consolidation. After all, the experience of the Supreme Court of the US and the US judicial system in general, where the judges perform as general rather than specialized experts on all

⁵¹⁸ In fact, the *Riikogu* (the Parliament) does not appoint constitutional judges specifically. This arrangement keeps the composition of the constitutional review court out of the elected politicians' direct influence.

legal matters, can evidence that this alternative is something more than a mere fantasy of a creative mind.⁵¹⁹

- *Judicial review by lower courts*

The judicial review system of Estonia is often described as a mixed model between the diffuse and centralized systems. This is not so much because of the failure to create a constitutional court, as one can presume, but because of the way in which this country's general courts are involved in judicial review. Actually, every court in the country is allowed to render a judgment in the constitutional adjudication process, or in other words, to render a decision on the constitutionality of a law which is binding on the parties to the case. So far, the described function matches the characteristics of the American decentralized version of judicial review. Meanwhile, though, the Estonian law provides that the decision of the courts in such cases shall be automatically submitted to the Supreme Court for initiation of a constitutional review procedure.⁵²⁰ This procedure, in an important way, differs from the usual institution of preliminary referral in cases of concrete review by ordinary courts. The ordinary judges of Estonia, unlike those of Germany, let's say, do not set the respective case aside until the constitutional review court releases a judgment, but they do, in fact, themselves render a final decision subject to review by the Supreme Court.

In fact, this setting involves all the judges in the country in the process of constitutional review. By doing this, the design enables participation of the "front line"⁵²¹ of the system of justice in the core constitutional debate, enhancing the judges' self-respect and the level of constitutional culture among them. One can also note that the core arsenal of ordinary judges, if their struggle *vis-à-vis* other institutions for dispersing independent justice is concerned, is enhanced by such a design. With these characteristics, the model differs substantially from the ordinary procedure of referrals by general courts which are present in most countries' systems.

At the same time, the Estonian system provides for a harmonic mechanism of abstract judicial review to be implemented at the level of the highest Court. In a sense, this combination allows

⁵¹⁹ In this light, one should not shy away from discussing the possibility that this single highest court to be composed by general judges who are not necessarily lawyers at all. As to constitutional review, one may argue that the legal background is not a must for implementing such a function (see Wojciech Sadurski, *supra* note 2, pp. 39-40). Although I do not claim that such a proposal should be compelling, especially if one takes into consideration the relationship of such a hypothetical argument with the other arguments which I made in this piece, I think that the likelihood of arriving to such construction may not be so far if we take into consideration the current trends in judicialization of public relations.

⁵²⁰ This is in contrast to e.g. the US and the Portuguese systems where the proceedings in the highest court may begin only upon an appeal by a party to the cases in the ordinary lower court.

⁵²¹ See, *supra* note 482.

an effective mixture of the concrete decentralized and the abstract centralized systems of judicial review. At some point, the accuracy of such a combined system may come under scrutiny. If so, one should note that the major problem which might arise in this context- the problem of consistency in the application of constitutional law given the absence of the *stare decisis* in a civil law country,⁵²² is avoided by the requirement for mandatory review of the lower court's judgment in the Supreme Court's Constitutional Review Chamber. Evidently, although Estonia did pass up this major problem directly, there have been some problems of a related nature under the Constitutional Review Procedure Act before its amendment in 2002. In particular and most substantially, the system created situations where the Supreme Court would not agree with the conclusion of the ordinary court and would find the applied law to be in line with the Constitution, while the judgment of that lower court might remain in force. This would be the case if none of the parties to the constitutional controversy in the lower level appealed the decision. Meanwhile, if one of the parties appealed, two simultaneous procedures would go- an appellate proceeding in the higher ordinary court and a constitutional proceeding in the Supreme Court.⁵²³ The story of the emerged debate on this issue and the effectiveness of the measures taken by the new Act in 2003 though prove that such drawbacks hardly amount to any substantial opposition to the overall system.

In particular, the mentioned issue with parallel proceeding was sorted out by an arrangement that enabled appeals against the ordinary court's decision only after the release of the Supreme Court's judgment. The only issue left is that if no appeal is submitted to the lower court based on the Supreme Court's verdict, the decision of the former will still remain in force which is by no means a serious problem if we consider that such situations are highly unlikely after the Supreme Court's revisions of the lower court's judgment.⁵²⁴

In light of this discussion, the Estonian system of judicial review looks both like an effective and a practical hybrid of the classical models of judicial review and an optimal design, avoiding the separation of judicial segments and on the contrary, providing for functional mechanisms for judicial consolidation.⁵²⁵ All this said, I should note that it is hardly the case that all of these

⁵²² Cappelletti supra note 21, p. 141.

⁵²³ Report by Mr. Peeter Roosma, former Advisor to the Constitutional Review Chamber of the Estonian Supreme Court, Venice Commission, CDL-JU (2002) 32.

⁵²⁴ Id.

⁵²⁵ It is noteworthy that the Estonian design of constitutional review has never been challenged on any essentially valid grounds. It is worth noting that the model was once subject to scrupulous review in connection with Estonia's accession to the EU. The only substantial concern in this view has been the system's failure to allow individual petitions to the Constitutional Review Chamber. This apparent shortcoming, though, has been said to be largely mitigated by the responsibility of constitutional review vested with ordinary courts-an institution which practically substitutes the institution of individual petitions brought to the Constitutional Review Chamber, as noted by Justice Pold (see supra note 57). Meanwhile, the rationale of creating a separate constitutional tribunal was based solely on the prospect of allowing individual petitions to be brought to that court though there has been no a comprehensible argument in this view that would demonstrate why such petitions could not be similarly brought before the Constitutional Review Chamber within the Supreme Court: see, *Opinion of the Venice Commission on the Reform of*

arrangements have been provided by Estonian designers especially having a concern about independence of the judiciary. Indeed, one may observe about Estonia that since the collapse of the Soviet Union, the country has not encountered serious problems with judicial independence, such as we observed with the post-Soviet countries in general. Justice Julia Laffranque of the Estonian Supreme Court's Administrative Chamber noted that the judicial power in Estonia has in general succeeded in sustaining itself as an independent institution, *inter alia vis-à-vis* the other powers of the Government.⁵²⁶ Justice Juri Pold said that they do not have to rely especially on the function of constitutional review for sustaining the independent status of the judiciary as there has never been a specific threat to the independence of the judiciary.⁵²⁷

In this light, it is noteworthy and paradoxical, that such a design emerged in a country which probably least of all the post-Soviet countries had a difficulty with sustaining an independent judicial authority. This evidence does, however, hardly undermine my consideration of this model due to its attributes which are highly supportive of judicial independence in general. Would the other post-Soviet countries adopt a similar design of constitutional review and the judicial system in general, I could expect a considerably improved state of affairs with judicial independence there.

Still, the reference to the Estonian paradigm is not an absolute tribute to its exclusiveness at all. One can imagine a considerable likelihood of institutional variations which propose some alternative paths avoiding the unwanted consequences of the Kelsenian model. In fact, my suggestion is not so much to abolish the constitutional courts as to guarantee their functional consolidation with the judiciary, should an institutional design affording such a possibility be found. The Estonian lessons rather show and confirm the applicability and the realistic character of opting for alternative, unprecedented models, that is rather to say for models which are designed for particular countries and particular transitional demands, rather than those carrying the key features of the popular generic type. The demands of the post-Soviet transitions are totally unique. Neither any existing or historical pattern, nor any standard institutional structure, derived from that experience can directly meet these demands. Only the models based on the scrupulous comprehensive analysis of those patterns with regard to the local factors, having considered not only the final objectives but also the transitional needs, can be successful.

Constitutional Justice in Estonia, based on the opinion of Prof. Sergio Bartole and comments by Prof. Helmut Steinberger, Venice Commission, CDL (1998) 059e-restr.

⁵²⁶ Interview in Tartu, Estonia, on 12 April, 2006.

⁵²⁷ *Supra* note 464.

Are there still valid justifications for the Kelsenian transplant? Conclusion

If one is convinced by the series of arguments demonstrating the drawbacks of the Kelsenian transplant in the post-Soviet countries and with the persuasiveness of arguments about alternatives, then opening the discussion on the rationale behind the faithfulness to the continental model is worthy of consideration. After all, if there is a prospect of enhancing judicial independence by re-considering the Kelsenian model, what are the major virtues of the latter that would prevent us from doing that?

I believe that the key arguments for the emergence of the separate courts in post-communist countries have either lost their persuasiveness nowadays, or they have never been really persuasive at all. One should first note that the popularly voiced points for the continental model have not been arguments for separate courts as much as they have been arguments against the decentralized model of judicial review. In this sense, they remind the major arguments brought by Cappelletti against the prospects of the diffuse system in the continental civil law countries.⁵²⁸

In this regard, we had a chance to observe two factors in the order. First, the applicability of the diffuse system, or more precisely of its principal settings, does not seem as unpromising as it used to, and one can find a strong argumentation for this account made in the context of post-communist countries.⁵²⁹ Second, we noted that not any alternative to the Kelsenian option brings to the transplantation of the diffuse system at all, and the assortment of hybrid and unprecedented systems in a designer's arsenal makes one seriously doubt the authority of such arguments for the Kelsenian design.

This is also true about the other main points for the emergence of separate courts in post-communist countries. One central motivation among these was to separate the newly established function of constitutional review from the highly discredited general judiciary.⁵³⁰ As we can see, this is also an argument against the implementation of the judicial review by general courts rather than it is an argument specifically for the existence of a separate court. If so, one should see if this concern which was highly topical and important at the immediate after-collapse period is still valid nowadays.

From the political perspective, it is hardly possible to reject that the lack of a neutral and independent check on the constitutional processes, as well as the lack of a guarantor of

⁵²⁸ Cappelletti, *supra* note 21, p. 137.

⁵²⁹ Sadurski, *supra* note 2.

⁵³⁰ Herman Schwartz, *supra* note 5, p. 22.

constitutional human rights protection is still present in post-Soviet countries. Possibly, the deficiency is even more accentuated now than it was in 1991.

The opposition to the suggestion that the constitutional court should keep distance from the general judiciary should proceed instead from other perspectives. In the first place, the “special regime”, so to say, for the constitutional courts has to be justified by evidence of superior (compared to general judiciary) achievements of this body in being independent and performing its duties impartially during the period of the “experiment”. In this respect, the facts might be unsupportive to such propositions if the post-Soviet countries were concerned. A first-hand indication is that one can fail to show a single constitutional court from among the former Soviet countries which has been so far successful in maintaining its independence and the stature. If this was the ultimate result, then the very rationale behind the separation of the courts bumps into a practical difficulty. One can resist this argument by turning to evidence of constitutional courts’ fervent efforts in acting independently, such as the judicial activism of the Russian Constitutional Court in the early 90-es. But from the perspective of a more than 15-year experiment, such justifications can hardly rehabilitate the overall failure of the design of strong separate courts which in any case looked to be destined to disappointment in the corrupt political environment of the former Soviet states.

Moreover, if the time experiment proved the “failure” of selected and highly reputable judges of constitutional courts, why should not one permit the possibility of rehabilitation of corrupt general judges during this long time even if such “black and white” discrimination is to be taken for granted? After all, the distinction between these was not based on personal characteristics of individual judges, be they constitutional or general, but on rather conceptual bias based on the judges’ ideological perceptions. In this light, one should not totally distrust the ordinary judges, viewing them as chronically corrupt and likewise he or she shouldn’t rely on the constitutional judges as absolutely trustful honest democrats. At the same time, no one can guarantee the constantly reliable pool of judges on the constitutional forum given the ease of substituting the “unfaithful” liberals even in spite of the generally accepted life tenures, as the Belarussian or the Russian experiences submit; neither should one be too skeptical about penetration of a new generation of educated and honest ordinary judges.

Ultimately, the long-living of the “trusted/distrusted judges’ doctrine” in the context of constitutional courts in the formerly communist countries raises a feeling of absolute misery of the democratic prospect and improvement in these countries: in a sense, the almost two decades-long survival of chronic distrust in judges, and moreover- if this rationale keeps being binding for the protection of the separate constitutional courts- the expectation of its survival for some more decades speaks about a political mentality under which the very idea of an independent review in any of its forms looks to be unpromising at all.

Even if there still exist reasons to insist on keeping the constitutional review function away from general judges, one can wonder why this goal is necessarily associated with the creation of a separate court and its isolation from the judicial branch, which appears so detrimental to the both segments of the judicial power, when there is so much of a prospect of an alternative institutional configuration which enables integrity of judicial segments while granting the constitutional review power to a specialized body. At the end of the day, it is difficult to find a reasonable answer to the question why the “highly reputable legal scholars” and the “honest democrats” can not be selected to the Supreme Court instead of the Constitutional Court and therefore distribute constitutional justice on behalf of the Supreme rather than the Constitutional Court. But if even this perspective seems troublesome, why ultimately it is not possible for these judges to serve in a specialized chamber within a single highest judicial body, in the manner of the Estonian Supreme Court?

Or is it that the European traditions, as indicated by Herman Schwartz, effectively predetermine the preference of the continental model of the judicial review? There are some comments in an order to respond to such claims. First, if such an argument may be raised for justifying the choice of now EU-member countries of Central and Eastern Europe and the Baltics, it cannot be similarly valid with respect to the greater part of the former Soviet Union where not even the majority of the countries emerged out of its collapse can be validly assigned to Europe or its cultural or any influence. Even for those of them which could be viewed as European in these accounts, one should be cautious not to overstate this point. After all, the institutional proximity of let’s say the Russian, Ukrainian or Armenian systems to the European legal tradition raises many doubts. Actually, this is not the existence of the “macro institutional” ground such as the civil law tradition in these countries that can explain the proximity; otherwise one should not shy away from applying this concept to Japan or Iran. In fact, the closer look at the pre-communist institutional legacies of post-Soviet countries and consideration of critically exotic Soviet-type institutional practices can strongly oppose to making such generalizations.

Last but not least: I feel a fair portion of anachronism and paternalism in any claims praising the institutional dependency on a legal family or tradition in today’s cosmopolitan world. From one perspective, it is hardly possible now to trace such cultural traditions in their pure forms in either of the continents. It would rather be true to say that the world’s legal systems have critically altered and transformed from their original forms, subject to influence from the globe’s different patterns and traditions which are now largely gathered in one universal spot. In modern societies, the major driving force is rather the practical expediency, which highly predetermines the shape and the contents of the institutions. This factor obliges deviations from pure forms and urges optimal designs to match the specific local demands. Completely different societies of the globalizing world need greater multiplicity in institutional options. My

personal guess is that the next generation of institutional models will be a generation of mixed ones.

CONCLUSIONS

The new Millennium closing its first decade, the question of institutional redesign of constitutional courts should be high on the political agenda in post-Soviet republics. Almost twenty years since the start of the transition from communism, democratic development in post-Soviet republics remains to be still a work in progress. So far in progress, this “work” has nevertheless seen a substantial change in its environment since the beginning of the transformation. Different are the attitudes and expectations from democracy, the patterns of democratic governance, the political elites and leaders, the societies themselves. Different are the constitutional institutions, though they have mostly preserved their basic forms, and the modes in which they perform; the constitutional courts, which also preserved their major institutional settings, but have carried essential transformations in their approaches, methods and styles; the judges. Different are, after all, the challenges facing democratization and the solutions required for fighting them.

In the beginning of this work, we identified several principles which should guide the process of institutional design in countries on their way to democratic consolidation and constitutionalism. It was said that the newly introduced institutions, called to support the societies’ progress towards democratization, should help to create a new political-cultural environment and to learn and appreciate the institutions of constitutional democracy; that they should be culture-sensitive and responsive to the delicate challenges facing the particular societies in transition; that they need to be timely in a way as to be able to react to the proper demands of the time considering the constantly evolving and changing circumstances and demands during the transitions, elastic enough to adjust to these permanent changes and, at the same time, sufficiently enduring in order to stand for the fundamental values and principles of the constitutional democracy. We said also that the post-communist institutions should be democratic in form and nature, legitimate and efficient.

All this said, the job of institutional designers may look very intricate as the principles outlined above do not rest in peace with each other but are in an inherent and subtle conflict. In particular, we saw in this work that the democratic nature, form and essence of institutions is often in conflict with their responsiveness to local circumstances, and that praising the first over the second threatens to result in idealistic designing which proved to be gravely counter-effective. The elasticity of institutions is in an inherent tension with durability, as we observed that institutions which are too rigid frequently fail to adjust to the new challenges and permanent changes in patterns of governance, while institutions too flexible may undermine the basic ideals of the democratic system. For the former, we witnessed that the prescription of

certain technicalities of constitutional courts' settings (such as the exhaustive list of their responsibilities or of exemptions from the duty to act) by constitutions, which are inherently unfeasible for easy change, makes the constitutional tribunals hostages of the settings which proved ineffective, restrictive, or detrimental. For the latter, we can observe nowadays that certain experiments with intrinsically non-democratic institutions, which are arguably called to address some interim difficulties,⁵³¹ are able to shift the subtle progress in democratic consolidation so far achieved and demoralize the fundamental democratic aspiration of the society. Lastly, discussing the very widespread normative view on courts and politics and the problem of the *counter-majoritarian difficulty*⁵³², we might see that legitimacy is not always in peace with effectiveness.

It was emphasized, therefore, that the finding of an optimal design of an institution is principally a matter of a compromise to be drawn with an utmost care, prudence and wisdom. The compromise has to be delicate enough not to exclude any of the principles from the formation of institutions and allow each of these principles to influence the performance of them. But, at the same time, the compromise has to find the right balance and resist the temptation to over-represent a cause.

The quest for the compromise in designing transitional constitutions may get a workable answer in the premise of constitutional design strategy resting on the hierarchy of provisions stipulating constitutional institutions: 1. mega-principles, embodying the core concepts of constitutional democracy; 2. principles, outlining the basic macro-political conceptions; and 3. rules and procedures, spelling out the more quotidian, routine performance of political institutions.⁵³³ This work's proposed conceptual formula for transitional constitution-making, in this light, is that constitutions should be primarily based on institutional mega-principles, should identify the principles outlining the basic macro-political conceptions, and should refer to routine rules and procedures, explicating institutional configurations within the chosen macro-political conceptions, only in the presence of reasonably necessary justifications. This theory can well accommodate durability of the fundamental democratic institutions and the elasticity of their rules and procedures, paving a way for accommodation, adjustment, implantation of new, often alien institutions into the local context. Meanwhile, the model has the virtue of reconciling legitimacy, through insistence on the primacy of the concepts or mega-principles, with effectiveness, through openness to changing, improving and amending

⁵³¹ Such as the reforms weakening the institutions of electoral democracy in the federal units (eliminating the direct elections of the governors) in Russia for the announced purposes of countering the terrorist threats or sustaining the economic growth- see supra notes 170-171.

⁵³² See the discussion on pp. 82-83 and footnote 237 (Bickel).

⁵³³ This entire premise has heavily relied on Ronald Dworkin's relevant theory of constitutional concepts and conception, supra note 378.

conceptions, rules and procedures to the extent that these can bring to more effective functioning of institutions.

Given the enduring challenges of democratic development in all of the countries of this research, the question of the redesign of constitutions and, in particular, the institution of constitutional justice should be high on the agenda of decision-makers in the post-Soviet countries. The dominant institutional settings of constitutional courts in all of these countries, although not at all indistinguishable, nevertheless contain some common attributes which cause fairly identical limitations on the better democratic performance by constitutional tribunals and the judiciary in general.

Chapter 3 demonstrated the defects of political empowerment where the courts were observed in a paradoxical standoff in which their responsibilities to perform as an arbiter in political disputes- a function itself essential for the development of constitution democracies- appeared rather detrimental and ineffective. Such empowerment, owing, as we could identify, largely also to its architecture, often resulted in political attacks on courts, judicial abstention from deciding on political cases and hence erosion of the courts' legitimacy.

Chapter 4 revealed some other defects caused by the institutional mechanism of post-Soviet constitutional adjudication. Exhaustiveness of the mandate and of specific matters subject to the constitutional courts' jurisdiction, for one, is a limitation on the courts' capacity to handle each and every pertinent constitutional issue raised by a party. Then, the model has developed a "complex of jurisdictions" in post-Soviet courts: general courts abstain from adjudicating conceptual constitutional problems in the cases under their review, while constitutional courts are often unable to adjudicate cases which technically fall under the jurisdictions of general courts, even if these cases contain essential constitutional issues. Furthermore, the current macro-model stipulates limitations in terms of the courts' latitude to adjudicate both matters of law and matters of facts: these limitations are associated with a substantial restraint on the capacity of constitutional tribunals to make pro-democratic decisions. Afterwards, the sole abstract mode of adjudication by constitutional courts, being the core characteristic feature of the system in place, obliges these courts to perform in an essential disconnection from the basic judicial conflict-resolving fashion of adjudication, and this fact adds to the alienation, ineffectiveness and impracticality of constitutional justice.

Finally, Chapter 5 extensively meditated on the consequences of separation of the constitutional review from the general judicial function, finding this major institutional setting to be one of the most important causes of the emergence of a fragmented and unconsolidated judiciary which is unable to strongly stand for the rule of law.

The comprehensive solution to the number of the shortcomings mentioned above cannot be merely drawn by a redesign project. The troubles are deeply rooted in the political and legal cultures. This work found the particular weaknesses of the implementation of constitutional justice being essentially caused by the heritage of the constitutional tradition distinguished by embedded formalism and “vulgar Marxian positivism”.⁵³⁴ More over, this stark heritage of the Soviet legal nihilism has been considerably affected also by the corrupt practices of “political legalism”- a product of post-communist-era political manipulations by dishonest quasi-autocratic ruling elites who employed and further activated the formalistic legal culture for reproduction of their political power.

This disease, clearly enough, requires an all-inclusive cure, and a comprehensive intervention is needed for overcoming it. The designer’s portion of investment in the “cultural revolution” can be in reforming the overall logic of constitutional structure from one based on rules and procedures to one based on concepts and principles. This approach should help shifting the constitutional discourse from the deeply embedded Soviet-time vision of it as “state law”- the law of organization of the government, hence, eventually, the law of government empowerment, to the genuine discourse of constitutional law as the law of limiting government.⁵³⁵ This line should be successfully taken over by (constitutional) judges who can be instrumental in activating the fundamental meaning of constitutional democracy by activist insistence on the spirit of constitutional law rather than the letter of the positive law which is everywhere fine-tuned to please the power-holders.

At the same time, while the most deeply-rooted and complex problems owe to the cultural settings and require a comprehensive political reform, many of the troubles of constitutional justice which we mentioned above are due to more “commonplace” defects and can be indeed cured by a designer intervention. The drawbacks of the Kelsenian model do belong to this category.

Surprisingly, the choice of the Kelsenian model has never been seriously contested by post-Soviet politicians or academics. The many challenges facing these countries’ constitutional courts are conventionally assigned to the realm of the political regime and culture. But the performance of constitutional review courts can vary even within the limits imposed by the political regime. This work has discussed a number of cases showing that the democratic contributions of constitutional courts have been restrained not only by the political factors, but often also by institutional limitations. The continental model of constitutional courts has, astonishingly, stipulated more limitations than possibilities for the democratic contributions by

⁵³⁴ Buttler, *supra* note 179, p. 59.

⁵³⁵ For perspectives on “limited government” in the post-communist mental setting, see András Sajó, *Limiting Government: An Introduction to Constitutionalism*, *supra* note 362.

the courts. Its major limitation stems from the separation of the judicial function into two segments with ensuing restriction of the both: the two are assigned functions of certain kind but are barred from the implementation of the others. According to the original idea- the ideal form- the separated functions would be organically interacting in case of the necessity and the two fragments would recall each other to compliment their powers. But this ideal proved unachievable in post-Soviet countries where the gap in-between the separated judicial segments tended to isolation instead of the synergy. The design strategies of the constitutional fathers proved idealistic, and the functional virtues of the model of separate constitutional courts were never realized in practice.

If the major limitation of the Kelsenian model was due to its separation of the two judicial functions, then the alternative should have considered a model where these are brought together. The consolidation of the judicial functions is possible through a number of institutional solutions, but the common ground in any of them should be abandoning of the Kelsenian model. However, repudiation of the continental model should not inevitably submit us to the classical diffuse system, even though the long established conventional wisdom would consider the latter as the mere alternative to the Kelsenian formula.⁵³⁶ The installment of a diffuse system with its essential elements, as emerged in the United States since *Marbury*, would substitute one ideal form with another. Although this work provided sufficient evidence against the position that the diffuse system is organically alien to the continental legal system,⁵³⁷ the optimal model of constitutional review for a post-Soviet country is likelier to be of a hybrid form. This hybrid form may offer different variations with particular settings, but we can identify certain milestone features which the new system can rely on.

It is, firstly, unquestionable that the reform shall not be intended at either elimination or the subordination of the function of abstract review. Abstract review is essential for aspiring democracies and their constitutional foundations. However, this function, as the discussion of different hybrid systems showed, can be well handled by the higher court of general jurisdiction. It can be left to the discretion of the particular designers in each case whether or not the function of abstract review is implemented by the higher court in the conventional bench or it is assigned to a special sub-division of it, as in Estonia. However, a proposition merits attention that from both the considerations of enhancing the role of constitutional discourse in general jurisprudence and those of enhancing the functional effectiveness of the

⁵³⁶ Mauro Cappelletti, *supra* note 21.

⁵³⁷ *Id.*

judicial action, the most optimal model would probably assign the final say in abstract constitutional matters to the single highest judicial decision-maker in the country.⁵³⁸

The suggestion may potentially raise a stream of strong opposition as the constitutional courts in all post-communist countries are recognized having the most progressive, honest and professional judges in their countries. Some responses to this potential critique were drawn in this work. To summarize, I find the above-mentioned differentiation between constitutional and other judges to be slightly exaggerated, openly discriminatory and definitely outdated. Meanwhile, if a united court is supposed to be created that would merge the functions of the constitutional and supreme courts, let us say, is it not possible that the new court can host the former constitutional judges, if they were really the best in the nation? One thing that would indisputably benefit from this entire project is constitutionalization of the whole legal system which would indeed perfectly serve the needs of constitutional democracy.

Secondly, constitutional adjudication should essentially return to the province of the inherently judicial method and be implemented in a conflict-resolving manner. This general rule may contain one albeit very important exception: abstract review. In other words, the reform should restore the typical judicial prerogative on adjudication of all constitutional violations (universal jurisdiction) and create a single exception from the standard of universality by assigning a special regime to the institution of abstract review. The special regime with its distinct mode of adjudication, limited standing and limited subject matter shall be the unique deviation from the characteristic judicial mode of adjudication, the latter allowing for concrete review, general standing and subject matter, appeal, and redress. The implementation of both of these functions by one body will furthermore ensure the synergy and organic interconnectedness of the functions of abstract and concrete review.

Thirdly, the design of constitutional review system should aim at both durability and flexibility and hence needs to abstain from having its particular configuration stipulated on the constitutional level. The point is made not only from the considerations of the largely experimentalist nature of any reforms of constitutional review system to be implemented. It is true that any model of constitutional review that was to emerge in the post-Soviet area after the collapse of the Soviet Union would be largely experimental as no country had experience in this respect, and this is largely relevant to our days too. Flexibility in the routine form and function of the constitutional review is also necessary for allowing the institutions to adjust to the changing circumstances of the social and political environment in the ongoing transition. After all, the elasticity of the certain institutions of constitutional review should serve strategic

⁵³⁸ This is the case, ultimately, also in Estonia where the Supreme Court *en banc* has the final word on constitutional issues, despite the existence of a separate chamber for the adjudication of constitutional issues. The virtues of such a system were discussed in length in Chapter 5.

purposes of allowing constitutional judges to accommodate to the style of and the challenges coming from the other branches, particularly the executives who are notoriously famous for ignoring, harassing, blackmailing, and often attacking the courts, and make the judges more immune to these. And in this particular perspective, it is highly desirable that certain settings of constitutional courts, such as the scope of their jurisdiction and of the standing within the principle of universality, the standard of judicial abstention, etc. shall be reserved to the discretion of the courts themselves, as this would not only help them to find optimal modes of performance but would genuinely empower the tribunals and would make them strategically better equipped to respond to the government abuse.

Constitutional design should be paid a renewed attention if the struggling democracies of the former Soviet Union choose to respond to the contemporary challenges facing democratization. Confronting the abuse of government power as the biggest of these challenges, it is imperative, as a renowned constitutional scholar puts this, to “discuss and learn those manners, institutions, and principles that efficiently limit all governments, democratically elected or controlled or not.”⁵³⁹ Constitutional courts, as the principal embodiments of the institutional formula of limiting government, have to be brought to the fore once again- to get a fresh start, insight, power and momentum, as the era of their decisive role in democratic development is only to actually start.

⁵³⁹ András Sajó, *Limiting Government: An Introduction to Constitutionalism*, supra note 362, Introduction.

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