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THE PROMISE OF EUROPEAN INTEGRATION
IMPROVING THE QUALITY OF DEMOCRACY IN THE
EUROPEAN NEIGHBORHOOD

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Improving the Quality of Democracy in the European Neighborhood

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Abstract

The recent research on EU's role in democratization in the post-communist world has been primarily concerned with its new member states of Central and Eastern Europe, as well as the prospective member states. A great deal of knowledge is now available on EU's impact on members or prospective members, but little stays known about EU's influence on democratic development in the neighborhood beyond the accession orbits. This paper makes an inquiry into the effect of European policies on democratic processes in a country which is not impacted by conditionality for EU accession but where the promise of "European integration" is nevertheless seen as an important factor affecting political developments. The particular focus of this paper is on the state of inter-institutional accountability within the frameworks of the democratic constitution in Armenia. This rather narrow concentration on constitutional structures is stipulated by the nature of the major European policies and instruments put into effect in the "remote neighborhood". As it will be explicated further in the text, these policies and instruments predominantly rely on the reforms of macro-political democratic institutions at the same time as the democratic achievements are largely "measured" by reference to the formal institutional reform.*

Keywords

Democratization, governance, constitution building, EU-East-Central Europe, judicial review, non-majoritarian institutions, neo-institutionalism.

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A. Introduction

EU-Armenia

The question how through various instruments of influence the EU has achieved improvements in the quality of democracy in Armenia has two underlying assumptions. The first assumption is that if we speak about improving of the quality of democracy, a certain compatible achievement in democratic development should have been made by now. The second assumption is that the European Union has had any, but tangible impact on democratic processes in this country.

In the comparative light, Armenia's case may seem failing both elements of this test. Firstly, Armenia's democratic credentials might hardly look similar to the credentials of those post-communist countries which were heavily affected by the EU accession process. Indeed, while most of these countries can now be considered as consolidated democracies,¹ the assessments of Armenia's democratic development may range from the most optimistic "illiberal democracy"² or "delegative democracy",³ where "democracy" is still the key word, to "competitive authoritarianism"⁴ where it is not. Secondly, the EU's role in Armenia's democratization should be generally assessed as derivative and intermediary. This assessment contrasts with the cases of the post-communist countries- now EU members where the EU could be said to be the primary and the direct drive for democratization.

But all these observations should be made with certain reservations. Although incompatible with the degree of democratic achievements of the majority of the new members of the EU, formerly communist states (e.g. Poland, Hungary or Latvia), Armenia's democratic development is nevertheless comparable with these. More over, it is, fairly enough, compatible with the democratic credentials that some other post-communist countries in EU's closest neighborhood enjoy (such as Serbia, Albania, Ukraine, etc.). Being regularly ranked⁵ as one of the freest countries among the CIS states,⁶ Armenia can be an especially noteworthy paradigm exactly because its democratic development can not only be comparable but also compatible with the same in some countries where both the geographical proximity to the EU and the promise of the European integration and the EU's pro-democratic investment have been a way more tangible factors in democratization.

Meanwhile, the EU's role in Armenia's democratization loses in quality only in a comparative perspective (when compared with its role in the other countries of post-communist Europe), whereas otherwise its impact on democratic development in this country is worthy of appraisal and certainly deserves a study. This appraisal will substantially gain if we refuse considering the conventional mode of the EU's influence- the conditionality for accession- as the only way in which the European Union influences democratic processes in its neighborhood. We can rather take on board the different efforts which the EU puts in joint undertakings and projects (with the Council of Europe and other supra-national European organizations) amounting to the consolidated impact of Europe as a political entity on democratization in its neighborhood.

1 See Freedom House's annual rankings, as well as the recent assessments in Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies throughout The World*, Times Books, 2008.

2 Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76 (November–December 1997): 22–41.

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

4 Steven Levitsky and Lucan A. Way, "The Rise of Competitive Authoritarianism", *Journal of Democracy*, Vol. 13, N. 2 (2002).

5 Supra note 1.

6 Commonwealth of Independent States- an organization including all former Soviet republics, except the 3 Baltic countries.

For one, the political agenda of the EU with respect to Armenia makes explicit delegation to Armenia's commitments within pan-European political and human rights undertakings and primarily the Council of Europe frameworks in the very key areas of the EU-Armenia interaction. This is witnessed, for example, from the major treaty arrangement between the EU and Armenia- the EU-Armenia Action Plan within the bilateral cooperation under the European Neighborhood Policy. Most illustrative are the Action Plan's priority area 1- "Strengthening of democratic structures, of the rule of law, including reform of the judiciary and combat of fraud and corruption" and priority area 2 - "Strengthening of respect for human rights and fundamental freedoms, in compliance with international commitments of Armenia". If so, as far as Council of Europe and/or the OSCE have assumed the role of the key agent in the EU-Armenia relationships in what refers to the political dimension, one can speak of Europe's impact on democratic processes in Armenia instead of the EU's impact on these processes with a certain degree of legitimacy.

If so, the assessments made previously in this text may considerably change in degree. Unlike it is the case with the EU proper, Armenia's engagement with the Council of Europe, since the full membership in 2001, has meant a series of commitments assumed by the country. These commitments, supported by a series of concrete sanctions for deviation from the standards of the Council, can be viewed as an instrument which is validly comparable with the EU's conditionality for accession. In this light, Armenia's commitments to Europe as to an integral political entity rather than to the EU as a single organization, have been much bigger in scope and much more effective in terms of the influence which the prospect of integration into the European community in large had on the democratic processes in Armenia.

The authority of "virtual" European integration given to Armenia through such instruments as the Council of Europe, the European Neighborhood Policy, etc., can be witnessed by the testimonials from any political unrest which happens in Armenia from time to time and which illustratively exposes the democratic practices in the country. For one, the recent turbulence in the aftermath of the presidential elections (February-March 2008) proved how binding the European clout is and how unwanted would even the mostly formal sanctions (such as suspension of Armenia's voting right in the Parliamentary Assembly) threatened by the Council of Europe be. Presidential elections were held on February 19, and on February 24 the Armenian Central Electoral Commission announced the official results giving victory to Serzh Sargissyan, the incumbent Prime Minister and a close ally of President Kocharyan. The CEC counted slightly more than 52% of all votes given to Sargissyan and 21.4% to his major contender Levon Ter-Petrosyan, the first Armenian President. 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. The Court endorsed the election of Sargissyan 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. Following these events, the authorities launched a comprehensive offensive on the opposition, putting many of its activists to jail and restricting the freedom of assembly. In reaction, the Council of Europe threatened to suspend Armenia's vote in its Parliamentary Assembly if no actions are undertaken to improve the state of democratic freedoms in the country. The Council of Europe Parliamentary Assembly resolutions,⁷ imposing requirements for the settlement of the political crisis that ensued after the presidential election, have since become the major political and "constitutional" guideline for the country.

⁷ Resolution 1609 "Functioning of Democratic Institutions in Armenia" (2008) and Resolution 1620 "Implementation by Armenia of Assembly Resolution 1609".

But even more convincing may be the look at the record of the country's compliance with formal conditionality imposed by the EU and the CoE. If we return back to the political dimension highlighted in the EU-Armenia Action Plan, it can be noticed that the conditions for meeting the same priority areas 1 and 2, mentioned above, have been almost entirely met by now. This reference may be especially valuable because the mentioned conditions mostly included macro-political institutional reforms concerning the functioning of democratic institutions- primary items of discussion in this paper.

From the perspective of the focus of this study, it is symbolic that the reforms which were pushed by the EU and the CoE aimed at a constitutional re-design to strengthen the democratic institutions and the balance of powers within its framework. These reforms eventually got their formal endorsement via a substantial revision of the Constitution in a referendum in November 2005. It is worth mentioning that drafting of the constitutional amendments was coordinated by a specially created body of the National Assembly (the Parliament), the name of which self-speaks about who strongly stood behind the initiative of the constitutional reforms: the Parliamentary Committee on European Integration.⁸ The constitutional reform touched upon the entire scope of institutional arrangements concerned in this research- the design of the constitutional court, legislative-executive relationship, regional government, and the Ombudsman which just acquired its first appearance in the Constitution.

As a conclusion to what has been so far said, a fact should be acknowledged that the European influence has been instrumental in shaping Armenia's democratic institutions. An essential warning, however, is to be made that this is completely true as far as the emergence of formal democratic institutions is concerned, while serious reservations should be made when speaking of a progress in genuine democratic practices. However puzzling this distinction (between formal and genuine institutional development) may seem, the mentioned paradigm is core for distinguishing the political regime and democratic practices in Armenia, as it is in virtually all the other countries of the post-soviet region. Then, the next section seems to offer an indispensable insight, as it will swiftly highlight the political background behind the particular democratic institutions to be discussed

Inter-Institutional Accountability in Context: Patterns of Governance in Post-Soviet Armenia

The mentioned paradigm where the non-democratic political practices thrive within the formal democratic constitutions is typical to the entire post-soviet region. What a famous British scholar has written about Russia is mostly true about the other countries in the region, though the degree of deviations from the democratic constitutions varies substantially from one country to another, from Moldova to Uzbekistan:

The system in formal institutions terms is undoubtedly a liberal democracy, but practice often falls short of declared principles. Fearing the stability of the state, Putin's regime represented a powerful shift from mobilizational to pacificatory politics, from encouraging civic activism to controlling and regulating it, almost unto death. The price of stability was the erosion of civic engagement, polyarchy, and active citizenship. It is for this reason that so much of Russia's democracy looks lifeless and empty. The institutions of democracy remain central to political practice, and democracy remains the legitimizing ideology of the regime.⁹

If legitimization is important for the authorities in Russia, which is self-sufficient enough to live without a need for faking its regime, then it should be crucial for political elites in such countries as Armenia, which can't do else than by making up their non-democratic practices. The democratic constitution, then, at least in formal terms, is an independent variable. But so, we can say, is the

⁸ See Alexander Markarov, "MacroInstitutional Political Structures and Their Development in Armenia", *Demokratizatsiya*, Spring 2006, at 164.

⁹ Richard Sakwa, "Two Camps? The Struggle to Understand Contemporary Russia", *Review Article, Comparative Politics*, July 2008, at 482.

inherent tendency to concentration of power which one can observe in virtually all post-soviet countries. The exploration of the co-existence and co-habitation of these inherently conflicting tendencies (as long as the chief function, the *telos*, of constitution is limiting the government)¹⁰ is a key to revealing the genuine nature of political processes in these countries. If the formal democratic constitution is untouchable for the incumbents for some reasons, then the way out is in fine-tuning of the democratic institutions¹¹ to meet the needs of maintaining and reproducing their power. For the purposes of this paper, we shall only mention the main instrumentality employed by incumbent political elites for maintaining and reproducing their power by keeping within the formal democratic institutions, as these methods self-speak of the quality of democracy and constitutionalism and represent the particular patterns of governance concerned: electoral fraud instead of banning elections, “legal” proceedings against free media and civil society instead of closing the media outlets down, controlling and dominating (often through faking) the political opposition instead of banning the oppositional parties, controlling and regulating the other branches rather than abandoning the separation of powers, harassing the courts instead of removing them from the constitutions, bribing the local governments instead of subjecting them to the authority of the central executive through by changes in laws, etc.

Only if approaching with this embedded background in mind we can look at the particular processes with separation of powers, constitutionalism, constitutional courts, and regionalism to be discussed further.

The Contours of Inter-Institutional Accountability

Our quests for the patterns of inter-institutional accountability in Armenia need to be made via reference to semi-presidential settings which were put in the foundations of both redactions of the Armenian Constitution. The emergence of the semi-presidential constitution in Armenia can be attributed to the general “path dependence” on choices made in the major decision-making center of the transition, well represented by a nearly famous speculation “As Russia goes, so goes the region”.¹² But more substantially, perhaps, the rise of semi-presidentialism in Armenia, as probably in other formerly soviet countries in the beginning of 90-ies, was a reaction to the conflicting tendencies of democratization- yet fairly strong in that time- on one hand, and of paternalistic culture and the realization of self-interest by the then powerful political leaders, on the other. The conflict between these contentious tendencies marked the whole epoch in between the initial years of democratic euphoria and the imminent arrival of the epoch of democratic recession. The first President, Levon Ter-Petrosyan, ascending to power as the leader of the national democratic movement back in 1990- a figure as emblematic for Armenia as Valensa for Poland or Havel for the Czech, soon transformed to be associated with the gradually increasing autocratic style and often directly blamed for this. With the extraordinary blending of his controversial standings- a Soviet dissident and a fanatic democrat in early 90-ies, a quasi-autocratic ruler few years later, a president who first tolerated faking of elections and who first banned opposition and yet who resigned on his own will in only a while, and then, after all, one who got again associated with the pro-democratic movements as late as in 2008, Ter-Petrosyan’s paradox is perhaps nothing else but a typical manifestation of the uselessness of the democratic ideals against the overwhelming force of the local political culture with its irresistible tendency to concentration of power.

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

11 For a detailed review of the patterns of imitation of democratic practices, see Andrew Wilson, *Virtual Politics: Faking Democracy in the Post-Soviet World*, Yale University Press (2005), Chapters 8-9.

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

As the concentration of power proved already to be the prevailing tendency, the Armenian Constitution of 1995, mostly designed by the guidance from Ter-Petrosyan, provided for architecture with a strong president who dominated the other institutions and possessed direct executive functions. Except the conventional “strategic” executive responsibilities, such as the foreign relations, army and security, the president was also empowered to appoint the government (to be further supported by the parliament) and chair its meetings, sign the legislative bills into laws, and endorse the governmental decrees. The president could (and many times did) arbitrarily change the prime-ministers. He could also dismiss the parliament (after formally consulting the prime-minister), but this never happened. One analysis on the system submits:

The constitution called for a separation of powers, but in actuality provided little, if any, means for real checks and balances, or any real guarantees for the branches to function independently. It could be argued that the government's structure is overshadowed by the presidency.¹³

The government framework, provided for by the 1995 Constitution, endured for ten years. The constitutional amendments of 2005, active in most part since the parliamentary elections in 2007, brought about a formal shift from a president-parliamentary to premier-presidential constitution,¹⁴ the latter usually being associated with a better democratic potential.¹⁵

These reforms were in the center of electoral platform of the new President, Robert Kocharyan, since his presidential campaign in 1998,¹⁶ after Ter-Petrosyan abruptly resigned (a development that was hardly believable in 1993-97). These reforms were said, back in 1998, to be intended at shifting the balance of powers more towards a parliamentary form of government and at better equilibrium between the branches. But Kocharyan was not a worse rational actor than his predecessor: designing of a strong parliament and a strong constitutional court was not in his best interests since his powers tended to increasing after 1999. As a result, the referendum on constitutional amendments, held at 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.¹⁷ In 2003, President Kocharyan still had a full term of 5 years in the 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 an overzealous propaganda by the authorities.

In the new edition of the Basic Law, the government and its prime-minister are now accountable to the National Assembly rather than to the president. The president still appoints the head of the government, but the latter should enjoy the support of parliamentary majority and cannot be resigned by the president. The president lost also the power of dissolving the parliament, except in specified cases when the assembly finds itself in a situation of political stalemate. In addition, the government got increased responsibilities by taking almost entirely over the issues of domestic powers and also over some even in the domain of foreign policy.¹⁸

13 See Alexander Markarov, *supra* note 8, at 162.

14 Based on distinctions offered by Mathew S. Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge, UK: Cambridge University Press, 1992).

15 See Robert Elgie, “Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies”, *Taiwan Journal of Democracy*, Volume 3, No.2: 53-71.

16 Markarov *supra* note 8, at 163.

17 *Id.*

18 Markarov *supra* note 8, at 167.

This constitutional heritage is what the new and the reining President-Serzh Sargissyan, ascended to the office after the heavily contested elections in 2008- should carry with. But the prospect, so far, does not seem so grim for him. The presidency, despite the formal degrading of its stature, enjoys the same- highest- privileges in the power-structures and Sargissyan himself is now the most powerful if not the only powerful political decision-maker in the country.

B. Executive-Legislative Relationship

Although the informal practices overwhelmingly prevail over the official prescriptions of constitutions and laws, much in post-soviet politics can be attributed to the force of formal constitutional engineering. The rationalization of this apparently paradoxical reality is offered by the ever influential science of new institutionalism, but for one particular explanation, we observed that the formal adherence to drawn constitutional frameworks in Armenia is also largely a product of the influence from the European entities. Whatever is the scale of imitation of democratic practices and of the abuse on the level of informal practices, the authorities in Armenia, as probably elsewhere in post-soviet countries, do confine their activities, including those intended at concentration and reproduction of their power, to the macro-political structures outlined by the constitution.

Since the emergence of Armenia's semi-presidential constitutional system, it has, in the great majority of the cases, resulted in the first of the two models of political interaction typical to developments within the matrix of semi-presidentialism in the post-soviet area: 1. domination of the president over the other institutions bringing to a political regime described as super-presidentialism¹⁹ (Russia's political regime since Yeltsin, as well as most of the other post-soviet regimes, have been regularly associated with this scenario)²⁰ and 2. dual authority situations resulting from the divided majority typically emerging in semi-presidential settings,²¹ which brings to severe conflicts between the presidency and the government, the latter enjoying the support of the parliamentary majority (typical is Ukraine's situation since 2004-5). The "conflict and gridlock"²² of the second scenario have been rather the exception than the rule. Independent Armenia has only twice experienced existence of majority in the parliament ready to contest the standing president. Very notably, in both times, the opposition was raised within the ruling elite as a result of the split within the parliamentary majority; never had it happened that the president's dominance was challenged after the elections proper.

In early 1998, the majority of the "party of the power" in the parliament was split between two competing camps- reportedly due to disagreement over how to further handle the Nagorno-Karabakh conflict. President Ter-Petrosyan, enjoying the support of then only the minority in the National Assembly, moved to resign. In 1999, the newly elected parliament featured a coalition which apparently looked cooperative with the President as it was also composed in part by the branch of the ruling elite, but it was largely believed to become the main source of decision-making in the country. This unprecedented inter-institutional tension was interrupted by the mass murder of the leaders of the new majority during a session in the premises of the parliament, but later got a culmination through an exposed rivalry between the president and the government (the latter for the time being still enjoyed the support of the majority in the parliament). The president came out as the winner of this confrontation by succeeding a fracture in the majority in 2000; since and until now, the dominance of the presidency has not been strongly challenged any more.

19 The term super "superpresidentialism" in relation with post-soviet countries was first used by T.J. Colton in "Superpresidentialism and Russia's Backward State", *Post-Soviet Affairs*, 1995.

20 For one, see John Ishiyama and Ryan Kennedy, "Superpresidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan", *Europe-Asia Studies*, Vol. 53, No. 8, 2001.

21 Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry Into Structures, Incentives and Outcomes*, 1994, p. 123.

22 *Id.*

But of these two episodes, only the second one could be associated with a dominance of the institution of parliament over that of the president, as the first episode witnessed a snap split within the ruling elite and even a more snap resignation of the president, and the inter-institutional tension could only be felt behind the coulisses for most probably only a very short time. In general, considering the relatively minor presence of the elements of the divided majority and respectively the strain between the two elected bodies in Armenia, the dominance of the presidency, characterized by superpresidential style of government, seems to be the prevailing paradigm in post-soviet Armenia. The patterns of the concentration and reproduction of power, depicted earlier in this paper, overwhelm the style of governance in this situation. With the stipulation to abide by the macro-political construction imposed by the constitution, the presidents in Armenia, properly as their counter-parts all over the post-soviet region, have strived in securing a loyal majority in the parliaments by heavily investing in electoral manipulation and stipulation of pseudo-parties.²³ This scenario leaves not much room for a meaningful inter-institutional accountability between the executive and the legislature.

The constitutional amendments of 2005, as mentioned, meant a shift from a president-parliamentary to premier-presidential constitution.²⁴ In the new edition of the Constitution, the government and its prime-minister are now accountable to the National Assembly rather than to the president. The president still appoints the head of the government, but the latter should enjoy the support of the elected majority and cannot be fired by the president. The president lost also the power of dissolving the parliament, except in specified cases when the assembly finds itself in a situation of political stalemate. In addition, the government got increased responsibilities by taking almost entirely over the issues of domestic powers and also over some even in the domain of foreign policy.²⁵

But the constitutional reforms can bring to better balance and accountability if only in the long-term perspective as the time proved that little has changed in political practices after the amendments. Since 2005 until now, presidency, even in its reduced capacity, remains the central address of the power, and the government now remains largely in the shadow of the president, rarely making fully independent decisions in key policy issues. The corrupt political practices of maintenance and reproduction of political elites have continued by faking democratic institutions, but have only changed their accent, now probably paying equal attention to the presidential and parliamentary elections.

The notion of inter-institutional accountability on the level of executive-legislative relations, in this whole context, is in trouble. The ratio of the opposition in the composition of the parliament in Armenia has tended to regular decline since 1999, reaching the mock 5-7% in the current Assembly,²⁶ though in any case the voice of the non-allying opposition in government matters has traditionally been simply ignored. As the government-opposition relationship has long ago “evolved” to an elementary zero-sum game, the latter’s “winner takes all” logic has come to mean a total exclusion of the opponents from the decision-making process- the process gradually depreciated from informal exclusion through ignoring the voices of the minority to de-facto exclusion as of now where the 130-member Assembly has only 7-10 members who are in opposition to the Government.

The current ratio of the opposition representation in the National Assembly and the fact of government coalition including four parties should not mislead us with associations with consensus-type democratic arrangements.²⁷ For one, the two of four parties represented in the coalition are obviously

23 Richard Sakwa, “The Development of the Russian Party System: Did the Elections Change Anything?”, in Peter Lentini (ed.), *Elections and the Political Order in Russia* (London, 1995), pp. 169–201, John Ishiyama and Ryan Kennedy supra note 18.

24 Supra note 14.

25 Markarov, supra note 8.

26 Except the newcomer “Heritage” party, holding 5% of the seats, the other 4 parties who got seats by proportional voting, have entered in a government coalition and with almost no substantial exceptions they speak one voice on policy issues.

27 See Arend Lijphart, *Patterns of Democracy: Government Forms and Performances in Thirty-Six Countries*, Yale University Press, 1999, pp. 31-47.

fake entities which are only created for electoral manipulation and for the ultimate reproduction of the incumbent political elite.²⁸ The only genuine political party serving in the coalition (the Armenian Revolutionary Federation) constantly prefers to “cooperate” to a large extent because non-cooperation and the status of an official opposition promise absolute exclusion from the policy-making process. A number of oppositional parties, on the other hand, do not get into the parliament because of the fraud and manipulation by the ruling party: in this way, they get involuntarily excluded from the decision-making. To sum up, it is not “inclusion” - the key word for consensus democracy, that characterizes the Armenian political arrangement despite the external illusion created by the fact of coalition government and a small fraction of the opposition in the Assembly, but, on the contrary, the real key word is “exclusion” which takes different forms, but eventually results in the monopoly on the government by a single party or elite which has exclusive and unlimited political domination.

However, the change in formal institutions is the initial but important step in democratic development, and the promise of a constitution with a better separation and balancing remains strong in the long run. As once mentioned before, the European organizations and the EU directly have been instrumental in bringing about these reforms.

C. Constitutional Justice

Institutional Design

The designing of Armenia’s Constitutional Court in both of its two phases perfectly matches the characteristics depicted in the rational choice stream of the theories of judicial review from Landes-Posner and to Ramseyer and Ginsburg.²⁹ The common ground for all of these feedbacks about the emergence and empowerment of judicial review is their unanimous acknowledgment of the politician-designers’ self-interest in a competitive electoral “market” beneath the constitutional design. These theories, drawing upon the utility of politicians involved in constitutional design, eventually suggests that constitutional courts are likelier to emerge as weak institutions if the incumbent politicians expect to stay in power after the upcoming elections. Accordingly, as Tom Ginsburg’s “insurance theory” elaborates on the mentioned paradigm, the incumbent politicians, if they expect to lose, stipulate strong constitutional courts, as insurance, to shield their policy choices against the incoming political elite’s attempts to reverse their “contracts”. Armenia’s case “follows” the depicted pathways in a mystically accurate way.

The Constitutional Court- a typical Kelsenian tribunal designated to chiefly carry out judicial review of statutes- was first created by the Constitution of Armenia in 1995 and became functional as late as in 1996.³⁰ The emphasis on the date of creation is not for formal purposes: the emergence of the court after five years since the independence, when political institution-building had mostly outlined the contours of the factual power structures, was due in a time when the romantic democratic designing of the early 90-ies had given way to the increasing tendencies of rational designing. As a result, unlike all the 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

28 This is also done in the best post-soviet traditions. See Andrew Wilson, *Virtual Politics: Faking Democracy in the Post-Soviet World*, Yale University Press (2005), Chapters 8-9.

29 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).

30 The constitutional acts in Armenia before the passage of the Constitution in 1995 did not provide for an institution of constitutional review unlike it was the case with many other post-Soviet countries (in Russia, for example, the constitutional court was created in 1991 by a special constitutional law, preceding the adoption of the Constitution).

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, not court referrals were then allowed.³¹ The overwhelming majority of the judgments- 91.8% of all decisions- were made on the compliance of international agreements of Armenia with the Constitution.³² 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.³³

The judges enjoyed all formal prerequisites for independence, such as life tenure and decent logistical support, but these appeared insufficient for guaranteeing courts' independence anywhere in the post-soviet area. In sum, the 1996-2005 Court appeared not only as a typical "third chamber of a parliament", as once Alec Stone Sweet called the French Conseil Constitutionell,³⁴ but also as an extremely formal institution with no real powers, independence, and significance. Back in 1993-95, when the Constitution was being designed, the running political elite in Armenia and its leader, President Ter-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 Landes-Posner-Ramseyer-Ginsburg.

The importance of rational choice in designing of the constitutional court was further confirmed by the reforms due to the amendments in the Constitution which were finally passed in 2005. These reforms were in the center of electoral campaign of the new President, Kocharyan, since he ran for the post in 1998,³⁵ after Ter-Petrosyan abruptly resigned (a development that was hardly believable in 1993-97). The constitutional officials were announced to be intended at a shift towards a parliamentary form of government and at better balancing and checks between powers; they envisaged a better status and more powers for the constitutional court too. But Kocharyan was an experienced rational actor and designing of a strong parliament and a strong constitutional court was not in his best interests since his powers tended to monopolization. Ultimately, the referendum on constitutional amendments, held in the end of 2003, after a few months from Kocharyan's re-election in the office, rejected the reform, and the failure was mostly blamed on the lack of enthusiasm from the authorities themselves.³⁶ In 2005, 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 his very active marketing.

The new Constitution brought about a completely new constitutional court. Standing was expanded to include individuals (individual complaints), general courts (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 could apply to the court.³⁷ Besides the review of the compliance with the Constitution of the international treaties, laws, acts of the parliament, the president, the government and the local self-government bodies, the court does have also a number of "marginal"³⁸ responsibilities which are

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

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

33 *Id.*

34 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.

35 Markarov *supra* note 8, p. 163.

36 *Id.*

37 Art. 101 of the Constitution of the Rep. of Armenia.

38 Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005), at 13.

“alien to the role and the nature of constitutional courts”³⁹ according to a constitutional judge from Armenia. These responsibilities are related to resolution of disputes during and after presidential and parliamentary elections, impeachments cases and banning of political parties. From the point of view of the predisposition of such functions to involve constitutional courts in the most partisan types of power struggles, these responsibilities are largely political, and the record of the regular involvement of the Constitutional Court of Armenia into *realpolitik* can serve as a good evidence for such an assertion.

The constitutional court consists of nine members. Four members are appointed by the president, the other 5 by the National Assembly. The parliament also chooses the chairman of the court from among its members, but in case of failure to appoint the head of the court within thirty day, the latter is appointed by the president.⁴⁰ The members of the court serve a life tenure, the retirement age is 65. There is a formal grant of the series of guarantees for the judges’ independence. Yet, judicial independence is still a work in progress and threats to it are posed especially during the review of the above-specified political responsibilities, as we will see it from the next sub-chapter.

The Court in 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 a scrutiny by English-language scholarship.⁴¹ 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.

The study of the relationship between constitutional courts and democracy is traditionally dominated by the debate on the “counter-majoritarian difficulty”,⁴² 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.⁴³ My inquiry suggests an empirical test rather. I take Ronald Dworkin’s thesis, where the courts acquire their legitimacy not from conventional normative constructions, but from their institutional virtue to contribute to the democratic conditions, as a starting point: by what means the democratic conditions are best met is an empirical, rather than a normative question.⁴⁴ I propose a framework of analysis where the issue of courts’ aptitude for democratic contribution is reviewed in the light of their

39 Tokhyan, Felix, “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>.

40 Art. 55 (10) and 53 (1) of the Constitution of the Rep. of Armenia. The 1996 edition of the Constitution granted the right of appointing the Chairman of the Court to the President of the Republic.

41 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, *The Russian Constitutional Court: The First Term*, 9 *Post-Soviet Affairs* 314 (1993); Robert Ahdieh, *Russia’s Constitutional Revolution: Legal Consciousness and the Transition to Democracy 1985-1996* (Pennsylvania State University Press 1997); Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000); Lee Epstein, Jack Knight and Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 *Law and Society Review* 117 (2001). 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.

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

43 See, e.g., Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005).

44 Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution*, 34 (HUP 1996).

institutional and ideological settings, as well as their predispositions in interest group politics. My suggestion is that constitutional and other higher courts deciding politically sensitive issues in post-Soviet countries are inherently pro-democratic agents, though this statement shall avoid clear-cut readings and shall be tried in 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.

The decisions of the Armenian Constitutional Court provide for an excellent case-study for the empirical test I suggested; indeed, Armenia's paradigm was instrumental in bringing to the first hypotheses about pro-democratic leanings of constitutional courts and their Trojan horse-fashion role in the politics of democratization.⁴⁵ In fact, all standing episodes of the Court's participation in the struggle for political power in its capacity of an arbiter in electoral disputes, with the exception of probably the presidential elections of 1996 (when the Court was too young, its informal affiliation with the incumbents was too obvious and the incumbents' positions were too strong) contain somewhat manifest signs of the patterns just described.

The first encounter with the politics happened in 1996. 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.

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 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 for to validate the perceptibly rigged ballot will later become a usual 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 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 small enough to ignore the evidence of widespread violations, bulletin staffing and abuse of public resources. The reputation of the Court was thus gravely damaged in the very first year of its operation.

The chance for a new review of presidential elections by the Constitutional Court was brought in 2003. While the electoral culture did not show any tendencies to improvement and the elections were marked by numerous violations carrying still the same patterns of faking democracy, the political situation was somewhat different than in 1996. Since, the presidential power kept more tending to concentration, democratic development was yet not present and the Court's independence still formal. Meanwhile, the public dissatisfaction with the political regime threatened to grow big at any flash and political uncertainty in the long run was easy to predict. In a review of the election results were the running President Kocharyan was given 67% of the votes against the 33% of the candidate

⁴⁵ The metaphor for the constitutional courts as Trojan horses of democracy serves to emphasize these courts' apparent loyalty to incumbent non-democratic political leadership while strongly discontent with this state of affairs in their countries and ready to "defect" their alliance as soon as a political uncertainty approaches.

Demirchyan, the Court produced a decision which perfectly fitted the political environment of the time, starkly exposing the political orientations and rational calculations of the Court and its members. Having found that the elections in general fell short of 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 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.⁴⁶

This call for a referendum of confidence is unprecedented in the history of constitutional adjudication. The Armenian Constitutional Court was not authorized by the Constitution to make any such recommendations whatsoever. In this respect, the recommendation of the Court represents a pattern of judicial activism in the most quotidian meaning of the term. The text of the decision and the paragraphs quoted carry the strong evidence of the Court’s motivation for such a manifestation, as far as the ideological aspects are concerned. The rational aspects nevertheless prevail. The decision in 2003 was made in a situation of apparent relative certainty, but in fact the times were marked by complete political vagueness and a true societal crack and disbelief in the 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.

Whichever consideration prevailed for deciding the case, the effect of the decision was eventually pro-democratic. Although not given a green light, the political manifestation of the Constitutional Court 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. But more

⁴⁶ 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”.

importantly for the conceptual framework outline in this section, the analysis of this decision gives us a chance to defend the suggestion about 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.

Here comes the last episode further confirming the assumptions. In 2008, the Court reviewed a petition of the presidential candidate Ter-Petrosyan during the elections campaign facing the former President against the “candidate of power”, Serzh Sargissyan, who enjoyed the uncovered support of the outgoing President and the entire incumbent elite. The petition challenged the constitutionality of the campaign run by the public television and other state-controlled media against candidate Ter-Petrosyan who requested 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 state-run “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 Sargissyan 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 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 for procedural reasons, but acknowledged 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 verdict of the Court, on merits, was obvious—the abuse of power by incumbents is unconstitutional; even this much of defiance and pro-democratic manifestation is rare in post-Soviet area and can cost a lot to the court members.

The “team of power” was able to timely extract the hidden lessons from the Constitutional Court’s political manifestations. When Ter-Petrosyan challenged in the Court the official results of the elections faking an immediate first-round win for Sargissyan, the authorities mobilized to prevent a further uncertainty and give the Court a “message of warning”. This campaign ended up in the dispersion of demonstrations which were initiated by Ter-Petrosyan and were meant to run permanently until the court hearings, in mass arrests of Ter-Petrosyan’s supporters, and in the imposition of an emergency rule banning further demonstrations, as well as the activities of several opposition parties and mass media. These “preventive” 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.⁴⁷ At the end, there was no uncertainty about the winner left— the power was kept by means of terror. Not a surprise, the Court endorsed the election of Sargissyan as president without any further excuses.

⁴⁷ Mark MacKinon, *The New Cold War: Revolutions, Rigged Elections, and Pipeline Politics in the Former Soviet Union*, 204, (New York: Carroll & Graf Publishers 2007).

D. Decentralization

Local democracy in Armenia was envisaged only on the level of communities. While the Constitution of 1995 divided the Republic into 11 territorial units, regions (Marzes), democratic institutions were ignored on this level. The regions are run by governors, who are the direct appointees of the government. Such a centralized administrative division looked especially at odds in the light of the provision according to which the city of Yerevan, the capital of the Republic where almost half of its population lives, had a status of a region with a mayor-governor appointed by the president. This institutional paradox has since been one of the centerpieces of the critique of the regional system in the country. The democratic construction on the level of rural and urban communities, including the twelve communities-districts within the city of Yerevan, was centered on the elected institutions of the heads of community (mayors) and the local councils (councils of alderman). The Law on Local Self-Government, adopted in 2002, provided for the exact scope of responsibilities for each of these bodies and the mechanisms of checks and balances between them.

Yet, local democracy is a troubled undertaking in Armenia. The government-backed governors, allowed with economic and political leverage over communities, have so far dominated in the key regional matters. Having only limited financial resources and even smaller enforcement capacities, the local communities appeared considerably dependent on the allocations from the national budget and the law enforcement machinery, both concentrated in the hands of the governors. Given the very weak civic capital and the absence of any traditions of local democracy whatsoever within the society, the elected institutions of local democracy appeared as a mere appendix to regional administrators who, after all, possessed a right of initiating impeachments of local mayors to be done by the government. Mayors then came to emerge as loyal proxies of the governors. Meanwhile, the tendency to concentration of power proved irresistible on the level of local self-government too. The institutions of the alderman, which were meant to embody and carry out party-based competition on the local level, gave up to the overwhelming dominance of the mayors. In reality, the local councils never grew up from the status of symbolic institutions. With this tendency, the accountability on the local level perverted in a way as to solely amount to the elected institutions' formal and informal accountability to the central government. The democratic accountability appeared incompetent on both levels: no strong patterns of vertical accountability ever evolved due to lack of civic traditions, and the horizontal accountability was distorted by the dominance of mayors over councils.

The constitutional reforms, initiated since 1998, mentioned the reform of regional governance as one of the priorities. The European institutions acted as one of the most consistent lobbyists for the local reforms. Since 2002, the European agenda on decentralization in Armenia acquired a legal ground as Armenia joined the European Charter of Local Self-Government of the Council of Europe. The critique of the existing system centered on three main shortcomings to be addressed: 1. possession of few substantial powers by the local self-government bodies, their unsatisfactory financial regime and strong supervision by state bodies, 2. absence of local civil service, 3. the status of Yerevan.⁴⁸ The amended Constitution of 2005 addressed some of these items. Yerevan acquired a status of community, and democratic institutions will start to function on the level of the city council and the elected mayor. This system will function in parallel with local democratic self-government in each of Yerevan's individual communities; in essence, this becomes the only case of a 2-tier democratic self-government in Armenia. The removal of the local mayors by the government shall be now subject to the approval by the constitutional court.

Meanwhile, not much has been changed with respect to the actual powers, financial strength and the autonomy of the communities, and the powers of the governors still remain to be super-strong, while the regions are still missing any democratic institutions. With these issues still pending improvement, institutional decentralization in Armenia keeps to be largely a work in progress. On the other

⁴⁸ For one, see the Recommendation 140 (2003)1 of the Congress of Local and Regional Authorities of the Council of Europe on local democracy in Armenia.

spectrum, the development of communal culture of democracy stays to be probably the most essential challenge for improved accountability on the local level. As a part of the mechanism of the maintenance and reproduction of the power, the local elections are called to legitimization of the ruling elite in the country. This is reached by faking local democratic elections. The incumbent ruling elite with a center in the office of the president heavily invests in electoral gains of its favored local candidates, expecting the backing of the mayors in nation-wide elections. As the local heads perform an essential role in assuring the ruling elite's electoral success in the subsequent presidential and parliamentary elections in their respective communities and as the public resources of each community are vital for the elite's reproduction, the central authorities turn intolerant to any elected mayors who are oppositional to them. Since 1998, when there were a number of oppositional mayors in Armenia- almost all of them eliminated by now either by the procedure of removal or by nomination of pro-governmental candidate in new elections- Armenia's local self-government system has become a province of total domination of the national ruling elite. In this light, the local authorities are swallowed into the framework of the monolith national power structures, which by definition means erosion of democratic processes and any meaningful accountability.

E. Ombudsman

The analysis of the functioning of the office of the ombudsman in Armenia, together with and similarly to that of the constitution court as previously showed, raises an apparently paradoxical hypothesis about both the conventional and normative role of "counter-majoritarian institutions" in democratic development and about the modes and methods of democratic contributions by the democratically elected bodies on one side and those which fall behind this conventional status on the other. The relatively small history of the ombudsman in Armenia may confirm that the democratic contributions by "non-democratic" institutions, such as the constitutional courts and the ombudsman, may often overshadow the contributions by the traditional institutions of democracy- elections, parliaments, etc, by both the degree of their actual grassroots role and by the orientation of their strategic political alliance. Hence, I argue that the role of the ombudsman is essential in grassroots democracy, and that this office is institutionally set to be least allied with the counter-democratic practices of the political elites in Armenia and can serve, similar to the constitutional court, as a Trojan horse of the pro-democratic parties.

It was once mentioned previously in this paper that the Constitution of the 1995 plainly ignored introducing such institutions which are now widely associated with primary instruments for human right protection- the institutions of the individual complaints in the constitutional court and the ombudsman. These gaps of the Constitution became the leitmotiv for the most stringent critique by the European organizations and especially the Council of Europe in Armenia's pre-accession process. Creation and promotion of the office of the ombudsman was one of the key conditions set also by the EU as the development of this institution was listed second after the call for the constitutional amendments for the sake of better separation of power in the EU-Armenia Action Plan.

As a result, a law introducing the institution of the ombudsman was adopted in 2003, even preceding the constitutional amendments of 2005. The ombudsman, called Human Rights Defender, was created to receive complaint from individuals on regarding the violations of human rights and fundamental freedoms provided by the Constitution, laws and the international treaties of the Republic of Armenia. The officer, holding the position of the defender, was empowered to initiate inquiries and proceedings with any state and self-government authorities regarding the contemplated violations of human rights. The amendments to the Constitution of the 2005 enhanced the powers of the defender by allowing the latter to initiate abstract review of laws, thought not to be in conformity with the human rights provisions of the constitution, in the constitutional court. The ombudsman is elected by the National

Assembly for the term of six years by a qualified majority. No person may be elected for the post for more than two times.

At first, the authorities in Armenia seemed to have underestimated the importance of the position by assigning strictly symbolic powers to the office. The first ombudsperson appointed by President Kocharyan in 2003⁴⁹ was even selected from among the non governmental organizations, which are normally treated with caution in the entire post-soviet region. This might well be a reverence towards Europe. But the growing regular criticism of the authorities from the ombudswoman, though not vital for the sustainability of the political power, soon started to irritate the incumbents: the defender was fired from the post by the president even before the official expiry of her term. The newly appointed ombudsman was now chosen from among the “team” of the president as the lessons learnt from the performance of the previous holder of the office were disappointing for the political elite. Armen Harutyunian, a legal scholar, was long respected as Kocharyan’s trusted advisor on constitutional issues who guided the works on constitutional amendments on behalf of the president.

The performance of the new defender initially confirmed the expectation of the president and his team. For some long time after his election by the parliament, the new ombudsperson did not bother the authorities with any explicit critique, backing up the anticipation of his political alliance with the body promoting him into office. Soon though, one could observe the patterns of ideological opposition to the regime type by the defender, and his “defection” shortly turned out to be explicit in the time of the political uncertainty of the presidential elections of 2008, marked with political violence and incidents of grave violations of human rights. Siding with the opposition and the European and international communities blaming on the authorities for use of force against demonstrators on March 1 in Yerevan, the defender appeared as a complete surprise for the outgoing President Kocharyan who did not hide his disappointment by saying that this ombudsman was his worst personnel choice ever. But the President’s following words, subsequent to the incident with the ombudsman’s critique of the use of force after the elections, deserve a special attention for the purposes of this paper: “Every state official must remember that they work for Armenia and not for Strasbourg”, - the President was quoted.⁵⁰

Such a stance of the ombudsman- here a trusted member of the presidential team- in the situation of political uncertainty is illustrative for conceptualizing the expected reactions and political behavior of the institution of ombudsman in the politics of democratization. The political orientation of the ombudsman seems to be embedded in the institutional structure of and the constitutional status and responsibilities assigned to the position and it is not always and necessarily dependent on the political alliances and personal affiliations only. This facet of the institution of the ombudsman, in stark similarity with the same about the constitutional courts, draws a bold line between these mentioned bodies with the political-majoritarian institutions, such as the national parliament and the local self-government bodies, which were observed to be closer, somewhat even organically part of the corrupt clan of the power. Armenia apparently deserves a special case study as much as the performance of both the constitutional court and the ombudsman strikingly confirm the hypothesis.

Conclusions

The patterns of inter-institutional accountability one can observe in Armenia as well as probably elsewhere in the post-soviet region may well raise a guess: the concept of horizontal accountability has plenty of chances to appear on the brink of bankruptcy in those social environments where the democratic constitution-building has gone far ahead of building of a social capital conscious of the

49 At the time and before entry into force of the 2005 constitutional amendments, the Ombudsperson was appointed by the President.

50 <http://www.arntown.com/news/en/rfe/20080305/20080305/>.

proper “self-interest” as understood by Tocqueville.⁵¹ Horizontal accountability, in these conditions, has one chance of thriving- through the sound contest between competing political interests represented in the different branches of government. This model, rarely observed in Armenia, proved rather contingent, as the patterns of post-soviet governance with an emphasis on concentration and abuse of power, being exempt of vertical checks, could succeed an assault on all institutions granting an illusion of democratic legitimacy for the incumbents. The institutions of representative democracy both on national and local levels, in this way, appear completely captured by the dominant political elite and exempt of any meaningful checks and balances. Paradoxically (but only in light of conventional democratic theories), counter-majoritarian institutions, such as the constitutional court and the ombudsman, have appeared better structured to challenge the incumbents. These bodies’ pro-democratic behavior is largely embedded in their institutional status and designation, but it is also a product of their strategic orientation and politics of uncertainty where both the court and the ombudsman proved acting as Trojan horses of democracy within the camp of the quasi-authoritarian incumbents.

The EU’s role in fostering democratic development and accountability in Armenia can be appreciated only as much as one appreciates the role of formal institutions in democratization in general. This said, the EU’s role is tremendous as institutions are the primary instruments of change insofar as they transform the formal transplanted rules of democracy into internally accepted practices. New institutions achieve this by “shaping the frames, habits, routines, expectations (and even memories) of citizens”⁵² and by “educating individuals into knowledgeable citizens.”⁵³ The constitutional amendments of 2005 with the ensuing transition from a president-parliamentary to a premier-presidential system, with largely increased powers of the constitutional courts, a constitutionally established ombudsman, and a better decentralization- all these heavily lobbied by the European organizations- should be viewed as the best ever investments in the evolution of democracy in Armenia- a goal which is troubled and slow, but is definitely closer with every day.

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

52 John Elster, Claus Offe, and Ulrich Preuss, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea*, Cambridge University Press (1998), at 296.

53 James March and Johan Olsen, *Rediscovering Institutions: The Organizational Basis of Politics*, Free Press, 1989, at 161.