

**SMOKE, MIRRORS, AND THE JOKER IN
THE PACK: ON TRANSITIONING TO
DEMOCRACY AND THE RULE OF LAW IN
POST-SOVIET ARMENIA**

*Karen E. Bravo**

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* Assistant Professor of Law, Indiana University School of Law—Indianapolis; L.L.M. New York University School of Law; J.D. Columbia University School of Law; B.A. University of the West Indies. From July 2002 to March 2003, the Author lived and worked in Armenia as a Rule of Law Liaison with the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI), a project of the International Law Section of the American Bar Association and a United States Agency for International Development (USAID) funded project. She is grateful to Elizabeth Defeis of Seton Hall University School of Law, Kevin Johnson of the University of California-Davis School of Law, Ndiva Kofele-Kale of Southern Methodist University Dedman School of Law, George Edwards, Maria Pabón Lopez, and Florence Wagman Roisman of Indiana University School of Law-Indianapolis, Enid Trucios-Haynes of Louis D. Brandeis School of Law, and the participants of the January 2006 Mid-Atlantic People of Color Legal Scholarship Conference for their comments on earlier drafts. Any errors of fact or judgment are the Author’s. This Article is dedicated to the Author’s Armenian friends and former colleagues who work passionately for Armenia’s future.

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*With smoke and mirrors the entertainer-magician creates images that thrill, delight, or confound the audience.*¹

*In Armenia, the smoke and mirrors of shining words and the strategic adoption of progressive legislation hide the reality of stagnant democratization and rule of law reform that reflects a creeping authoritarianism² exemplified by the Russian Federation.*³

*In the deck of cards, the joker is the wild card—the unpredictable element that may trump all the other cards, and put the other players off balance—throwing, and perhaps winning, the game.*⁴

Appearing and disappearing among the smoke and mirrors that project the image of Armenian democracy and rule of law reform is the joker which, to date, has blocked Armenia's transition.

The joker's identity is unknown and perhaps unknowable. Is it a cadre of power holders? Is it the hidden power behind the 1998 parliamentary assassinations? Or is it the psychological mindset of powerlessness and alienation,⁵ bureaucratic paralysis

1. Academics in the field of anthropology have studied the role of mirrors. For example, anthropologist Victor Turner has described “magical mirrors of social reality [that] exaggerate, invert, re-form, magnify, minimize, dis-color, re-color, even deliberately falsify . . . events.” VICTOR TURNER, *THE ANTHROPOLOGY OF PERFORMANCE* 42 (1986) (discussing genres of cultural performance). Worthy of further study, but left unexplored in this Article, is the subject of elections as cultural performance.

2. The creeping authoritarianism in Armenia seems to mirror a phenomenon that Western observers fear is already taking place in Russia. See Editorial, *A Message for Mr. Putin*, WALL ST. J., Sep. 26, 2003, at A8; see also Steven Lee Myers, *Russia Pushing Measure to Curb Private Groups*, N.Y. TIMES, Nov. 24, 2005, at A1 (discussing Russia's “control over charities and other private organizations”); Joel Brinkley, *Pro-Democracy Groups Are Harassed in Central Asia*, N.Y. TIMES, Dec. 4, 2005, at A3 (describing restrictions on the activities of pro-democracy nongovernmental organizations (NGOs) in Russia and Central Asia).

3. Throughout the Article, the state successor to the Union of Soviet Socialist Republics (U.S.S.R. or Soviet Union) is referred to interchangeably as the Russian Federation and Russia.

4. “Joker’ is a name given to an odd card added to the pack This 53rd card, when admitted to the pack, counts as a trump. In ‘poker’ and other games ‘The Joker’ is the highest trump of all.” W. GURNEY BENHAM, *PLAYING CARDS: HISTORY OF THE PACK AND EXPLANATIONS OF ITS MANY SECRETS* 157 (1957).

5. On the way to a meeting in Yerevan, Armenia's capital city, I observed water shooting up from the sidewalk in an area of Yerevan that was subject to scheduled water

and corruption lingering from the Soviet era? Is the joker the dominance of the Executive Branch enshrined in the post-Soviet Constitution, with its accompanying abasement of the Judiciary and Legislature? What of the intersection of the hopes and dreams of the Armenian Diaspora and the political power of its lobby with the reluctance of the Armenian power structure to concede power to the people?

I. INTRODUCTION

A. Transitioning From “Them” to “Us”

The Union of Soviet Socialist Republics (U.S.S.R.) officially dissolved in 1991, and its component republics were set free to make their own sovereign way in the world.⁶ These are called transitional countries.⁷ The depth and breadth of the contemplated transition is breathtaking in its scope.⁸

lockoffs. It was clearly caused by a broken water pipe. The water had been spewing out for several days. “Why,” I asked the ABA/CEELI Armenian driver, “has this not been fixed? Do you think anyone has called? All this water is going to waste when the pipes often are shut down.” “No one will call,” he replied. “If someone calls, they will take a name, and everyone will know that this is a person who calls.”

6. See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 146 (2d ed. 2006); *End of the Soviet Union: Gorbachev’s Six Tumultuous Years at Soviet Helm*, N.Y. TIMES, Dec. 26, 1991, § 1, 13.

7. The appellation “transitional” derives from a Western, nonintrospective stance. The underlying assumption of the West that the more-than-decade-long transition will end in a mirror image of the West reveals a failure to perceive the West’s own ongoing evolution. That evolution is epitomized in the United States, for example, by the emergence of a monarchical presidency. George F. Will, Op-Ed., *No Checks, Many Imbalances*, WASH. POST, Feb. 16, 2006, at A27; Editorial, *Mr. Cheney’s Imperial Presidency*, N.Y. TIMES, Dec. 23, 2005, at A26 (both opinion pieces describe the efforts of the administration of President George W. Bush to expand the scope of power of the U.S. Presidency—to the perceived detriment of the rule of law and the checks and balances of the U.S. constitutional system). The transitional countries are the Russian Federation and the former Soviet Republics of Armenia, Azerbaijan, Belarus, Estonia, Georgia, Moldova, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Tajikistan, Ukraine, and Uzbekistan, together with the former satellite states such as Poland, Hungary, and Czechoslovakia. See, e.g., Shlomo Avineri, *On Problems of Transition in Postcommunist Societies*, 19 CARDOZO L. REV. 1921, 1925 (1998).

8. See Avineri, *supra* note 7, at 1934 (“The collapse of communism was not merely the collapse of a political or economic system, nor was it merely the demise of a particularly repressive form of tyranny. It was a total collapse of a whole way of life, a

“Transitional” describes a movement: from communism to capitalism and democracy; from command and control economies and dependence to the free market and independence; from repression and acceptance to freedom and questioning; from constituent part to autonomous whole; and from represented to representing.⁹

In other words, transitioning from “them” to “us”¹⁰—to the mirror image of the idealization of Western capitalist democracies. After all, capitalism, democracy, and the West, had won the epic, decades-long battle of the Cold War.¹¹

The complexities and challenges of the process of transition for the former Soviet Republics, now more than a decade and a half long, is evident in the disparate nature of their current circumstances. While Poland, the Baltic Republics (Lithuania, Latvia, and Estonia), and the component parts of the former Czechoslovakia (the Czech Republic and Slovakia), Hungary and Slovenia (formerly a constitutive republic of Yugoslavia) are now members of the European Union, others continue to struggle with the challenges of the post-Soviet reality.¹² Ethnic

Lebenswelt . . . Never have so many people lost so many of their social and psychological anchors in such a short time . . .”).

9. Also, in the case of Armenia, for example, from melting pot to ethnic purity. See *id.* at 1924–26 (describing the rise in and expressions of ethnic nationalism in Armenia, Georgia, Azerbaijan).

10. The use of the pronoun “us” attempts to convey the mindset of a significant number of political and opinion leaders as well as public opinion in the West—the classic “insider” versus “outsider” viewpoint that distinguishes self and community from “the other.” It does not necessarily reflect the Author’s viewpoint, except in as much as the Author may be deemed a product, through citizenship, education, and other affiliations and influences, of the West.

11. See Avineri, *supra* note 7, at 1924 (“The conventional wisdom after the fall of the Berlin Wall was that the demise of communism would herald, almost automatically and universally, the emergence and secure institutionalization of democracy and market economy.”); see also FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 42 (1992) (“As mankind approaches the end of the millennium, the twin crises of authoritarianism and socialist central planning have left only one competitor standing in the ring as an ideology of potentially universal validity: liberal democracy . . .”). Fukuyama also opined that “[d]espite the bad moral odor that capitalism has had . . . [.] its ultimate victory as the world’s only viable economic system is easier to explain . . . than is the victory of liberal democracy in the political sphere.” *Id.* at 90–91.

12. Europa, Member States, http://europa.eu/abc/european_countries/eu_members/index_en.htm (last visited Apr. 1, 2007).

conflicts—which led, for example, to the breakup of the former Yugoslavia, low standards of living, and difficulties—both economic and social—of adjusting to free market economic systems have created stumbling blocks for many of the new states.¹³ Further, the installation of authoritarian regimes in Azerbaijan, Belarus, and Uzbekistan, has stymied the republics' movements toward democracy.¹⁴ Even the republics that have overcome post-Soviet political malaise or repression, or both, through a successful expression of “people power” (namely the Orange Revolution of Ukraine, the Rose Revolution of Georgia, and Kyrgyzstan's ejection of its former President) have encountered difficulties in the execution of pro-Western, popularly backed reform.¹⁵

B. Armenia's Transition to Democracy

This Article assesses, through the lenses of elections and Armenia's Constitution, the transition to democracy and the rule of law in the former Soviet Republic of Armenia (Armenia or the Republic). Armenia, which has encountered many of the challenges faced by the other transitional countries, and might appear to be similarly, if not better, circumstanced, provides an excellent case study, particularly in view of the advantages that the Republic appeared to have when it became an independent member of the international community.

Through exploration of multiple layers of meaning in the analogy of smoke, mirrors, and the joker in the pack, it is possible to recognize certain broad themes in the process of transition in Armenia—themes which have general applicability to other transitional societies. To challengers who may claim “There is no joker” and “All transitions, whether from communism to democracy or from feudalism to fettered

13. Grzegorz W. Kolodko, *Ten Years of Post-Socialist Transition: Lessons for Policy Reforms* 2, 13 (The World Bank Development Economics Research Group, Working Paper No. 2095, 1999).

14. See, e.g., Press Release, Freedom House, Challenges and Opportunities for Democracy in Former Soviet Countries (June 15, 2005), available at <http://www.freedomhouse.org/template.cfm?page=70&release=278>.

15. See, e.g., Marc Champion, *In Russia's Shadow, Georgia's Leader Remakes Nation*, WALL ST. J., July 6, 2006, at A1.

monarchy entail upheaval, are imperfect, and do not flow smoothly,” I interpose the following rebuttal: To the extent that no transition is easy or free of challenges, it is more crucially the task of the analyst to identify the factors that pose barriers to such transitions. Only through identification, subjection to analysis, comparison, and contrast of individual factual circumstances can the jokers be managed, constrained, and neutralized.

The assessment performed in this Article neither implies nor adopts a particular incarnation of democracy. However, a normative bias in favor of democracy does underlie the analysis. In 1992, Professor Thomas Franck wrote of the emergence of a new international norm—the right to democratic governance.¹⁶ Tracing the emergence of the norm through both state practice and its foundation in the right to self-determination, among other rights,¹⁷ Franck identifies “[t]he . . . newest building block in constructing the entitlement to democracy . . . the emerging normative requirement of a participatory electoral process.”¹⁸ In a later work, Franck acknowledged the complexities inherent in a global movement toward democracy.¹⁹ In clarifying his claim, he made clear that the democracy that is protected by the new norm is “not some unattainable, impracticable absolute democracy”;²⁰ instead, the content of the emergent right is the creation of “a presumption in favor of governance by the free, equal, and secret expression of popular will.”²¹

Similarly, the analysis conducted in this Article does not attempt to measure Armenia’s transition to democracy (or its adherence to the rule of law) against some extant manifestation

16. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 47 (1992) [hereinafter Franck, *The Emerging Right*] (“This newly emerging ‘law’—which requires democracy to validate governance—[is] also becoming a requirement of international law, applicable to all and implemented through global standards . . .”).

17. See *id.* at 52–74 (discussing the right to self determination and personal expression, and state practice with respect to elections).

18. *Id.* at 63.

19. See Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 1–2 (1994) [hereinafter Franck, *Democratic Entitlement*].

20. *Id.* at 4.

21. *Id.* at 5.

of democracy, the rule of law, or even a particular idealized conception of those terms. Clearly, even if one looks to more mature democracies, such as the United States, serious questions could be raised not only about the electoral processes²² but also structural features of the U.S. constitutional framework.²³ Instead, this Article attempts to ascertain, with respect to Armenia's transition to democracy, whether the Armenian people govern through the "free, equal, and secret expression of popular will."²⁴

Since September 1991, when the Republic declared its independence from the Soviet Union,²⁵ the country has often been held up as a beacon of democracy²⁶ and economic freedom²⁷ among transitional countries. The country appeared to be poised

22. Consider, for example, the debacles of the U.S. presidential elections of 2000.

23. See generally ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001) (asking whether there are democratic defects in the American Constitution).

24. See Franck, *The Democratic Entitlement*, *supra* note 19, at 5.

25. GEORGE A. BOURNOUTIAN, A CONCISE HISTORY OF THE ARMENIAN PEOPLE 332 (2d ed. 2003).

26. See, e.g., Press Release, U.S. Department of State, U.S. Assistance to Armenia—Fiscal Year 2004 (Aug. 17, 2004), available at <http://www.state.gov/p/eur/rls/fs/35976.htm> ("Armenia has been one of the leading performers in Eurasia in economic and political reform . . ."); see also Elizabeth F. Defeis, *Armenian Constitutional Referendum: Towards a Democratic Process*, 9 TEMP. INT'L & COMP. L.J. 269, 269 (1995) [hereinafter Defeis, *Armenian Constitutional Referendum*]. Paradoxically, as early as 1999, Thomas Carothers included Armenia in a list of countries that had made initial steps toward democracy but had regressed to "strongman rule" or other forms of authoritarianism. See THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 108–09 (1999) (diagnosing a backward shift into "semi-authoritarianism of one kind or another" by Armenia and other countries).

27. See, e.g., Mary Anastasia O'Grady, Op-Ed., *Wish They All Could Be Like Estonia*, WALL ST. J., Jan. 4, 2006, at A10 (reproducing the rankings chart of the 2006 Index of Economic Freedom published by the Wall Street Journal and the Heritage Foundation that ranks Armenia twenty-seventh, third highest among the countries of the former Soviet bloc—only Estonia and the Czech Republic ranked higher, at seventh and twenty-first respectively). Economic indicators show that Armenia's economic transition is proceeding well. Press Release, Int'l Monetary Fund, Armenia—IMF Mission Concluding Statement (Feb. 20, 2004), available at <http://www.imf.org/external/np/ms/2004/022004.htm> ("The Armenian economy continued to display high economic growth in 2003, expanding by nearly 14% The business environment has also improved, contributing to an increase in investment.").

for success, with a well-educated population²⁸ and ardent support from the Armenian Diaspora,²⁹ which had attained much lobbying power in Western countries such as the United States.³⁰ Although a superficial examination would indicate, based on the adoption of new laws,³¹ the amendment of much Soviet-era legislation,³² the ratification of international human rights treaties,³³ among other overt actions such as memberships in the World Trade Organization³⁴ and the

28. See SHALE HOROWITZ, *FROM ETHNIC CONFLICT TO STILLBORN REFORM: THE FORMER SOVIET UNION AND YUGOSLAVIA* 86 (2005).

29. *Id.* Ethnic Armenians are citizens of varied countries throughout the world—the result of different emigration movements throughout history. GERARD J. LIBARIDIAN, *MODERN ARMENIA: PEOPLE, NATION, STATE* 35–36 (2004). Modern Armenian communities exist in, for example, France, Lebanon, Russia, the United States, Cyprus, and Greece. *Id.* at 36, 248, 298. The Russian, French and U.S. communities are said to be the “largest and wealthiest” of the Diaspora communities. *Id.* at 298. See BOURNOUTIAN, *supra* note 25, at 332–58 (discussing the nature and histories of the various Diaspora communities).

30. See discussion of the Armenian Diaspora’s power in the United States *infra* Part VI.B.1.

31. For example, legislation creating the position of Ombudsman was approved by the Armenian General Assembly on October 21, 2003. Liz Fuller, *Armenia Introduces Post of Ombudsman*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Oct. 22, 2003, <http://www.rferl.org/newsline/2003/10/221003.asp?po=y>; Kristina Gevorkyan, *The Ombudsman/Human Rights Defender*, ARM. L. REV. (July 17, 2006), <http://www.arm.lawreview.org/archive/ombudsman.htm> (discussing the legislation, including its purpose, responsibilities of the ombudsman, and mechanism for appointment).

32. Armenia’s new criminal code, adopted in April 2003, abolished the death penalty, among other changes. See ANNA WALKER, *NATIONS IN TRANSIT 2004: ARMENIA 17* (Freedom House, 2004), available at <http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN016569.pdf>.

33. Upon its accession to the Council of Europe on January 25, 2001, Armenia signed, and has since ratified, the European Convention for the Protection of Human Rights and Fundamental Freedoms and ten of its protocols. Council of Europe Information Office, *Countries Info: Armenia and the Council of Europe*, http://www.coe.int/T/E/Com/About_Coe/Member_States/e_ar.asp (last visited Apr. 1, 2007). In addition, Armenia has since signed and ratified Council of Europe treaties addressing, for example, the prohibition of torture and cruel and inhuman treatment and the protection of minorities. Council of Europe, Armenia, Jan. 29, 2007, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=ARM&MA=999&SI=2&DF=&CM=3&CL=ENG>.

34. Armenia became a member of the World Trade Organization on February 5, 2003. World Trade Organization, *Members and Observers*, Jan. 11, 2007, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

Council of Europe,³⁵ that the Republic of Armenia is in the midst of a grand transition toward democracy and rule of law reform, this is, in a fundamental sense, but an illusion.

Analysis of post-Soviet elections and plebiscites in Armenia, the balance of power among the branches of government enshrined in Armenia's 1995 Constitution, and both the process of amendment and the substance of the amended Constitution adopted through a referendum in December 2005 indicate that the country is in the throes of a creeping authoritarianism, a pseudo democracy with a *de facto* autocrat at its helm.³⁶ Despite the apparent wide-ranging changes in the legal and political landscape since 1991, rule of law reform and the spread of democracy is largely superficial and formalistic.³⁷ The people of Armenia are experiencing a simulacrum of democracy that has dashed their hopes and expectations of post-Soviet transformation.

Part II of this Article summarizes Armenia's recent economic, social, and political history. Part III summarizes and analyzes trends in the conduct of Armenia's post-Soviet elections, describing the events surrounding elections, including alleged and documented violations and the popular demonstrations against the results. Part IV employs narrative devices to give the flavor of the Armenian presidential elections of 2003, of which the author was an observer. Part V examines Armenia's Constitution, centering on the status of the Judiciary and the process and looked-for benefits of the Constitution's 2005 amendment as a mechanism to evaluate adherence to the rule of law. Part VI attempts to identify the "joker in the pack,"

35. The Council of Europe was formed in 1949 as part of a wave of European integration attempts following World War II. See George A. Berman *et al.*, CASES AND MATERIALS ON EUROPEAN UNION Law 4 (2d ed. 2002). The organization has forty-six member states, many of which are also members of the European Union. Council of Europe, *The Council of Europe's Member States* (June 2006), http://www.coe.int/T/E/Com/About_Coe/Member_States/.

36. Other phenomena, identification and analysis of which point toward the dysfunction in the political and social system, are the rise of the mafia, widespread bureaucratic corruption, and increasing disparity in income and inadequacy of the social safety net. For further discussion, see *infra* Part VI.

37. That is half-heartedly *de jure*, but certainly not *de facto*. See *infra* Part V.

while Part VII concludes by assaying the steps required for transition to democracy and adherence to the rule of law in Armenia.

II. ARMENIA AFTER THE U.S.S.R.

A strategically important country³⁸ with which most Americans are unfamiliar, for a period of time after dissolution of the Soviet Union, Armenia reportedly received the second largest amount of annual aid from the United States on a per capita basis, only behind Israel.³⁹ Since 1993, the Republic has received grants and loans from international monetary and lending institutions, such as the International Monetary Fund, totaling more than \$1 billion (USD).⁴⁰ In addition, since 1992, the United States alone directed more than \$1.6 billion (USD) in aid to Armenia.⁴¹ Although the relationship with the United States is a close one and Diaspora Armenians defend Armenia's

38. For the West, reliable access to the mineral wealth of Azerbaijan and the Caspian Sea require that the ethnic conflicts in the region should not simmer to boiling point. In addition, Armenia's location on the periphery of the Middle East creates an incentive for the United States to facilitate peace in the region. Should hostilities erupt once more between Armenia and Azerbaijan, the conflict might spread to Iran, Armenia's neighbor to the South. For Russia, Armenia is the southern edge of its sphere of influence in the Caucasus, a buffer zone between it and the Turks and Persians to the south. For Iran, Armenia serves to separate the ethnic Azeri population of its northern reaches from their brothers in Azerbaijan. Afshin Molavi, *Iran's Azeri Question: What Does Iran's Largest Ethnic Minority Want?*, EURASIANET.ORG, Apr. 15, 2003, <http://www.eurasianet.org/departments/culture/articles/eav041503.shtml> (discussing, among other things, the potential of unification of Iran's ethnic Azeris with Azerbaijan). Ethnic Azeris make up 24% of Iran's total population. CIA, *The World Factbook: Iran*, Mar. 15, 2007, <https://www.cia.gov/cia/publications/factbook/geos/ir.html>; For a fuller discussion of Armenia's strategic importance, see LIBARIDIAN, *supra* note 29, at 283–302.

39. Mark McDonald, *16 Years After Armenia Quake, Aid Still Flows In; Missions Remained After Media Left – Groups Worry About Creating Dependence*, SEATTLE TIMES, Jan. 30, 2005, at A16 (“Today, Armenia is one of the largest per-capita recipients of U.S. government aid in the world, reportedly second only to Israel. A large and influential immigrant population in the United States helps drive those government appropriations.”); see also Defeis, *Armenian Constitutional Referendum*, *supra* note 26, at 269 n.1.

40. U.S. & FOREIGN COMMERCIAL SERV. AND U.S. STATE DEP'T, *DOING BUSINESS IN ARMENIA: A COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 2* (2004), available at <http://yerevan.usembassy.gov/commerce/ccg.pdf>.

41. *Id.* at 3.

interests in the United States,⁴² Armenia also maintains close ties with Russia⁴³ and Iran⁴⁴—strategic alignments that provide a buffer from the hostility of its Turkish and Azeri neighbors.⁴⁵

A. Geography and History of Armenia

Landlocked in mountainous territory between the Caspian and Black Sea, today's Armenia is a mere fragment of the Armenian people's historic territory, which once stretched from eastern Turkey through the Transcaucasus.⁴⁶ A region of contested dominance among the Persian, Ottoman, and Tsarist Russian empires,⁴⁷ the territory that is now Armenia was conquered and annexed into the Russian Empire in 1828.⁴⁸ A brief independence from the Russians, lasting from 1918 until 1921, was followed by absorption into the Soviet Union.⁴⁹ It was after the conquest by communist Russia that the current borders between Armenia and Azerbaijan were delineated in their current configuration,⁵⁰ laying the groundwork for the current conflict with Azerbaijan.

42. In the winter of 2002, Armenia was included on the list of countries whose nationals residing in the United States were required to register with the Immigration & Naturalization Service. Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 77135, 77136 (Dec. 16, 2002). Following one weekend's extraordinary lobbying by the Armenian Diaspora in the U.S., including blitzing the White House with outraged faxes, Armenia was removed from the list. Press Release, Armenian National Committee of America, Bush Administration Revises I.N.S. Policy On Requiring Registration of Armenian Nationals in the United States, Dec. 16, 2002, http://www.anca.org/press_releases/press_releases.php?prid=274; see also discussion *infra* Part VI.B.1.

43. In 2002–2003, the Armenian government sold to Russian business interests industrial infrastructure remaining from the Soviet era, and the Chernobyl-style nuclear facility at Medzamor. LIBARIDIAN, *supra* note 29, at 289–90.

44. *Id.* at 243–44.

45. *Id.* at 244.

46. See BOURNOUTIAN, *supra* note 25, Maps 21–23. Armenia lies between the Black Sea and the Caspian Sea, surrounded by Georgia to the north, Azerbaijan to the northeast and south (Nackichevan), Iran to the south, and Turkey to the south and east. A map depicting Armenia and its neighbors can be found in the Appendix.

47. *Id.* at 211–15.

48. *Id.* at 215.

49. *Id.* at 297–313.

50. See *id.* at 312 (recounting the negotiated settlements reached by Russia and Turkey regarding the disposition of territory, made with no input from the Armenians).

B. Post-Soviet Political Developments; Conflicts & Consequences

Armenia remained a Soviet Republic until 1991, when the Republic declared its independence based on a plebiscite, during which citizens of Soviet Armenia voted overwhelmingly in favor of independence from the Soviet Union.⁵¹ Since gaining its independence, the people of this tiny⁵² Transcaucasian republic have engaged in fierce conflict with their neighbor, Azerbaijan.⁵³ As a consequence, Armenia has also continued to endure a closed border and economic blockade⁵⁴ by Azerbaijan, as well as Turkey, its large neighbor to the west. It has also experienced the traumatic assassination of Members of its Parliament broadcast live on public television.⁵⁵

In 1988, the Supreme Soviet of Nagorno-Karabagh, the majority Armenian Autonomous Region within Azerbaijan's borders,⁵⁶ delivered a request to Moscow that the region be transferred from Azerbaijan's to Armenia's control.⁵⁷ The request was met with strong public reactions in both countries—an outpouring of large public demonstrations in Armenia in support of the request⁵⁸ and anti-Armenian pogroms in

51. See LIBARIDIAN, *supra* note 29, at 210; BOURNOUTIAN, *supra* note 25, at 332. The declaration of independence and the popular referendum that approved it took place a few months before the formal collapse of the Soviet empire. BOURNOUTIAN, *supra* note 25, at 332, 356.

52. Armenia is slightly smaller than Maryland, with an area of 29,800 square kilometers. Central Intelligence Agency, The World Factbook: Armenia, <https://www.cia.gov/cia/publications/factbook/geos/am.html> [hereinafter CIA Factbook: Armenia] (last visited Apr. 1, 2007).

53. See, e.g., Susan Sachs, *Armenia's Isolation Grows Only Deeper*, N.Y. TIMES, Dec. 26, 2004, A1.

54. *Id.*

55. On October 27, 1999, five gunmen entered the Armenian Parliamentary Assembly, killing the Prime Minister, the Speaker of the House, and six other officials. See Emil Danielyan, *Armenia: Parliament Massacre Still a Mystery Three Years Later*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Oct. 28, 2002, <http://www.rferl.org/features/2002/10/28102002161752.asp>; see discussion *infra* Part II.C.

56. See HOROWITZ, *supra* note 28, at 77. Armenians constituted approximately 75% of Karabagh's population at that time. *Id.* The names "Nagorno-Karabagh" or "Nagorno-Karabakh" and "Karabagh" or "Karabakh" are used interchangeably throughout the Article. Both spellings are encountered in the relevant literature.

57. *Id.*

58. See LIBARIDIAN, *supra* note 29, at 206.

Azerbaijan.⁵⁹ Tension and allegations of mistreatment and massacre escalated on both sides, leading to the outbreak of hostilities. The situation deteriorated with more demonstrations, pogroms, exchanges of population and military conflict.⁶⁰ Armenia's Azeris fled the Republic and Azerbaijan's Armenians fled Azerbaijan.⁶¹ The U.S.S.R., unable to contain the conflict, and further preoccupied by its own woes, switched support from Azerbaijan to Armenia⁶² on the basis of geopolitical imperatives⁶³ and as its own leadership changed.⁶⁴

The conflict increased following the collapse of the Soviet Union, and continued until 1994, when a ceasefire was brokered under the auspices of the Organization for Security and Cooperation in Europe's (OSCE) Minsk Group.⁶⁵ The conflict left Armenia cleansed of its Soviet-era Azeri population⁶⁶ and holding one-fifth of Azerbaijan's internationally recognized

59. *See id.* at 207.

60. *See id.* at 206–08; BOURNOUTIAN, *supra* note 25, at 327–32; HOROWITZ, *supra* note 28, at 77–81. Armenian nationalists “liberated” the Nagorno-Karabagh region. Thomas Cromwell, Nagorno-Karabakh: ‘There is no going back for us,’ http://diplomatictrffic.com/highlights_archives.asp?ID=163 (last visited Apr. 1, 2007). The region is now a self-declared independent republic whose legitimacy is recognized only by Armenia. *Id.*

61. HOROWITZ, *supra* note 28, at 77; LIBARIDIAN, *supra* note 29, at 235; BOURNOUTIAN, *supra* note 25, at 330.

62. *See* LIBARIDIAN, *supra* note 29, at 208; BOURNOUTIAN, *supra* note 25, at 331–32, 368–72.

63. The Soviet Union was in the throes of collapse, as the independence dreams unmasked by Gorbachev's *glasnost* and *perestroika* divided the energies of Russia and the Soviet Union's constituent republics. BOURNOUTIAN, *supra* note 25, at 369–71 (discussing the dissolution of the U.S.S.R. and Armenia's recognition as a sovereign state).

64. *Id.* at 370–71 (citing Gorbachev's resignation as president).

65. The Organization for Security and Cooperation in Europe (OSCE) is the world's largest regional security organization; it provides a forum for member state political negotiations and conflict resolution and avoidance, among other functions. *See* OSCE, About, <http://www.osce.org/about/> (last visited Apr. 1, 2007). The Minsk Group (so called based on the site of an international conference on the Nagorno-Karabagh issue in Minsk, Belarus) was constituted following Armenia's and Azerbaijan's agreement to mediation of the conflict by the OSCE. LIBARIDIAN, *supra* note 29, at 234.

66. *See* LIBARIDIAN, *supra* note 29, at 235 (describing the movement of ethnic Armenians out of Azerbaijan and ethnic Azeris out of Armenia).

territory,⁶⁷ including the Lachin corridor between Armenia and Nagorno-Karabagh.⁶⁸

During and subsequent to the conflict, Armenia endured a blockade by Azerbaijan and Turkey which interrupted its communications, transport, and energy supply links with Russia and the wider world.⁶⁹ Armenia also suffered a devastating earthquake in 1988 that killed 25,000 people.⁷⁰ The energy crisis that began with the 1989 imposition of the blockade⁷¹ contributed to a ruinous shrinkage of its economy, epitomized by a 60% decrease in GDP between 1991 and 1993.⁷² The energy crisis ended only with the reopening of the Medzamor nuclear plant in 1995.⁷³

C. Political Leaders and Assassins

Armenia's leadership is inextricably linked with the Nagorno-Karabagh conflict; it was from the group of leaders who supported Karabagh's bid to rejoin Armenia (the Karabagh

67. CIA Factbook: Armenia, *supra* note 52. One consequence of the war has been the homogenization of Armenia. Once a multi-ethnic and diverse region of the world, located at the crossroads of three great empires (Persian, Russian, and Ottoman), Armenia is now, arguably, one of the least ethnically diverse countries in the world. The population is 97.9% Armenian, 1.3% Yezidi Kurd, 0.5% Russian, and 0.3% other. *Id.* at 4. Moslem Kurds not directly involved in the conflict also departed Armenia for Azerbaijan. *See, e.g.,* ANNA MATEVA, THE SOUTH CAUCASUS: NATIONALISM, CONFLICT AND MINORITIES 18 (Minority Rights Group Int'l 2002). In neither country are the refugees of that conflict fully integrated into the social and political lives of the nations. For example, in Armenia, refugees are allowed to vote in local elections, but are prohibited from participation in presidential and parliamentary elections. *See* ELECTORAL CODE OF THE REPUBLIC OF ARM., art. 2.

68. ROBERT KAPLAN, EASTWARD TO TARTARY 325 (2001).

69. BOURNOUTIAN, *supra* note 25, at 332, 339, 372; LIBARIDIAN, *supra* note 29, at 226. The blockade continued following the ceasefire and exists to this day. *See* Sachs, *supra* note 53, at A1. Armenia's only open borders are with Georgia and Iran. *See id.*

70. LIBARIDIAN, *supra* note 29, at 207.

71. BOURNOUTIAN, *supra* note 25, at 369.

72. HOROWITZ, *supra* note 28, at 81; *see* LIBARIDIAN, *supra* note 29, at 224–31 (summarizing the economic challenges confronting the new republic).

73. *See* BOURNOUTIAN, *supra* note 25, at 374. The plant had been closed toward the end of the Soviet era in response to the populace's protest against the environmental dangers. LIBARIDIAN, *supra* note 29, at 369.

Committee) that the nation's post-Soviet leadership arose.⁷⁴ Levon Ter-Petrossian, Armenia's first post-Soviet president who served from 1991 to 1998, as well as key figures in his government, led the Karabagh Committee as it transformed into the Armenian National Movement, which spearheaded the call for Armenia's independence from the Soviet Union.⁷⁵

Ter-Petrossian's willingness to negotiate with Azerbaijan and Turkey about Karabagh's fate (perhaps even allowing Karabagh to remain an autonomous region of Azerbaijan in return for a lifting of the crippling Azeri-Turkey blockade)⁷⁶ led to his resignation in 1998.⁷⁷ Ter-Petrossian was replaced by Robert Kocharian, a Karabagh-born prime minister, and ardent defender of Karabagh's right to decide its own status.

On October 27, 1999, five gunmen entered the Armenian parliamentary Assembly, killing Prime Minister Vazgen Sargsian; the President of the National Assembly, Karen Demirjian; and six other officials.⁷⁸ The gunmen surrendered the next day after holding the surviving Legislative body hostage overnight.⁷⁹ Soon after the capture, the prosecutor's decisions regarding the indictment of the gunmen and the nature of the charges to be brought against them ended any zealous official investigation into a potentially wide-ranging plot.⁸⁰ The five gunmen were charged as individuals, and the public investigation of unapprehended conspirators ceased.⁸¹

74. LIBARIDIAN, *supra* note 29, at 231–34 (discussing the connection between Nagorno-Karabakh and the Karabakh Movement in Armenia).

75. *Id.* at 232–33.

76. HOROWITZ, *supra* note 28, at 82. Ter-Petrossian had earlier declined to officially accept the Karabagh Supreme Soviet's declaration of independence from Azerbaijan. *Id.* at 81.

77. *Id.* at 83. Some considered his resignation a "bloodless coup." *Id.*

78. See LIBARIDIAN, *supra* note 29, at 252; BOURNOUTIAN, *supra* note 25, at 378–79.

79. See Liz Fuller, *Armenian Premier, Parliament Speaker Gunned Down*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Oct. 29, 1999, <http://www.rferl.org/newsline/1999/10/2-TCA/tca-291099.asp>.

80. See LIBARIDIAN, *supra* note 29, at 253 (explaining how the prosecutor's charges "placed full responsibility of the killings" on the five gunmen).

81. *Id.* Shortly before the trial of the gunmen began in February 2001, the incumbent Prosecutor-General resigned and was replaced by President Kocharian. Liz

The power behind the gunmen, if any, has not been revealed. Mr. Nairi Hunanian, the leader of the gunmen, was convicted of murder in December 2004 and sentenced to life imprisonment.⁸² The war, the trauma of the assassination, and the farcical trial of the accused perpetrators left deep scars on the Armenian psyche and public life.⁸³

The killings removed in one fell swoop Robert Kocharian's most influential opponents,⁸⁴ arousing the enduring suspicions of Armenians regarding his involvement in the assassination

Fuller, *Embattled Armenian Prosecutor General Resigns*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 8, 2001, <http://www.rferl.org/newsline/2001/02/2-TCA/tca-120201.asp>. The trial of the five gunmen, which did not begin until February 2001, continued in *Bleak House*-like fashion until November 14, 2003. Liz Fuller, *Judge Forestalls Possible New Revelations by Armenian Parliament Gunman*, RADIO FREE EUR./RADIO LIBERTY, Nov. 18, 2003, <http://www.rferl.org/newsline/2003/11/181103.asp?po=y>. (In Charles Dickens' *Bleak House*, the case of Jarndyce and Jarndyce wound its way through the High Court of Chancery for many years. When the case was ultimately resolved, the estate at the center of the dispute had been depleted by the Chancery Court and other legal fees. See generally CHARLES DICKENS, *BLEAK HOUSE* (Norman Page ed., Penguin Books 1971) (1853)). The seven-day adjournment that immediately followed the first days' less-than-two hours of proceedings is symptomatic of the conduct of the trial. See Freedom House, *Freedom in the World – Armenia* (2004), <http://www.freedomhouse.org/template.cfm?page=228year=2004RCountry=2881>; see also Liz Fuller, *Armenian Parliament Killings Trial Opens, Adjourns . . .*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 16, 2001, <http://www.rferl.org/newsline/2001/02/160201.asp#2-tca>; Liz Fuller, *Armenian Parliament Shootings Trial Resumes*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 23, 2001, <http://www.rferl.org/newsline/2001/02/230201.asp#2-tca>. After hearing the testimony of twenty-nine witnesses over the course of two years, the presiding judge determined that the remaining 101 witnesses need not testify. See Liz Fuller, *Court Seeks to Speed Up Armenian Parliament's Gunmen's Trial*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Aug. 12, 2003, <http://www.rferl.org/newsline/2003/08/120803.asp?po=y>.

82. See *Armenia Parliament Killers Jailed*, BBC NEWS, Dec. 2, 2003, <http://news.bbc.co.uk/2/hi/europe/3256756.stm>.

83. LIBARIDIAN, *supra* note 29, at 252 (“The tragedy of the carnage was paralleled only by the trauma of the country following the event from which it has yet to recover.”). Throughout the trial, Mr. Hunanian appeared to taunt the Armenian people and the relatives of the deceased. *Leader of the Gunmen Who Stormed Armenian Parliament Plans to Run for President*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Oct. 3, 2002, <http://www.rferl.org/newsline/2002/10/031002.asp?po=y> (reporting, in October 2002, Hunanian's expressed intention to run for President of the Republic).

84. See LIBARIDIAN, *supra* note 29, at 250–52 (citing Kocharian's main opponent as being Karen Demirjian).

conspiracy.⁸⁵ The elimination of his opponents allowed the consolidation of more power within the office of the president.⁸⁶

D. Apparent Progress

Despite this tumult, Armenia appears to have made astonishing progress on the road toward democracy and international standing. Armenia sought international legitimacy by, among other things, signing international conventions and carrying out amendments to its Soviet-era legislation. For example, Armenia acceded to the following international conventions: the International Covenant on Civil and Political Rights,⁸⁷ the International Covenant on Economic, Social and Cultural Rights,⁸⁸ the Convention on the Rights of the Child⁸⁹

85. See, e.g., *id.* at 252; Emil Danielyan, *Armenia: Parliament Massacre Still a Mystery Three Years Later*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Oct. 28, 2002 <http://www.rferl.org/features/2002/10/28102002161752.asp>. “We have come to the conclusion that the crime was aimed at making Robert Kocharian’s power unlimited and uncontrolled.” *Id.* (quoting Albert Bazeyan, an opposition figure). Danielyan further reported that “[i]n early 2000 [state prosecutors] were close to personally implicating Kocharian in the killings but backed down for an apparent lack of evidence. This, in turn, predetermined Kocharian’s victory in a seven-month power struggle with pro-Sarkisian government factions that followed the parliament shootings.” *Id.*

86. LIBARIDIAN, *supra* note 29, at 253–54 (citing the weakening of various political branches and an overall decrease in debate). Unsolved political and other assassinations have been a staple of Armenia’s post-Soviet political life. The first wave of such assassinations, ending in 1994, eliminated several political and business figures, including the “Soviet-era head of the KGB” and the mayor of Yerevan, the capital city. *Id.* at 241–42. The trend continued during the campaign for the 2003 presidential elections: In December 2002, the head of the national public television and close friend of the incumbent president, reputedly the possessor of videotapes of and secrets about the parliamentary assassinations, was murdered as he returned home one night. Liz Fuller, *Senior Armenian Media Official Murdered*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Dec. 30, 2002, <http://www.rferl.org/newsline/2002/12/301202.asp>; Emil Danielyan, *Murder of Armenian State TV Chief Heightens Political Tension*, EURASIANET EURASIA INSIGHT, Jan. 17, 2003, <http://www.eurasianet.org/departments/insight/articles/011703a.shtml>.

87. International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171; Office of the United Nations High Commissioner for Human Rights (UNHCHR), Ratifications and Reservations, Mar. 13, 2007, <http://www.ohchr.org/english/countries/ratification/4.htm>.

88. G.A. Res. 2200A (XXI), at 49, U.N. Doc. A/6316 (Jan. 3, 1976); United Nations, Participants, 2000 <http://www.hri.ca/fortherecord2000/documentation/reservations/cescr.htm>.

and the Convention on the Elimination of All Forms of Discrimination against Women.⁹⁰

In 2001, the Republic made significant strides in its efforts to strengthen its relationship with Europe, acceding to the Council of Europe and ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹¹ In January 2003, Armenia became a member of the World Trade Organization.⁹² To the cursory Western observer, adoption of these new international obligations reflects a movement toward recognition and enforcement of fundamental international norms.

However, 43% of the population lives below the poverty line,⁹³ and the unemployment rate stands at 30%,⁹⁴ stimulating the emigration of large numbers of the Armenian population,⁹⁵ despite an 8% growth in gross domestic product.⁹⁶ Together with

89. G.A. Res. 44/25, at 167, U.N. Doc. A/44/49 (Sept. 2 1990); UNHCHR, Ratifications and Reservations, Mar. 13, 2007, <http://www.ohchr.org/english/countries/ratification/11.htm>.

90. G.A. Res. 34/180, at 193, U.N. Doc. A/34/46, (Sept. 3, 1981); UNHCHR, Ratifications and Reservations, Mar. 13, 2007, <http://www.ohchr.org/english/countries/ratification/8.htm>.

91. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended* by Protocols Nos. 3, 5, & 8 which entered into force on 21 September 1970, 20 December 1971, and 1 January 1990, respectively. Consequently, individuals within Armenia's territory now have standing to bring claims before the European Court of Human Rights in Strasbourg. See DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 624 (3d ed. 2001) ("The [European Convention for the Protection of Human Rights] applies to every individual within the jurisdiction of all the State parties, including non-citizens.").

92. See World Trade Organization, Member Information: Republic of Armenia and the WTO, http://www.wto.org/english/thewto_e/countries_e/armenia_e.htm (last visited Apr. 1, 2007).

93. CIA Factbook: Armenia, *supra* note 52.

94. See Index Mundi, Armenia Unemployment Rate, http://www.indexmundi.com/armenia/unemployment_rate.html (last visited Apr. 1, 2007). *But see*, CIA Factbook: Armenia, *supra* note 52 (citing an unemployment rate of 7.4% based on a November 2006 estimate).

95. See BOURNOUTIAN, *supra* note 25, at 356. The primary destination country is Russia. *Id.*

96. CIA Factbook: Armenia, *supra* note 52.

the phenomena discussed in Parts III and IV *infra*, the economic figures suggest that Armenia's reality may be at variance with the image projected abroad.

III. DEMOCRACY IN ACTION: ARMENIA'S POST-SOVIET ELECTIONS

*"[T]he ballot box has yet to effect a change of government or President in an independent Caucasian state."*⁹⁷

Since establishing its independence, Armenia has held seven presidential and parliamentary elections.⁹⁸ Following each Armenian election, the international community, including the OSCE/Office for Democratic Institutions and Human Rights (OSCE/ODIHR) observer missions, has expressed concerns regarding the freedom and fairness of the proceedings,⁹⁹ but generally has agreed that Armenia is making progress on the path to democracy. While this may be true in a broad sense,¹⁰⁰

97. EDMUND HERZIG, *THE NEW CAUCASUS: ARMENIA, AZERBAIJAN AND GEORGIA* 33 (1999). Events in the Republic of Georgia in 2003–2004 may signal a positive shift in the region, perhaps belying Herzig's negative assessment. In response to presidential elections widely perceived to have been fraudulent, people power demanded and achieved the re-administration of Georgia's presidential elections. See Hugh Pope, *Pro-West Leaders in Georgia Push Shevardnadze Out*, WALL ST. J., Nov. 24, 2003, at A1. The incumbent's principal challenger was elected by an overwhelming majority of the popular vote. Seth Mydans, *With the Vote in Georgia, a Dynamic Young Leader and a New Era*, N.Y. TIMES, Jan. 5, 2004 at A3.

98. Presidential elections were held in 1991, 1996, 1998, and 2003; National Assembly elections were held in 1995, 1999, and 2003. IFES, Country Profile: Armenia, <http://www.electionguide.org/country.php?ID=12>. No Armenian elections have yet met international standards. See OSCE/ODIHR FINAL REPORT ON PRESIDENTIAL ELECTIONS IN ARMENIA 1 (Apr. 28, 2003), http://www.osce.org/documents/odihr/2003/04/1203_en.pdf [hereinafter 2003 PRESIDENTIAL ELECTIONS REPORT]; OSCE/ODIHR, FINAL REPORT ON PARLIAMENTARY ELECTIONS IN ARMENIA 1 (July 31, 2003), http://www.osce.org/documents/odihr/2003/07/533_en.pdf [hereinafter 2003 PARLIAMENTARY ELECTIONS REPORT]; OSCE/ODIHR FINAL REPORT ON PARLIAMENTARY ELECTIONS IN ARMENIA 1–3 (July 30, 1999), http://www.osce.org/documents/odihr/1999/07/1217_en.pdf [hereinafter 1999 PARLIAMENTARY ELECTIONS REPORT]; OSCE/ODIHR FINAL REPORT ON PRESIDENTIAL ELECTIONS IN ARMENIA 3–5 (Apr. 9, 1998), http://www.osce.org/documents/odihr/1998/04/1215_en.pdf [hereinafter 1998 PRESIDENTIAL ELECTIONS REPORT]; OSCE/ODIHR FINAL REPORT ON PRESIDENTIAL ELECTIONS IN ARMENIA 13–14 (Sept. 24, 1996), http://www.osce.org/documents/odihr/1996/10/1208_en.pdf [hereinafter 1996 PRESIDENTIAL ELECTIONS REPORT].

99. See sources cited *supra* note 98.

100. Armenia's progress in the conduct of elections stands in stark contrast to the

the events of the presidential elections in February and March 2003 and the parliamentary elections in May 2003 can be viewed as both prism and snapshot, facilitating analysis of the progress of democracy and the rule of law in Armenia. The events of February through May of 2003 (and, indeed, the lead-up to that critical period) demonstrate that the transition to democracy is in large part legalistic and formalistic, and has not penetrated to institutional and administrative levels.¹⁰¹ This negative analysis is more forcefully suggested when the 2003 elections and the 2005 plebiscite to amend the Armenian Constitution are situated within the history of Armenia's post-Soviet elections.

Further, review and analysis of the Republic's post-Soviet elections indicate that fundamental characteristics of democracy—elections, popular demonstrations, political parties—are carefully stage-managed to convey a superficial image of democratic transition. However, the consistently fraudulent elections reveal an entrenched regime that has minimized the “free, equal, and secret expression of popular will.”¹⁰²

A. *Democracy and Elections*

To undertake to define “democracy” would be a task of Herculean difficulty and splendor. To create a *new* definition of the term is beyond the scope of this Article. Instead, before reviewing Armenia's post-Soviet elections, this Part will attempt to identify some essential characteristics of democracy.

To break down “democracy” to its component linguistic parts, it is defined as the rule by the *demos*, the people.¹⁰³

more overt disregard for appearances of some of its neighbors. For example, through the October 2003 presidential elections in Azerbaijan, ailing strongman Heydar Aliyev officially handed over the reins of the presidency to his son, Ilham Aliyev, among violence and widespread accusations of fraud. See Editorial, *Nepotism in Central Asia*, N.Y. TIMES, Oct. 27, 2003, at A22; Anthony Richter & Svetlana Tsalik, *Rich in Oil, Poor in Everything Else; Making Sure the Money Goes Where It's Supposed To*, N.Y. TIMES, Dec. 4, 2003, at A39.

101. See CAROTHERS, *supra* note 26. (“It is all too common for countries attempting political transitions to achieve the forms but not the substance of democracy.”).

102. See Franck, *The Democratic Entitlement*, *supra* note 19, at 5.

103. *Demos*, from the Greek, refers to the people of the Greek city states. ELLEN

However, the *demos* cannot govern when the population's size surpasses that of the ancient city states, and expansive territorial boundaries are commonplace. In the era of the nation state, rule by the people is possible only through the mechanism of indirect or representative government.¹⁰⁴ That is, given the size and complexity of the modern polity, the people no longer have the ability to practice direct democracy,¹⁰⁵ that is, to govern themselves via face-to-face meetings of all the people/citizens. Instead, a system of representative government is required, where the people designate the representatives that will govern them or, better put, designate the representatives through whom they will govern themselves.

Modern democracy, then, government by the people in a nation state, involves representation by voters of the entire polity and populace of the political unit. It involves government by the people through their elected representatives. Further, it requires participation, through oversight and quality controls, of the governance provided by the representatives. Fundamentally, democracy requires the express consent of the people regarding the identity of their representative governors and the nature of that governance.

Why use elections as a lens through which to analyze a country's transition to democracy and its rule of law reform? Elections have been called the "traditional acid test" of democracy¹⁰⁶ and "[f]ree and fair elections[] the *sine qua non* of a democratic society."¹⁰⁷ According to this view, elections, the process through which the people elect their representatives, are the fundamental test for a functioning democracy.¹⁰⁸ It is

MEIKSINS WOOD, *DEMOCRACY AGAINST CAPITALISM* 204–37 (Cambridge Univ. Press 1995), available at <http://www.iefd.org/articles/demos.php>.

104. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 245–46 (3d ed. 1950) (questioning the feasibility of rule by the people in scenarios other than "small and primitive communities with a simple social structure" and pointing to, instead of "government by the people" the substitution of "government *approved by* the people") (emphasis added).

105. *Id.*

106. HERZIG, *supra* note 97, at 33.

107. Elizabeth F. Defeis, *Elections and Democracy: Armenia, A Case Study*, 20 *LOY. L.A. INT'L & COMP. L. REV.* 455, 455 (1998).

108. *Id.* at 456 (stating that voting is "[c]haracterized as a democratic entitlement,

through the mechanism of elections that the *demos* participate in governing itself.¹⁰⁹ As discussed in Part I *supra*, Thomas Franck has identified “the emerging normative requirement of a participatory electoral process”¹¹⁰ and the creation of “a presumption in favor of governance by the free, equal, and secret expression of popular will.”¹¹¹

Yet, equally assertive are the voices that maintain the insufficiency of elections as the measure of the functioning of a democracy, or as an indicator of the successful transition of a society. Thomas Carothers warns of the danger of idealizing elections as democracy achieved: “Elections do not equal democracy . . . [.] they are, at best, only an early step, one that often leaves underlying political problems largely untouched.”¹¹² Susan Gibson notes the inadequacy of elections as an indication of successful transition: “[c]learly, something more than elections are required before a country can be said to have a democratic government—rather than merely having a democratically-elected government.”¹¹³ And Thomas Franck notes the irony that majoritarian and totalitarian regimes may be emplaced through the mechanism of elections.¹¹⁴ Furthermore, Carothers emphasizes the fragility of elections in transitional countries:

self-governance is emerging as an internationally-protected human right. Yet, the premise that free elections are a significant indicator of a democratic society has been challenged.”).

109. See SCHUMPETER, *supra* note 104, at 245–46. In Schumpeter’s opinion, it is the sole mechanism for participation by the people. *Id.* at 284–85 (“Democracy means *only* that the people have the opportunity of accepting or refusing the men who are to rule them. . . . [O]ne aspect of this may be expressed by saying that democracy is the rule of the politician.”) (emphasis added).

110. See Franck, *The Emerging Right*, *supra* note 16, at 63.

111. Franck, *The Democratic Entitlement*, *supra* note 19, at 5.

112. CAROTHERS, *supra* note 26, at 336.

113. See Lt. Col. Susan S. Gibson, *The Misplaced Reliance on Free and Fair Elections in Nation Building: The Role of Constitutional Democracy and the Rule of Law*, 21 HOUS. J. INT’L L. 1, 8 (1998).

114. See Thomas M. Franck, *Democracy, Legitimacy, and the Rule of Law: Linkages*, in DEMOCRACY AND THE RULE OF LAW 169, 171 (Norman Dorsen & Prosser Gifford eds., 2001) [hereinafter Franck, *Democracy, Legitimacy, and the Rule of Law*] (noting that “[e]lections may also conduce to majoritarian totalitarianism”).

Not only are many bad elections still held in transitional countries, despite the impressive development of elections assistance, *but even when an election does come off well it often results in less significant democratic gains than the providers of electoral aid hoped for.* The 1990s have seen many successful first elections fail to fulfill their promise as launching pads for democratic transition and consolidation. Several dozen transitions have moved from exciting breakthrough elections into stagnation, backsliding toward authoritarianism, or even breakdown into civil conflict. Democracy promoters often regard elections aid as a key that will help open the door to broader democratization. Once the door is open, however, the remaining challenges are often overwhelming.¹¹⁵

Despite, or perhaps in light of, these admonitions, however, it is undeniable that elections present a crucial test for democratic or would-be democratic entities. The principal reasons are two-fold: (1) elections and their conduct are the mechanism through which the people gives its consent¹¹⁶ and governs itself and (2) elections require that the representatives previously elected by the people, and holding the reins of power, be prepared for and acquiesce in their removal from power by the people.

While conceding that well-run elections, by themselves, do not signify the successful functioning of a democracy, it is clear that badly-run elections, whether stemming from lack of resources or fraudulent intent and lack of respect for the will of the people, denote a malfunctioning of the democratic process. Democracy is even more threatened when the conduct of elections serves to prevent “the free, equal, and secret expression of popular will.”¹¹⁷

If well-run elections alone cannot be considered a guarantee of a functioning democracy, is the reverse true? That is, can

115. CAROTHERS, *supra* note 26, at 131 (emphasis added).

116. *See, e.g.*, THE DECLARATION OF THE INDEPENDENCE (U.S. 1776) (stating that “governments are instituted among men, deriving their just powers from the consent of the governed”).

117. Franck, *The Democratic Entitlement*, *supra* note 19, at 5.

consistently fraudulent elections, alone, be considered an indicator of illusory democratization and adherence to the rule of law? The conduct of elections and plebiscites in Armenia raises this fundamental question.

B. Overview of Armenia's Post-Soviet Elections

The first post-Soviet, post-independence election, the presidential election of October 1991, was generally said to have been free and fair in light of the Republic's lack of experience with elections.¹¹⁸ Those elections brought Levon Ter-Petrossian, Armenia's first post-Soviet President, to office with a mandate of 83% of the popular vote,¹¹⁹ riding into office on a cresting wave of market and political liberalization.¹²⁰

However, by the time of the National Assembly elections of 1994, the electoral procedures in Armenia were shrouded in doubt.¹²¹ The downward trend continued with the presidential election of September 1996.¹²² Two years later, Ter-Petrossian was forced to resign in a bloodless coup orchestrated by Karabagh-affiliated officials in his administration as well as members of the military, which was heavily invested, and had its origins, in the Karabagh conflict.¹²³

118. HOROWITZ, *supra* note 28, at 73.

119. LIBARIDIAN, *supra* note 29, at 208.

120. *See id.* at 224–31 (describing the challenges presented by the transition to a market economy).

121. A key opposition party, the ARF, was banned from participation in the elections on the basis of governmental accusations of terrorist activity. *See id.* at 238. The elections were also marred by allegations of fraud and other restrictions placed on candidate participation. *See* BOURNOUTIAN, *supra* note 25, at 375.

122. Among suggestions of electoral misconduct, the incumbent, Ter-Petrossian, narrowly avoided a runoff vote against his principal opponent, Vazgen Manukian, with an official tally of 51.8% of the votes cast. Pursuant to Armenian law, in order to avoid a runoff vote, a presidential candidate must receive a simple majority of the popular vote. *See* ELECTORAL CODE OF THE REPUBLIC OF ARM. arts. 84, 85.

123. Ter-Petrossian's overwhelming support in 1991 had dwindled away in the face of his open willingness to compromise on the Karabagh issue for the sake of practicality—a compromise for which there was nugatory public or political support. *See* HOROWITZ, *supra* note 28, at 83.

In accordance with the Armenian Constitution, following the resignation of Ter-Petrossian's constitutionally-mandated immediate successor,¹²⁴ Robert Kocharian, Ter-Petrossian's Karabagh-born Prime Minister and second-in-line, was designated the Republic's second post-Soviet President.¹²⁵ Kocharian's appointment was confirmed by general elections that, in accordance with the Armenian Constitution, took place within forty days of Ter-Petrossian's removal.¹²⁶ While Karen Demirchian accepted the results of the election, there were rumors that Demirchian, Kocharian's principal opponent, was the true winner.¹²⁷

The next national elections, the May 1998 National Assembly elections, brought a parliamentary majority to Karen Demirchian and Vazgen Sargsian, positioning them to challenge the authority of President Kocharian.¹²⁸ Some months after those elections, the political assassinations described in Part II were perpetrated in the Parliament. The confusion and power vacuum created by the killings gave President Kocharian the opportunity to begin the accumulation of power in the Executive branch of Armenia.¹²⁹

1. *The 2003 Elections*

In February through March and May of 2003, Armenia held its third presidential and fourth parliamentary elections since independence from the Soviet Union in 1991.¹³⁰ The first round of voting in the presidential elections was held on February 19,

124. See LIBARIDIAN, *supra* note 29, at 250.

125. *Id.*

126. 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 4.

127. See LIBARIDIAN, *supra* note 29, at 251.

128. *Id.* at 251.

129. See *id.* at 253.

130. Press Release, Embassy of the Republic of Armenia to the United States (Feb. 24, 2003), <http://www.armeniaemb.org/News/EmbassyPressReleases/Releases/SecondRoundElections2003.htm>; Julia Hakobyan, *Lower Turnout, Fewer Violations: International Observers Report On Parliamentary Elections*, ARMENIANOW.COM, May 30, 2003, <http://www.armenianow.com/archive/2004/2003/may30/news/lowerturnout/index.htm>.

2003.¹³¹ As required under Armenian law, a second round of voting was scheduled since none of the nine candidates had received the “50% plus one votes”¹³² mandated by the Electoral Code.¹³³ Following accusations of election falsification,¹³⁴ mass demonstrations, and arrests of opposition supporters,¹³⁵ the second round of the elections was held on March 5, 2003.¹³⁶ The incumbent, President Robert Kocharian, was declared the decisive victor, with 67.5% of votes cast.¹³⁷

The elections were held in the context of concentrated reform and support efforts by the international community, including the U.S. government through the U.S. Agency for International Development (USAID) and its contractors.¹³⁸ In 2002–2003, a total of \$22.4 million of aid from the United States was directed toward the municipal, presidential, and National

131. Liz Fuller, *Voting Gets Underway in Armenian Presidential Election*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 19, 2003, <http://www.rferl.org/newsline/2003/02/190203.asp#2-tca>.

132. See Liz Fuller, *Armenian Presidential Election Will Go to Second Round*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 20, 2003, <http://www.rferl.org/newsline/2003/02/200203.asp#2-tca>.

133. ELECTORAL CODE OF THE REPUBLIC OF ARM., arts. 84, 85. According to the results announced by the Armenian Central Election Commission, the incumbent received 49.8% of the votes cast, while his closest opponent, Stepan Demirchian, received 27.7%. Liz Fuller, *Armenian Presidential Election Will Go to Second Round*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 20, 2003, <http://www.rferl.org/newsline/2003/02/2-TCA/tca-200203.asp>.

134. Liz Fuller, *Armenian Opposition Claims Presidential Election Was Illegal*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 21, 2003, <http://www.rferl.org/newsline/2003/02/2-TCA/tca-210203.asp>.

135. See *infra* Part III.E.2. (containing a more detailed description of the arrests).

136. Liz Fuller, *Voting Begins in Armenian Presidential Runoff*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Mar. 5, 2003, <http://www.rferl.org/newsline/2003/03/050303.asp#2-tca>.

137. *Armenia President Re-Elected . . .*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Mar. 6, 2003 <http://www.rferl.org/newsline/2003/03/060303.asp#2-tca>.

138. United States Agency for Int'l Dev. (USAID) contractors included ABA/CEELI, IFES (formerly known as the International Foundation for Election Systems), NDI (National Democratic Institute), and Intermedia, among others. See USAID, DIRECTORY OF DG OFFICE IMPLEMENTING PARTNERS (2006), http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/dg_office/partners.pdf (listing USAID contractor contact information).

Assembly elections of 2002–2003.¹³⁹ Other donors included Armenia's European neighbors, through the offices of the Council of Europe and the OSCE.¹⁴⁰

The efforts of the international community to help foster free and fair elections included millions of dollars of assistance, in the form of, *inter alia*, technology transfers, monitoring of and assistance to the media, and trainings of election officials and the Judiciary in preparation for the elections, media monitoring, and assistance.¹⁴¹ Nevertheless, the elections failed to meet international standards,¹⁴² and raised serious doubts regarding the validity of the proceedings and their official results. In both the parliamentary and presidential elections of 2003, the OSCE/ODIHR election observation missions¹⁴³ opined that the conduct of the proceedings did not meet international standards. Despite this commitment of resources and conventional perception of the Republic as a beacon of democracy and economic progress, the 2003 Armenian elections were neither free nor fair,¹⁴⁴ evidencing instead a well-thought-out and coordinated subversion of the democratic process.

2. *Referenda*

In addition to elections for public office, since its independence from the Soviet Union, Armenia has held three referenda. Through the constitutional referendum of 1995, the Armenian people approved the Republic's first post-Soviet Constitution.¹⁴⁵ The second referendum on the Constitution, held in tandem with the parliamentary elections of 2003, did not

139. Press Release, U.S. Dep't of State, U.S. Assistance to Armenia—Fiscal Year 2003, Feb. 17, 2004, <http://www.state.gov/p/eur/rls/fs/29484.htm>.

140. Information regarding the source of the donations is based on the Author's personal knowledge.

141. Information about the nature of the elections assistance programs is based on the Author's personal knowledge.

142. See 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98 at 1.

143. A specialized institution of the OSCE, the Office for Democratic Institutions and Human Rights (ODIHR), promotes democracy and institution-building in OSCE member states. See, OSCE, Office for Democratic Institutions and Human Rights, <http://www.osce.org/odihr/13421.html> (last visited Apr. 1, 2007).

144. See *infra* Part IV (containing a more detailed discussion of 2003 elections).

145. LIBARIDIAN, *supra* note 29, at 210–18; BOURNOUTIAN, *supra* note 25, at 374.

receive voter approval for the proposed constitutional amendments.¹⁴⁶ Finally, the contested results of the 2005 constitutional referendum, according to the administration, confirmed the populace's approval for the proposed constitutional reforms.¹⁴⁷

C. *Post-Soviet Elections Violation Trends*

A review of the OSCE/ODIHR final election reports issued after the 1996, 1998, 1999, and 2003 elections reveal recurring trends in Armenian electoral violations. This analysis will highlight a number of the more fundamental defects in the conduct of the elections that undermine the freedom and fairness of the Armenian electoral process as observed by the OSCE/ODIHR.

1. *Access to Media:*

In its 1996 Presidential Elections Report, the OSCE/ODIHR mission noted that the incumbent President received the lion's share of electronic media coverage, and that the vast majority of such coverage was favorable.¹⁴⁸ The report noted with concern that the state of the media in Armenia, and the economic circumstances of the majority of its citizens, created a heavy reliance by voters on electronic media for information about the elections and candidates, as only electronic media provided nationwide coverage.¹⁴⁹ The state television station, in defiance of electoral laws and regulations, did not provide equal coverage of all candidates.¹⁵⁰

146. Liz Fuller, *Armenia: Armenian Voters Reject Proposed Constitutional Amendments*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, May 29, 2003, <http://www.rferl.org/newsline/2003/05/290503.asp#2-tca>.

147. See *infra* Part V.C.2 (containing a more detailed discussion of the 2005 constitutional referendum).

148. See 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98 at 6 (stating that "according to the Media Monitoring conducted by the European Institute for the Media, supported by the EU's TACIS democracy program, Levon Ter-Petrossian had a substantial advantage over his opponents during the election period").

149. See 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 14.

150. 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 6. President Ter-Petrossian was given 1,050 minutes of coverage, while his three main opponents together received 150.5 minutes of coverage. *Id.*

The failure of media outlets to adhere to Armenian electoral law and the discriminatory nature of coverage continued to be a significant problem during the presidential and National Assembly elections in 1998, 1999 and 2003.¹⁵¹

2. Voter Lists

The observer mission in 1996 pointed to the inadequacy of the voter lists, the lack of coordination and the lack of transparency in their production, and their overall inaccuracy, as important elements in the conduct of Armenia's elections.¹⁵² Nevertheless, throughout the ensuing OSCE/ODIHR reports, covering elections in 1998, 1999, and 2003, the flaws in the voter lists continued to bedevil the conduct of elections in Armenia.¹⁵³ The most serious allegations were the inclusion of the deceased and nonresident, the removal of current residents, and the failure to post lists at polling stations prior to elections, as required by the election laws.¹⁵⁴

3. Military Voting

The 1996 report noted observations of voting by military units where soldiers were brought to polling stations, instructed on the substance of their vote, and subjected to open voting in

151. See 1998 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 5–6; 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 16 (reporting only minor violations); 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 12–14; 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 15–16 (reporting positive developments in comparison with the coverage of the presidential elections earlier that year). The pattern of improvements in performance during parliamentary elections followed by downswings during presidential elections appears to be well-established.

152. See 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 4–5.

153. See 1998 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 12, 21; 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 14–15, 20–21; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 8, 15; 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 9–10, 25 (“As in previous elections, the accuracy of the voter lists was of concern and most political parties have little confidence in them.”); see also *infra* Part IV.A.

154. See, e.g., 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 8; 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 20.

view of their commanding officers.¹⁵⁵ Similar observations were made in the majority of subsequent Armenia election reports.¹⁵⁶

4. *Ballot Stuffing*

Allegations and direct observations of ballot stuffing¹⁵⁷ were included in the 1996 report of the OSCE/ODIHR.¹⁵⁸ Similar allegations, varying only with respect to scope and frequency of the occurrence of the reported activity, appear in most of the subsequent election reports.¹⁵⁹

5. *Flaws in Counting and Vote Verification*

Among the flaws observed in the counting of ballots, the 1996 election observer teams reported: failure to conduct the count in accordance with Armenia's Electoral Code, discrepancies among the number of ballots received by individual polling stations, the total number of ballots reported by the polling stations, and the final count of registered voters released by the Armenian Central Electoral Commission

155. See 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 8. Open voting means that the vote was not private, but subject to implied penalty by supervising officers. *Id.*

156. See 1998 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 8; 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 21; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 21 ("Observers also noted problems with military voting, including open voting. . ."). The absence of such observations during the subsequent 2003 Parliamentary elections repeats the trends of upswings in performance between Armenia's Presidential and Parliamentary elections.

157. In ballot stuffing, an individual, or individuals, inserts more than one ballot into the ballot box. See, e.g., *Armenia: Election Marred by Intimidation, Ballot Stuffing*. HUMAN RIGHTS WATCH, Mar. 7, 2003, <http://hrw.org/english/docs/2003/03/07/armeni5383.htm> [hereinafter *Armenia: Election Marred*].

158. See 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 9.

159. See 1998 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 8–11; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 19–21; 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 19; see also *infra* Part IV.E.

(ACEC).¹⁶⁰ Similar flaws were reported in each of the subsequent Armenian election reports.¹⁶¹

6. *Presence of Unauthorized Persons in Polling Stations*

The 1996 report of the OSCE/ODIHR recounts the presence in polling stations of a large number of unauthorized persons, including military or law enforcement personnel and representatives of the Ministry of Interior, among others.¹⁶² The report noted the danger of intimidation of voters and recommended that this problem be addressed.¹⁶³ Nevertheless, intimidation of voters and the presence of unauthorized persons in polling stations during Armenian elections and election campaigns continued to recur in all subsequent elections in the Republic.¹⁶⁴

Other apparent trends in the shortcomings reported surrounding the conduct of a majority of the post-Soviet Armenian elections, particularly the presidential elections, include the co-opting of state resources to the election campaign of the incumbent administration,¹⁶⁵ intimidation, and violence

160. See 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 10–13.

161. See 1998 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 10–11, 14; 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 22; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 20; 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 18–19; *see also infra* Part IV.E.

162. See 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 8.

163. *Id.* at 14.

164. See 1998 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 6–7; 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 19–20; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 19, 21; 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 17–18; *see also infra* Part IV.D.

165. For example, the state-owned media has consistently favored the incumbent in its campaign coverage. See 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 6; 1998 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 5–6; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 12–13. Other state resources were also pressed into the service of the incumbent. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 10.

The widespread use of public resources in favor of the incumbent was confirmed by observers around the country. Some public officials at the local level were engaged full-time in running the incumbent's campaign while performing their official duties. . . . Public buildings such as mayors' offices

directed toward opposition candidates and members of the public,¹⁶⁶ and lack of security of ballots or ballot boxes,¹⁶⁷ such that ballots are openly and illegally circulated outside polling stations during the conduct of the elections.¹⁶⁸

D. Theatrical Non-Reform Reform?

The ongoing nature of these flaws notwithstanding, Armenia undertook a number of overt initiatives to combat the defects in the conduct of its elections.

1. The Electoral Code

The first example of such initiatives is the promulgation of a wide-ranging Electoral Code, enacted and first employed in the 1999 National Assembly elections and amended for the 2003 elections.¹⁶⁹ The Electoral Code replaced the 1996 Law of the Republic of Armenia on the Election of the President of the Republic of Armenia and the 1996 Law of the Republic of Armenia on the Effects of Local Self-Governing Bodies.¹⁷⁰ The enactment of the Electoral Code and its subsequent amendment

were commonly used for campaign purposes, overwhelmingly by the incumbent's team.

Id.

In this regard, as with respect to other repeated trends described above, a significant improvement in performance occurred between the presidential and parliamentary elections.

166. 1998 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 5 (“The most serious and well-substantiated case was the distribution of kerosene outside of Mr. Kocharian’s headquarters in Yerevan.”); 2003 PRESIDENTIAL ELECTION REPORT, *supra* note 98, at 9–11 (reporting, among other things, outbreaks of violence during opposition campaign meetings, dismissal or threatened dismissal of individuals associated with opposition campaigns, and threats to business owners who displayed opposition campaign posters).

167. *Armenia: Election Marred*, *supra* note 157; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 19 (describing the circulation of signed and stamped ballots outside polling booths and the delivery of 400 blank ballots to the Election Observation Mission’s office in Yerevan).

168. *Id.*

169. See 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 3–4; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 3.

170. See 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 2; 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 3–4.

were both greeted with approval by the OSCE Election Observation Missions.¹⁷¹

2. *Armenian Voter Lists*

Second, in preparation for the 1999 National Assembly elections, the United Nations Development Program (UNDP) initiated a wide-ranging program to clean up and clarify the Armenian voter list.¹⁷² Nevertheless, the voter lists continued to be generated by local authorities, with little or no coordination, resulting in the absence of a master voter list from which duplication could be verified.¹⁷³

3. *The Law on Television and Radio Broadcasting*

Finally, the Law on Television and Radio Broadcasting, was adopted for the 2003 elections.¹⁷⁴ Article 28 of the new media law mandates impartial and equal access of electoral candidates to state media outlets.¹⁷⁵ In addition, several provisions of the Electoral Code require equality of media access for all candidates.¹⁷⁶ Both legislative efforts constitute significant improvements over preexisting laws.

4. *Memoranda of Understanding*

Other reform initiatives included various Memoranda of Understanding between the Armenian government (acting through the ACEC) and various international organizations. The memoranda provided for training of the electoral commission members, voters, domestic election observers, judges, and others who play a crucial role in the conduct of elections in Armenia.¹⁷⁷

171. 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 3.

172. *Id.* at 8 (describing the initiation of a wide-ranging technical assistance project designed to “improve the quality of voter lists”).

173. 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 10 (“Armenia has no centralized civil or voter register to safeguard against potential multiple entries across community borders.”).

174. See WALKER, *supra* note 32, at 11 (2004).

175. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 12.

176. See ELECTORAL CODE OF THE REPUBLIC OF ARM. arts. 18, 20, 51, 81.

177. This is a personal observation of the Author, who participated in organizing training sessions for the judiciary in preparation for the 2003 presidential elections.

E. Post-reform 2003 Election Violations

Most of these efforts were undertaken prior to the 2003 elections or were conducted in anticipation of those elections. However, they did not lead to improvements in the conduct of Armenian elections.

Despite several far-ranging initiatives, the text of the OSCE/ODIHR's Report on the 1996 Armenian presidential election, which described the shortcomings perceived by OSCE/ODIHR's election observer mission and outlined recommendations made by the mission to alleviate those problems, might have been lifted wholesale and reinserted into the OSCE/ODIHR's 2003 presidential elections report with little substantive change in details.¹⁷⁸ Such has been the *de facto* effect of ameliorative initiatives undertaken to enhance the Armenian electoral system.

1. Voter Lists

The problems observed included incomplete or inaccurate voter lists, ballot stuffing, carousel voting, tabulation violations, and intimidation.¹⁷⁹

2. Intimidation and Violence

While the voting itself was relatively calm, violence hovered like a miasma and included attacks on journalists and candidates' staff.¹⁸⁰

178. Compare, for example, 1996 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 14 with 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 24, 25, 26.

179. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 1, 7, 9, 17–22, 24.

180. In early February 2003, a member of Parliament who served as a key player for one of the presidential candidates was stabbed during a campaign rally. Liz Fuller, *Armenian Presidential Candidate's Campaign Manager Stabbed*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 5, 2003, <http://rferl.org/newsline/2003/02/2-TCA/tca-050203.asp>. Violence against journalists included a grenade attack in broad daylight and the night time shooting and death of another. Liz Fuller, *Armenian Journalist Injured in Grenade Attack*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Oct. 23, 2002, <http://rferl.org/newsline/2002/10/2-TCA/tca-231002.asp>; *Senior Armenian Media Official Murdered*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Dec. 30, 2002, <http://www.rferl.org/newsline/2002/12/301202.asp>; 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 12.

Further, in the interval between the first and second rounds of the presidential elections, popular protests by thousands of citizens, led by the opposition candidates, who alleged massive fraud during the elections,¹⁸¹ were countered by the arrests at night at the homes of opposition election staffers.¹⁸² The accused were tried and convicted in closed trials¹⁸³ and “coincidentally” received sentences ensuring they would be unavailable to participate in the second round of campaigning.¹⁸⁴

181. Liz Fuller, *Thousands Protest Armenian Election Falsification*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 24, 2003, <http://www.rferl.org/newsline/2003/02/240203.asp#2-tca> [hereinafter *Thousands Protest*] (describing a rally of 25,000 people in the capital, led by opposition candidates).

182. Liz Fuller, *Police Arrest Armenian Opposition Candidate's Supporters*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 24, 2003, <http://www.rferl.org/newsline/2003/02/2-TCA/tca-240203.asp> [hereinafter *Police Arrest*] (“During the night of 21–22 February, Armenian police rounded up ‘dozens’ of Demirchian’s supporters who were sentenced behind closed doors in legal proceedings on 22 February to 15-day prison sentences. . . .”); see also Liz Fuller, *More Supporters of Armenian Presidential Challenger Arrested*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 28, 2003, <http://www.rferl.org/newsline/2003/02/2-TCA/tca-280203.asp> [hereinafter *Supporters*].

183. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 10 (“Many of the hearings were closed; the accused in general did not have legal counsel present.”). The arrests and secret sentences violated the Armenian Constitution, which proclaims that “[c]itizens are entitled to hold peaceful and unarmed meetings, rallies, demonstrations and processions.” ARM. CONST. OF 1995, art. 26. The Armenian Constitution states that “[e]veryone is entitled to legal counsel from the moment he or she is arrested, detained, or charged.” *Id.* art. 40.

184. The first round of the elections was held on February 19, 2003. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 165, at 3. The Electoral Code requires a second round, when necessary, be held “on the 14th day after voting.” ELECTORAL CODE OF THE REPUBLIC OF ARM. art. 85. Thus, detentions of fifteen days prevented the participation of campaign workers in the period between the two rounds of voting. Even before the 2003 campaign, the unchecked use of violence to quell dissent was demonstrated by the killing, allegedly by one of President Kocharian’s bodyguards, of Poghos Poghosian, a civilian who had expressed negative views about Kocharian. Liz Fuller, *No Arrests in Death of Armenian Activist*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Oct. 2, 2001, <http://www.rferl.org/newsline/2001/10/2-TCA/tca-021001.asp> (“Poghos Poghosian was found dead with head and stomach injuries in the cafe toilet shortly after [President] Kocharian left the premises. Law enforcement officials initially said that Poghosian, who was 43, died of heart failure.”). Mr. Poghosian was brutally beaten to death in the bathroom of a nightclub in downtown Yerevan, the capital of Armenia. *Id.* Aghmal Harutiunian, the only one of Kocharian’s bodyguards to be charged with a crime, was charged with murder; however, he received the minimum legal penalty after a conviction of manslaughter. Liz Fuller, *Armenian President's Bodyguard Convicted of Manslaughter*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 21, 2002,

3. Media

Prior to elections, the media was intimidated. Two neutral television stations lost their broadcast licenses through curious machinations of the government agency in charge of auctioning licenses.¹⁸⁵ The stations that did remain on the air, including the national public television, were unabashedly pro-incumbent.¹⁸⁶

4. State Resources

During the campaign, governmental resources were coopted to the use of the incumbent, in clear violation of Armenia's own election laws.¹⁸⁷

<http://www.rferl.org/newsline/2002/02/2-TCA/tca-210202.asp> ("Harutiunian pleaded guilty to manslaughter, having told the court last month that he gave Poghosian a 'gentle shove' that caused him to lose his balance and fall, incurring fatal head injuries."). Harutiunian received a one year suspended sentence. *Id.* Additionally, "[s]everal witnesses testified they saw a group of men assaulting Poghosian after the latter addressed insulting remarks to Kocharian, but that Harutiunian was *not* one of them." *Id.* (emphasis added). Members of the Armenian public believe the circumstances of the killing have been covered up. Liz Fuller, *Armenians Protest Jazz Concert at Murder Café*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Apr. 23, 2002, <http://www.rferl.org/newsline/2002/04/2-TCA/tca-230402.asp>.

185. See 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 11–12; see also Emil Danielyan, *Thousands Rally in Yerevan to Condemn A1 Plus Closure*, Apr. 5, 2002, <http://www.armenialiberty.org/armeniareport/report/en/2002/04/B1510DA1-186B-4913-9A10-40C03D223AAD.asp>; Liz Fuller, *Thousands Rally to Condemn Independent TV Closure*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Apr. 8, 2002, <http://www.rferl.org/newsline/2002/04/2-TCA/tca-080402.asp>. The two private broadcast stations, A1+ and Noyan Tappan, had been expected to offer independent reporting about the elections. See 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 11–12. However, beginning in 2002, A1+'s broadcast license was rescinded, and its attempt to bid on new licenses that would enable the station to broadcast in time for the elections were entrapped in a curiously dilatory tender process that remained unresolved even after the conduct of the parliamentary elections. Liz Fuller, *Embattled Armenian TV Channel Submits Bid for New Frequency*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, June 10, 2003, <http://www.rferl.org/newsline/2003/06/2-TCA/tca-100603.asp>; Liz Fuller, *Embattled Armenian Television Station Loses Tender for Frequency*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, June 12, 2003, <http://www.rferl.com/newsline/2003/06/2-TCA/tca-120603.asp>.

186. See 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 12–14.

187. See 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 13. Such co-opting by incumbent leaders is not unusual. See, e.g., Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, 9 EUR. L.J. 288, 304 (July 2003)

F. Role of the International Community

Despite substantial contributions to the Armenian economy and continued engagement with the government and other institutions of public life, the events of the elections demonstrate the impotence of the international community in the face of Armenia's illusory democratic and rule of law reform. The impotence is manifested in the exhortations and recommendations made by the Parliamentary Assembly of the Council of Europe (the Assembly or PACE).¹⁸⁸ In successive opinions targeted at Armenia's repeated use of administrative detentions to quell political dissent, both during electoral campaigns and in other circumstances, the Assembly has condemned the use of the detention mechanism.¹⁸⁹ For example, in response to events that took place in Armenia in the period between the two rounds of the 2003 presidential elections, the Assembly declared in Resolution 1361:

14. The Assembly is shocked by the scandalous use that continues to be made of the arbitrary procedures concerning administrative detention provided for in the Administrative Code, which is totally incompatible with its strongly-worded statement in Resolution 1304 of September 2002 that the Armenian authorities should no longer make use of these procedures. It firmly condemns the arrest and conviction of over 270 people – members of the opposition parties, sympathizers and office-holders – between the two rounds of the presidential election and at the end of the second round.

("[T]he Soviet culture of using the public administration for political ends and sometimes even for personal advantage has still not been fully overcome.").

188. The Assembly (PACE) is one of the two statutory organs of the Council of Europe, and is composed of a Committee of Ministers, as well as an Assembly, which represents the political forces within member states. See Council of Europe, Parliamentary Assembly, The Framework, http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_framework.htm (last visited Apr. 1, 2007). The powers of PACE, performed through various committees, include monitoring, and issuing recommendations, opinions, and resolutions. See Council of Europe, Parliamentary Assembly, http://assembly.coe.int/ASP/Committee/PACECommitteesInfoListing_E.asp (last visited Apr. 1, 2007).

189. Eur. Parl. Ass., *Honouring of Obligations and Commitments by Armenia*, Res. 1361, 3d Sess., Doc. No. 10027 (Jan. 27, 2004), available at <http://assembly.coe.int/Documents/AdoptedText/ta04/ERES1361.htm>.

It expects the Armenian authorities to discuss by February 2004 the issue of administrative detention provided for in the Administrative Code in co-operation with Council of Europe experts and to send the draft amendments for the Council of Europe's expertise by April 2004.¹⁹⁰

However, despite stern wording, these exhortations had little effect. They were followed by these statements in Resolution 1374 of PACE:

5. With regard to the conduct of the authorities, the Parliamentary Assembly recalls that its actions are contrary to the spirit and to the letter of the recommendations formulated in its Resolution 1361 (2004) on the honoring of obligations and commitments by Armenia, adopted in January 2004. It is particularly concerned with the fact that:

i. arrests, including those carried out on the basis of the Administrative Code, ignored the demand to immediately end the practice of administrative detention and to change the Administrative Code used as a legal basis for this practice;

ii. the authorities refused to authorize opposition rallies for reasons not permitted under the European Convention on Human Rights. Moreover, the new draft law on the procedure for conducting gatherings, meetings, rallies and demonstrations, currently undergoing parliamentary procedure, was evaluated as excessively restrictive by experts of the Venice Commission;¹⁹¹

190. *Id.*

191. See Eur. Parl. Ass., *Honouring of Obligations and Commitments by Armenia*, Res. 1374, 13th Sess., Doc. No. 10163 (Apr. 28, 2004), available at <http://assembly.coe.int/Documents/AdoptedText/ta04/ERES1374.htm>. The Council of Europe's European Commission for Democracy through Law (known as the Venice Commission) is an advisory body created to provide constitutional assistance following the dissolution of the Soviet Union. See Council of Europe, Venice Commission, http://www.venice.coe.int/site/main/presentation_E.asp (last visited Apr. 1, 2007). Members of the Commission include all Council of Europe members. *Id.* In addition to constitutional assistance, the Commission is active in the sphere of elections and referenda, cooperation with

iii. persons detained during the recent events were reportedly subjected to brutality and ill-treatment by police and security forces while in custody, in spite of the Assembly's demands that resolute and more active steps be taken to remedy misconduct by law enforcement officials;

iv. freedom of expression continues to be seriously curtailed and several acts of violence against journalists, which took place during the recent events, were carried out, or were allowed to happen, by the police and security forces.¹⁹²

Clearly demonstrating the impotence of the international community, the repeated condemnations from the Assembly, beginning in September 2002, spurred no ameliorative action addressing the targeted electoral campaign violations, that is, abuse of the administrative detention mechanism—on the part of the Armenian authorities whether before, during, or after the 2003 elections.¹⁹³

G. Implications of the 2003 Election Violations for Democracy in Armenia

A review of the OSCE/ODIHR Election Observation Mission 2003 Reports raises a strong suspicion that the election violations and discrepancies from international electoral norms are no accident, but instead are successful tactics employed in previous Armenian election cycles. Indeed, two months after the presidential elections, when the stakes for the incumbent

constitutional courts, and transnational studies and reports. See Council of Europe, Venice Commission, The activities of the Commission, http://www.venice.coe.int/site/main/Activities_E.asp (last visited Apr. 1, 2007).

192. See EUR. PARL. ASS., *Honouring of Obligations and Commitments by Armenia*, Res. 1374, 13th Sess., Doc. No. 10163 (Apr. 28, 2004), available at <http://assembly.coe.int/Documents/AdoptedText/ta04/ERES1374.htm> (addressing official Armenian government response to a series of popular demonstrations held in Yerevan in April 2004).

193. See *Police Arrest*, *supra* note 182; *Supporters*, *supra* note 182.

administration were considerably lower,¹⁹⁴ the parliamentary elections witnessed a substantial improvement in execution.¹⁹⁵

However, observers can take no comfort in the improvements. The positive changes that took place between the 2003 presidential and parliamentary elections mirror the improvements effected between the presidential and parliamentary elections of 1998 and 1999.¹⁹⁶ The conduct of the elections and the improvement from the presidential to parliamentary round, instead of providing evidence of amelioration, may merely indicate the cynicism of the power structure. Further, the recurring pattern indicates that, rather than lacking the resources and know-how to conduct elections that meet international election norms, there may be inadequate institutional incentive or will to attain those standards—or, worse, an intentional manipulation of the electoral machinery.¹⁹⁷

In the eyes of Western officials, and some Armenians, the fact the protests following the 2003 presidential elections were not met with violence and instead were allowed to proceed over a period of several weeks, may appear to be an indication that rule of law reform has penetrated into the political life of the country.¹⁹⁸ However, the targeted secret arrests, trials, and convictions of opposition supporters belie this view. Rather, the apparent democratic development of tolerance for open protest can be viewed as smokescreens and mirrors used by the power

194. As a consequence of the concentrated presidential power provided for in the Armenian Constitution, and divisions among the many opposition parties, the heart of Armenian political power rests with the Executive and not with the Legislature. See *infra* Part V.B.

195. See 2003 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 1 (“The 25 May 2003 parliamentary elections in the Republic of Armenia marked an improvement over the 2003 presidential election in the campaign and media coverage, but fell short of international standards. . .”).

196. See *id.*; 1999 PARLIAMENTARY ELECTIONS REPORT, *supra* note 98, at 2 (“[T]he 1999 electoral process in Armenia generally showed an improvement over the flawed elections of 1995, 1996 and 1998 . . .”).

197. See, e.g., CAROTHERS, *supra* note 26, at 335 (“If a leader or government wants to distort or subvert an electoral process, which many still do, external electoral aid rarely stops them. The art of manipulating elections has developed just as rapidly as the art of aiding elections.”).

198. See, e.g., *Thousands Protest*, *supra* note 181.

elite to weave the illusion of reform. The dramatic improvements from the presidential to parliamentary elections starkly demonstrate the presidential-round violations were deliberate—with illegal methodologies systematically deployed when the stakes of power retention were higher.

IV. ELECTORAL NARRATIVES

The first person¹⁹⁹ and other narratives about the 2003 Armenian presidential elections are included here to give color to the popular Armenian perception of the 2003 presidential elections, as well as the experiences of a foreign observer. Employment of the narrative devices here encapsulates and gives flesh to otherwise potentially sterile discussions of violations of electoral procedures.

*“People who have grown up and lived in Europe cannot understand our mentality. They have their rules and views on democracy, and we have ours.”*²⁰⁰

A. Voting Armenian Style

In the interval between the first and second round of the presidential campaign of 2003, a joke made the rounds of Yerevan, the Armenian capital city, demonstrating the populace’s weariness and cynicism regarding the electoral process. The joke went something like this: A man from Malatia went to the polling station to vote. As he handed over his ID and bent over to sign the voter list, he noticed that his father, dead lo these last three years, had voted before him and signed the

199. The Author was an observer of the second round of the Armenian presidential election of March 2003. The observation was conducted under the auspices of the OSCE/ODIHR Election Observation Mission in Armenia.

200. . . . *As Defense Minister Dismisses International Criticism*, RFE/RL NEWSLINE, Mar. 10, 2003, <http://www.rferl.org/newsline/2003/03/100303.asp#2-tca> (quoting Serzh Sargsian’s defiant response to OSCE criticisms of the conduct of the Armenian presidential elections); see also 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98 (detailing criticisms of the Armenian Presidential Elections, held during February through March of 2003).

voter list. “That wretched old man!” he thought bitterly. “Three long years, and he didn’t even have the decency to come visit me and his grandchildren!”²⁰¹

B. The Knock on the Door & Carousel Voting

An Armenian acquaintance recounted to the Author her experience with carousel voting:²⁰² A week prior to the presidential election, a knock on her apartment door presaged the appearance of two gentlemen who offered a certain number of Armenian drams²⁰³ in return for her agreement to vote for the incumbent. In order to ensure she carried out her commitment, on the day of the election she would be required to check in with the contact person, receive a pre-checked ballot, and return to the handler the blank ballot given to her at the polling station. Only after completing these steps would she receive the promised payment.²⁰⁴

C. No Unchecked Ballots

Another Armenian acquaintance returned to her small village to vote.²⁰⁵ Despite movement of a large part of the rural population to Yerevan, the capital city, many citizens continue to be registered in their home villages. Upon entering the polling station and presenting her identification, she was handed a ballot already checked for the incumbent. A sophisticated resident of Yerevan, my acquaintance demanded she be given a

201. See 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 21 (“International observers also reported . . . voting on behalf of deceased or absent persons. . .”).

202. See *id.* at 19 n.2 (“‘Carousel voting’ involves voters in sequence casting premarked ballot papers in substitution for the blank ballot papers they receive at the polling station; the blank ballot is smuggled out and premarked for the next participant. Voters are often paid to participate in such a scheme.”).

203. Armenia’s currency, the dram, floats against the U.S. dollar, the euro, and the ruble.

204. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 19 n.2 (“‘Carousel’ voting was observed. . .”).

205. Armenians must vote in the localities in which they are registered as residents. See ELECTORAL CODE OF THE REPUBLIC OF ARM. arts. 10(1), 11(1)–(2).

clean ballot. The puzzled village election officials were unable to comply, as every ballot in the precinct had been pre-checked for the incumbent President.²⁰⁶

D. The Second Round: Observing the Vote

I was an official international observer for the OSCE observer mission for the second round of the 2003 Armenian presidential election. My partner, a U.S. Embassy employee, and I were driven through the streets of our assigned precincts in Yerevan in a large white SUV that flew the blue and white OSCE flag. We noticed as we approached various polling stations, there was a flurry of movement outside followed by a mini exodus of individual civilians. Voters? Or persons not authorized to gather in the polling stations?

At the second precinct we visited, we were approached by a middle-aged woman who haltingly relayed her complaint to us through our driver-translator. She explained that her two children lived in Moscow; however, when she came to the precinct to vote, as she bent over the voter list to sign her name, she noticed her son's and daughter's names had been signed on the list, indicating they had already voted. But neither of them had traveled home from Moscow! What should she do?

Knowing the courts of first instance would be open all day to enable those erroneously omitted from the voter lists to be reinstated and allowed to vote, we advised her to go to the nearest court to complain. But would she be able to have the names struck?

When I relayed the story to my Armenian acquaintances, they laughed knowingly. "Yes, the dead, the migrated, and the moved-away all voted in these elections!" they said.²⁰⁷

206. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 22 (highlighting the unusual phenomenon in several precincts where the official count indicated 100% of the vote had been cast for the incumbent); "[T]he official statistics included a number of implausible figures:

- 12 polling stations where the incumbent won every vote
- 96 polling stations where the incumbent won more than 90% of the vote
- 11 polling stations with 100% voter turnout, and almost 100 polling stations with over 90% turnout." *Id.*

207. *See id.* at 21.

E. The Second Round: Observing the Count

*“It’s not who you vote for that matters, but who counts the votes.”*²⁰⁸

These were the wee hours of election night; the majority of Yerevan’s residents were long abed. My partner and I sped through the streets, following what we hoped were the ballots from the polling station we had just observed.

We chose that particular station because the election officials had seemed rather uneasy when we visited earlier in the day, and were visibly relieved when we announced we were leaving. Shocked at our unexpected return toward the end of election day, the chairman of the precinct electoral commission insisted we sit a full twelve feet across the room away from the action we had come to see—the counting of the vote. Nevertheless, thanks to the transparent ballot boxes the ACEC had been persuaded to use,²⁰⁹ we could keep a somewhat close watch.

The chairman would pull out an individual ballot, announce his determination of the candidate in support of whom it had been cast or, if it was a spoiled ballot, and hand it over to the other committee members. An initial lead by the challenger was whittled away by thickly enwrapped mother loads of pro-incumbent ballots that the chairman visibly wrestled to separate in order to take them from the ballot box. The final determination after many hours of counting was that the incumbent had carried the polling station.

Then came the hard part for the precinct electoral commission: making the numbers look legitimate. The number of votes counted, including the spoiled ones, exceeded the number of voters on the precinct’s list, that is, the number of ballots counted exceeded the number of ballots delivered to the precinct in preparation for the vote and signed for by the committee.²¹⁰ How would the precinct electoral commission

208. HERZIG, *supra* note 97, at 33 (quoting Joseph Stalin).

209. Liz Fuller, *Armenia to Use Transparent Ballot Boxes for Presidential Poll*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 4, 2003, <http://www.rferl.org/newsline/2003/02/040203.asp>.

210. Each precinct receives ballots that amount to 103% of the number of voters on

resolve this? It was a simple matter to change the numbers to match the official number of voters assigned to that precinct.

A committee member representing an opposition candidate loudly protested the arithmetical contortions to no avail and finally stalked out. He did not sign the precinct's official count document (the "protocol") that must be submitted with the ballots at a central location. The committee continued to fill out the form, and the chairman ordered us to leave the room for a few minutes. "Is this right?" we asked ourselves. "Can he do that? Did our training cover this issue?" Once we had begun to observe the count, we were not supposed to let the ballots out of our sight. But *we* didn't have an armed soldier on our side—*they* did. We decided to wait in the car. As we waited, a car sped out of the precinct. "After them!" we yelled to our translator-driver. "They've got the ballots! They're trying to get away."

We thought we had kept them in sight, but by the time we showed our ID cards at the central location some miles away, we lost sight of them. We were then directed to a small antechamber where we found several other teams of official observers. We all were tired and wound up. We swore we would wait until our polling station's number was called. We wanted to see whether the protocol reflected the nonmatching counts and the absence of the opposition committee member.

Several hours later, dawn breaking in the sky, outwaited, outwitted, and outlasted, we left. Our precinct had not been called. We were too tired and had to go home. We agreed to make a note of this matter in our report, but realized we would not be present to challenge the official submission by the precinct electoral commission. We assumed a forged signature had been submitted and the doctored count had been matched to the official numbers for the precinct.²¹¹

the voter list for that precinct. The extra 3% of ballots is intended to allow for spoilage. ELECTORAL CODE OF THE REPUBLIC OF ARM. art. 114(7).

211. 2003 ARMENIAN PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 20 (describing negative assessments of the counting process by a significant proportion of international observer teams). For a contemporaneous media account of electoral misdeeds, see *Elections Recapped: What Will It Take to Get It Right?*, ARM. INT'L MAG., Aug.-Sept. 2003, at 42 [hereinafter *Elections Recapped*] ("Armenian genius [*sic*] showed itself this spring. Under the watchful eyes of half the country, and some of Europe, the most clever ways of subverting a simple voting process were devised.")

V. THE RULE OF LAW: CONSTITUTIONAL FRAMEWORK AND THE ROLE OF THE JUDICIARY

Through an examination of the 1995 Constitution of the Republic of Armenia, particularly the status of judges under the Constitution, this Part assesses the rule of law in Armenia. The role played by the Judiciary and the law during the 2003 elections exemplifies the gap between the appearance and reality of rule of law reform in Armenia, as do the process and events leading to amendment of the 1995 Constitution.

A. *The Rule of Law*

Defining the term “rule of law” would be no less arduous than attempting to define democracy.²¹² This Article neither creates nor attempts to adopt a single definition of the rule of law; Professor Brian Tamanaha describes the rule of law as, “stand[ing] in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.”²¹³ However, the three clusters of meaning of this “conceptual concept,” identified by Professor Tamanaha: (1) law as a limit on governmental power;²¹⁴ (2) formal legality (or rule by rules);²¹⁵ and (3) “the rule of law, not man”²¹⁶ illuminate attributes of the term as referred to in this Article.

The rule of law is thought to be essential to the functioning of a democracy, as law provides the rules to which the citizens and population of a polity and their government (Legislative, Judicial, and Executive branches) will adhere. Professor Thomas M. Franck expresses the interaction between the rule of law and democracy as follows: “To counteract the tendency of democracy to corruption and illegitimacy, societies have sought relief through the rule of law.”²¹⁷ Professor Franck further notes “[t]he

212. See *supra* Part III.A.

213. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 4 (2004).

214. *Id.* at 137.

215. *Id.* at 139–40.

216. *Id.* at 140.

217. Franck, *Democracy, Legitimacy, and the Rule of Law*, *supra* note 114, at 173.

need to balance democracy and safeguard legitimacy through implementation of a rule of law has been widely recognized in the recent global resurgence of democracy.”²¹⁸ In a democracy, the rule of law functions to restrain the actions of the people and of the representatives through whom they govern themselves. The rule of law operates to restrain: (1) the peoples’ leader-representatives in their interaction with the people; (2) the people in their interaction with each other; (3) the people in their interaction with their representatives; and (4) the state in its interactions with the people and with other states. Fundamentally, then, the rule of law maintains an equilibrium among relevant actors.²¹⁹

B. Constitutional Framework and the Role of the Judiciary

In a constitutional order, the constitution is the fountainhead from which springs the substantive and procedural principles and laws, adherence to which signifies the rule of law. The Judiciary’s function is integral to the functioning of the legal framework in its capacity as the neutral arbiter of disputes and interpreter of the laws. In order for the law and the rule of law to fulfill their functions, not only must the substantive and procedural content of the legal framework facilitate those functions, but the Judiciary must be empowered to uphold those procedural and substantive roles.

The 1995 Constitution of the Republic of Armenia was in effect during most of the elections described in Part III, including the 2003 elections. Via a plebiscite, described in this Part, the 1995 Constitution was replaced by a newly-amended Constitution. By its terms, the 2005 Constitution will come into effect upon publication in the Official Bulletin on the Republic of Armenia.²²⁰

218. *Id.* at 12.

219. *Id.*

220. ARM. CONST., art. 115. Some provisions of the Constitution will come into force on a rolling basis. *Id.* art. 116.

1. *The 1995 Constitution*²²¹

A review of the 1995 Constitution of the Republic of Armenia (Constitution or 1995 Constitution) is likely to engender some cognitive dissonance, in schooled and unschooled readers alike, due to the conflicting values it appears to enshrine. The document is divided into nine Chapters.

Chapter 1, The Foundations of Constitutional Order, outlines the fundamental principles upon which the Republic is based. Broadly written, these include “state guarantee[] [of] the protection of human rights and freedoms,”²²² universal suffrage,²²³ a multiparty political system,²²⁴ ownership and protection of private property,²²⁵ “protection and reproduction of the environment,”²²⁶ and, most importantly for purposes of the analysis here, the principle of “separation of . . . powers”:²²⁷ “State power shall be exercised in accordance with the Constitution and the laws based on the *principle of the separation of the legislative, executive and judicial powers.*”²²⁸

However, as discussed in this Part, the 1995 Constitution provided for extremely permeable lines among the three branches, effectively prescribing the domination of the other branches by the President of the Republic.²²⁹

Chapter 2, Fundamental Human and Civil Rights and Freedoms, is a veritable litany of fundamental human rights, encompassing the traditional Western civil and political rights, as well as socialist economic, social, and cultural rights. The rights recognized and to be protected by the state²³⁰ are: equality before the law,²³¹ privacy in one’s dwelling,²³² life,²³³

221. ARM. CONST. OF 1995; See Defeis, *Armenian Constitutional Referendum*, *supra* note 26, at 277–89 (providing a thorough analysis of the 1995 Constitution).

222. ARM. CONST. OF 1995, art. 4.

223. *Id.* art. 3.

224. *Id.* art. 7 (recognizing a multiparty system).

225. *Id.* art. 8.

226. *Id.* art. 10.

227. *See id.* art. 5.

228. ARM. CONST. OF 1995, art. 5. (emphasis added).

229. *See id.* art. 55.

230. *Id.* art. 4.

231. *Id.* art. 16.

freedom from unwarranted detention²³⁴ or search,²³⁵ and freedoms of speech,²³⁶ expression,²³⁷ and association.²³⁸ Perhaps more extraordinary to American eyes are the rights to rest,²³⁹ an adequate standard of living and housing,²⁴⁰ and “freedom of literary, artistic, scientific and technical creation.”²⁴¹

Indeed, the Constitution’s Chapters 1 and 2 present an almost blinding reflection of human rights norms. The Constitution is so solicitous of the rights of individuals and the people, that article 43 provides for the protection of unenumerated and perhaps still inchoate but universally accepted human rights: “The rights and freedoms set forth in the Constitution are not exhaustive and shall not be construed to exclude other universally accepted human and civil rights and freedoms.”²⁴²

The provisions of Chapter 3, The President of the Republic; Chapter 4, The National Assembly; Chapter 5, The Government; and Chapter 6, Judicial Power, contradict and undermine the fundamental principles and rights expressly provided for in the preceding chapters, thus engendering the cognitive dissonance diagnosed at the beginning of this section.²⁴³ Chapters 7, 8, and

232. *Id.* art. 21.

233. *Id.* art. 17. However, the 1995 Constitution provides for an exception, so the death penalty may be prescribed as an exceptional punishment for certain capital crime. *Id.*

234. ARM. CONST. OF 1995, art. 18.

235. *Id.* art. 21.

236. *Id.* art. 24.

237. *Id.* art. 23.

238. *Id.* art. 26.

239. *Id.* art. 30 (“Everyone is entitled to rest.”).

240. ARM. CONST. OF 1995, art. 31.

241. *Id.* art. 36.

242. *Id.* art. 43.

243. Chapters 3 through 6 enumerate the powers of each branch of government. See ARM. CONST. chs. 3–6. Because, *inter alia*, the Legislature’s agenda is limited by the President and the President has the ability to both designate and remove judges, the balance of powers is weighted heavily in the President’s favor. *Id.* This allows a president to violate these human rights principles without significant check.

9 address Territorial Administration and Local Self Government; Adoption of the Constitution, Amendments; and Provisions For the Transitional Period, respectively.²⁴⁴

The separation of powers among the three branches (Executive, Judiciary, and Legislative) is, in fact, merely illusory, with broad power concentrated in the President of the Republic. Professor Elizabeth Defeis notes: “[T]he powers vested in the President are vast and the office has been characterized as ‘probably the strongest presidency anywhere in the western world.’”²⁴⁵ Among the powers vested in the President by Chapter 3 of the Constitution are the ability to dissolve the National Assembly (the Republic’s unicameral legislative body) after consultations with the Prime Minister and President of the National Assembly;²⁴⁶ appointment and removal of the Prime Minister and members of the government,²⁴⁷ for example, the cabinet; appointment, removal, and approval of the arrest of the members and President of the Constitutional Court²⁴⁸ and the judges of all three levels of the tri-level Armenian Judicial system;²⁴⁹ and appointment and removal of the Prosecutor General upon the recommendation of the Prime Minister.²⁵⁰

Vis-à-vis the Legislative branch, the President, and his government hold perhaps overwhelming power. Chapter 4 delineates the powers of the National Assembly, with Article 62 providing “[t]he powers of the National Assembly are determined by the Constitution.”²⁵¹ In addition to the absence from the Constitution of a “necessary and proper” clause or its equivalent, which could provide room for the expansion of the National Assembly’s power, the President and his government control the agenda of the National Assembly and, therefore, in

244. See ARM. CONST. OF 1995, chs. 7–9.

245. Defeis, *Armenian Constitutional Referendum*, *supra* note 26, at 283 (quoting from Chrystia Freeland, *Armenia Polls Test Fragile Democracy*, FIN. TIMES, July 5, 1995, at 2).

246. ARM. CONST. OF 1995, art. 55(3).

247. *Id.* art. 55(4).

248. *Id.* art. 55(10).

249. *Id.* art. 55(11).

250. *Id.* art. 55(9).

251. *Id.* art. 62.

large part, the Assembly's exercise of its power.²⁵² In Professor Defeis' words, "The allocated legislative powers are extremely limited"²⁵³ and "the Government to a large extent controls the legislative agenda."²⁵⁴

2. *Status of the Judiciary under the 1995 Constitution*

As in any study of the existence and functioning of the rule of law, of particular concern is the status and power of the Judiciary, and the Judiciary's consequent power to enforce the rule of law. Judges in Armenia do not enjoy judicial independence, as separation of the balance of power between Executive and Judiciary—a separation that is essential to the checks and balances of power, and indeed, to the rule of law itself—has not been enshrined in the Constitution.²⁵⁵

The Judicial system in Armenia has three levels: courts of first instance, with general jurisdiction, review courts, and a court of appeals,²⁵⁶ also referred to as the Court of Cassation.²⁵⁷ A separate Constitutional Court hears constitutional challenges.²⁵⁸ Analysis of the 1995 Constitution indicates that prior to the constitutional amendment in 2005, judges in Armenia were constrained by the structural realities of their office, while desire for change was impacted by the realities of intimidation and violence.²⁵⁹

*"The President of the Republic shall be the guarantor of the independence of the judicial bodies."*²⁶⁰

252. Defeis, *Armenian Constitutional Referendum*, *supra* note 26, at 284.

253. *Id.*

254. *Id.* at 285.

255. ARM. CONST. OF 1995, art. 55(11)

256. *Id.* arts. 92, 100.

257. *See, e.g.*, LAW ON THE STATUS OF JUDGES art. 2 (June 17, 1998), available at <http://www.legislationline.org/legislation.php?tid=112&lid=3414>.

258. ARM. CONST. OF 1995, art. 100.

259. Perhaps in recognition of the precarious position of the Judiciary and the ease of targeting them, the Law on the Status of Judges provides that "Judges shall have a right to have and to wear a service weapon and special means of defense." LAW ON THE STATUS OF JUDGES, *supra* note 257, art. 25.

260. ARM. CONST. OF 1995, art. 94 (emphasis added).

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*“The President of the Republic . . . may remove from office any judge, sanction the arrest of a judge and through the judicial process, authorize the initiation of administrative or criminal proceedings against a judge.”*²⁶¹

The above provisions from the 1995 Armenian Constitution encapsulate some of the principal flaws concerning the status of the Armenian Judiciary. The President of the Republic has the power to appoint, remove, and order the arrest of all members of Armenia’s Judiciary.²⁶²

The appointment of judges, their evaluation, and discipline are decided and carried out by the Judicial Council.²⁶³ Article 95 of the 1995 Constitution provides:

The Judicial Council:

1) *shall, upon the recommendation of the Minister of Justice, draft and submit for the approval of the President of the Republic the annual list of judges, in view of their competence and professional advancement, which shall be used as the basis for appointments.*

2) shall, upon the recommendation of the Prosecutor General, draft and submit for the approval of the President of the Republic the annual list of prosecutors, in view of their competence and professional advancement, which shall be used as the basis for appointments.

261. *Id.* art. 55(11) (emphasis added).

262. *Id.*

263. *Id.* art. 94. All members of the Judicial Council were appointed by the President:

The Council shall include fourteen members appointed by the President of the Republic for a period of five years, including two legal scholars, nine judges and three prosecutors. Three Council members shall be appointed each from among the judges of the courts of first instance, the courts of review and the courts of appeals. The general assembly of judges shall submit three candidates by secret ballot for each seat allocated to judges. The Prosecutor General shall submit the names of candidates for the prosecutors’ seats in the Council.

Id.

3) *shall propose candidates for the presidency of the courts of appeals, the presidency and judgeship positions of its chambers, the presidency of the courts of review, courts of first instance and other courts.* It shall make recommendations about the other judicial candidates proposed by the Ministry of Justice.

4) shall make recommendations regarding the candidates for Deputy Prosecutor proposed by the Prosecutor General, and the candidates for prosecutors heading operational divisions in the Office of the Prosecutor.

5) shall make recommendations regarding training programs for judges and prosecutors.

6) *shall make recommendations regarding the removal from office of a judge, the arrest of a judge, and the initiation of administrative or criminal proceedings through the judicial process against a judge.*

7) shall take disciplinary action against judges. The president of the court of appeals shall chair the meetings of the Judicial Council when the Council is considering disciplinary action against a judge. The President of the Republic, the Minister of Justice and the Prosecutor General shall not take part in these meetings.

8) shall express its opinion on issues of pardons when requested by the President of the Republic.

The operational procedures of the Judicial Council shall be prescribed by law.²⁶⁴

Thus, all judges are appointed by the President upon recommendation of the Judicial Council²⁶⁵—a council over which the President presides.²⁶⁶ The Vice Presidents of the Council are the Prosecutor-General and the Minister of Justice.²⁶⁷ While membership of the Judicial Council includes some judges, the

264. *Id.* art. 95 (emphasis added).

265. *Id.* art. 95(1).

266. ARM. CONST. OF 1995 art. 94 (“The President of the Republic . . . shall preside over the Judicial Council.”).

267. *Id.* “The Minister of Justice and the Prosecutor General shall be the vice presidents of the Council.” *Id.*

appointment of those members is decided by the President, who, following a non-public interview process chooses among candidates presented by the members of the Judiciary.²⁶⁸

These constitutional limitations on the Judiciary's status and function are further elaborated on in the Law on the Status of Judges²⁶⁹ that mandates the independence,²⁷⁰ immunity,²⁷¹ and irremovable nature²⁷² of the judges' office. Nevertheless, the law enshrines the subordination of the Judicial branch to the Executive²⁷³ with respect to the discipline²⁷⁴ and termination of judges.²⁷⁵

While lifetime appointments of all judges and members of the Constitutional Court,²⁷⁶ as well as the constitutional requirement of independence,²⁷⁷ appear to guarantee the neutral application of the rule of law and independence of the Judiciary, the preceding discussion outlines the hollowness of the provisions, and the disconnect between *de facto* reality and *de jure* adjurations. The provisions function as smoke to obscure the reality of lack of independence and as mirrors to reflect outward the desired normative imitation of the West.

268. *See id.* art. 94.

269. LAW ON THE STATUS OF JUDGES, *supra* note 257.

270. *Id.* art. 5 ("During administration of justice judges shall be independent, and subordinate only to law.").

271. *Id.* art. 11 ("A judge shall be immune.").

272. *Id.* art. 10 ("A judge shall be irremovable.").

273. *Id.* art. 11 ("Only the Procurator [*sic*] General of the Republic of Armenia may commence a criminal prosecution against a judge, and the former shall oversee the legality of the conduct of investigation of that case.").

274. *See id.* arts. 31–32 (elaborating in detail the disciplinary causes of action and procedures against members of the judiciary).

275. LAW ON THE STATUS OF JUDGES, *supra* note 257, art. 30 (listing the grounds for termination of members of the judiciary).

276. ARM. CONST. OF 1995 art. 96 ("Judges and members of the Constitutional court are appointed for life. A judge may hold office until the age of 65, while a member of the Constitutional Court may do so until the age of 70.").

277. *Id.* art. 97 ("When administering justice, judges and members of the Constitutional Court shall be independent and may only be subject to the law.").

3. *The Judiciary and the 2003 Presidential Elections*

This allocation of power greatly affected the functioning of the rule of law in Armenia during the crucible of elections: The status of judges, as delineated by the 1995 Armenian Constitution, prevented the attainment of independence by the Judiciary and contributed to the serious dereliction of duty on the part of the Judiciary between the first and second rounds of the 2003 presidential elections.

The Armenian public widely perceives judges as corrupt state actors.²⁷⁸ It is within this context that international organizations determined special training for the Armenian Judiciary was necessary in preparation for the presidential election, especially in light of the amendments to the election laws. The training appears to have been largely in vain: As described in Part II, the presidential election, featuring nine presidential candidates, was decided by a runoff vote after the incumbent President, Robert Kocharian, failed to win an absolute majority in the first round.²⁷⁹ The period from the second round of elections until the conclusion of the parliamentary elections was marked by civic and social unrest, manifesting the anger of the Armenian people at the “theft” of the elections by the incumbent President.²⁸⁰

The actions of the Judiciary in reaction to these events evidenced the serious deficits in the balance of power between

278. In a 2002 survey by Transparency International Armenia, respondents categorized the judiciary as one of the most corrupt groups, somewhat less corrupt than traffic policemen. CENTER FOR REGIONAL DEVELOPMENT, TRANSPARENCY INTERNATIONAL ARMENIA, COUNTRY CORRUPTION ASSESSMENT: PUBLIC OPINION SURVEY 13 tbl.1 (2002) [hereinafter TRANSPARENCY INTERNATIONAL SURVEY]. The survey results must be viewed in the context of the practice of traffic officers who, from the Author's personal observations and experiences, regularly flag down motorists in the absence of traffic violations, then allow them to depart without a ticket in return for a specified number of drams. It is said each officer must collect a specified amount of drams each day, a percentage of which is tendered to superior officers. The money then goes up the ladder into the highest echelons of law enforcement. *See infra* Part VI.

279. *See supra* note 137 and accompanying text.

280. Anna Hakobyan, *Armenia: Yes or No, Mr. President*, TRANSITIONS ONLINE, June 3, 2003, available at 2003 WL 57575.

the Executive and Judicial branches and the challenges facing Armenia in its path toward the implementation of meaningful rule of law reform. Judges presided over secret trials of opposition campaigners who, after being denied (or, according to official reports, “refusing”) access to counsel were sentenced to from fifteen days up to a month in prison based on allegations of public misconduct and hooliganism.²⁸¹

4. *Procedural Constraints and Challenges of Interpretation*

Some flaws in the performance of the Armenian courts stem from procedural rules that constrain the courts’ ability to act. For example, access to—in other words, standing before—the Constitutional Court is denied to the individual Armenian citizen. It is instead restricted to the President of the Republic, a one third vote of the National Assembly, or candidates who challenge election proceedings.²⁸² In addition, due to procedural flaws in the election laws and the statute of the Constitutional Court, the Court’s decision with respect to the challenges against the administration’s actions during the first and second rounds of the presidential elections, was not issued until after the second round had been held²⁸³ and the winner declared.²⁸⁴ Further, in its decision, the Court acknowledged the irregularities alleged by the challengers but decided to uphold the results of the election.²⁸⁵

281. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 10; *see also* *Police Arrest*, *supra* note 182.

282. ARM CONST. OF 1995 art. 101. (“The Constitutional Court may hear cases submitted by: 1) the President of the Republic; 2) at least one third of the Deputies; 3) Presidential and parliamentary candidates on disputes concerning election results . . .”).

283. *See* Const. Court of the Rep. of Arm., *In re* The Elections for RA President, Apr. 16, 2003, DCC-412, ¶ 1, *available at* <http://www.concourt.am/Voroshum/sdv-412-e.htm>.

284. *Id.* ¶¶ 2–3. Stepan Demirchian, the losing candidate, filed suit on March 17, however, the decision of the Constitutional Court was issued on April 16, 2003, at which time the incumbent had already been re-invested with the power of the Presidency. *Id.*

285. *Id.* ¶ 17.

Considering the factual difference in votes for Presidential candidates as per the March 5, 2003 election result, the impact thereon of the size of discrepancies and the results recognized unreliable by the Court as a result of investigation of the case; as well as evaluating the analytical material available in the case; and the impact of duly legally formulated and evidentially justified electoral violations of a qualitative nature on realization of active and passive electoral rights, *to keep unchanged the RA CEC Decision 36-A dated March 11, 2003 on electing a President of the RA.*²⁸⁶

The Constitutional Court, noting that the alleged violations and subsequent events continued to leach the public's confidence in the legitimacy of the government, urged the conduct of a national referendum of confidence.²⁸⁷

[C]onsidering 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;

...

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

286. *Id.* ¶ 17(5) (emphasis added).

287. *Id.* ¶ 17(6).

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.²⁸⁸

The court thus appears to acknowledge implicitly, that even in the face of a finding that violations were committed, *it has no power under the Constitution or electoral law to hand out or impose sanctions to cure the violations*. Given that the Constitution does not provide for the administration of a referendum of confidence to legitimate electoral results, it is not surprising that the government questioned the legitimacy of this suggestion from the Court.²⁸⁹

The Constitutional Court's call for a referendum of confidence transports the observer into Samuel Beckett's theatre of the absurd. While affirming that violations did take place, and deciding that those violations did not have a material effect on the results of the elections, yet recognizing that their decision would not have validity in the eyes of the citizenry, the Judicial body, implicitly acknowledging its own impotence and lack of authority, suggests a potentially legitimizing mechanism that is illegal under Armenian law. More significantly, the Constitutional Court's suggestion evidenced a belief by the judges that the machinery of democracy in the Republic of Armenia failed with respect to the 2003 presidential elections.

The Court's opinion is illustrative of Professor Frank Emmert's description of the methodological challenges to legal reform among the then-candidate countries to the European Union (E.U.):

288. *Id.* Article 2 of the 1995 Constitution, to which the Constitutional Court made specific reference, provides "[i]n the Republic of Armenia power lies with the people. The people exercise their power through free elections and referenda, as well as through state and local self-governing bodies and public officials as provided by the Constitution. *The usurpation of power by any organization or individual constitutes a crime.*" ARM. CONST. OF 1995 art. 2 (emphasis added).

289. *Armenian President Rejects Call for 'Referendum of Confidence'*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Apr. 18, 2003, <http://www.rferl.org/newsline/2003/04/180403.asp?po=y>; *Armenian Prosecutor-General's Office Queries Constitutional Court Ruling*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Apr. 18, 2003, <http://www.rferl.org/newsline/2003/04/180403.asp?po=y>.

[M]ethodological problems . . . are widespread in Central and Eastern Europe. First of all, the judges are trained to apply the law and the (written) law only. They have no training to overcome lacunae in the law, for example, by recourse to general principles of law, such as the notion of unjust enrichment. Second, the judges have no experience with the concept of justice in contrast to the concept of law. This can lead to cases where the letter of the law is duly followed but the result is obviously unjust, if not outright absurd.²⁹⁰

The conduct of the Judiciary in the period between the first and second rounds of the elections, and the inability of the Constitutional Court to provide a timely or real remedy in the face of documented violations, depicts the true status of the Judiciary and the structural flaws of that status. These flaws, however, have been obfuscated by the smokescreen of the highflown enunciations of the Law on the Status of Judges²⁹¹ and the guarantees of independence constitutionally provided by the President.²⁹²

C. *The 2005 Constitution – Theatrical Non-Reform Reform?*

The process of amendment of the 1995 Constitution also demonstrates flaws in Armenia's transition to democracy and the rule of law.

1. *Purposes of the Amendment*

As a condition of its accession to the Council of Europe, the Republic made commitments to conduct reforms of its legal system.²⁹³ Pursuant to those commitments, Armenia obligated itself to, among other things, sign and ratify international treaties and reform its domestic law to comply with those treaties, including amendments to its 1995 Constitution.²⁹⁴ For

290. Emmert, *supra* note 187, at 295.

291. *See generally* LAW ON THE STATUS OF JUDGES, *supra* note 257.

292. ARM. CONST. OF 1995, art. 94.

293. EUR. PARL. ASS., *Armenia's Application for Membership of the Council of Europe*, Opinion No. 221, ¶ 13, 21st Sess. Doc. No. 8747 (2000), available at http://www.coe.am/en/docs/pace/opinion_221.pdf [hereinafter EUR. PARL. ASS., No. 221].

294. *Id.*

example, the structure of the courts and appointment and removal of judges is addressed in the 1995 Constitution.²⁹⁵ The commitments included the requirement that Armenia “fully implement the reform of the judicial system, in order to guarantee, *inter alia*: the full independence of the judiciary. . . .”²⁹⁶ Since the balance of power among the branches of government was specified in the Constitution, only a reform of the relevant constitutional provisions could affect such a change.

The principal areas identified for reform were recognition and protection of human rights, local self-government, and the balance of power among the Executive, Judiciary, and Legislature.²⁹⁷ The process of constitutional reform was supported by the Venice Commission²⁹⁸ and other international organizations that assisted in the drafting and evaluations of proposed provisions.

2. *Process of Amendment*

In 2002, the government of Armenia announced a halt in the process of constitutional reform.²⁹⁹ Then, unexpectedly, some weeks prior to the National Assembly elections of 2003, the government announced that the referendum on the Constitution would take place simultaneously with the National Assembly elections.³⁰⁰ The draft submitted for referendum did not reflect the comments of the Venice Commission, but instead

295. ARM. CONST. OF 1995, arts. 91–103.

296. EUR. PARL. ASS., No. 221, *supra* note 293.

297. Venice Commission, Council of Europe, *Interim Opinion on Constitutional Reforms in the Republic of Armenia*, Opinion No. 313/2004, CDL-AD (2004)044, ¶ 5 (2004), [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)044-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)044-e.asp) [hereinafter Venice Commission, *Interim Opinion*].

298. *Id.* ¶ 8.

299. Liz Fuller, *Opposition Postpones Vote on Alternative Armenian Draft Constitution*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Apr. 4, 2002, <http://www.rferl.org/newsline/2002/04/2-TCA/tca-040402.asp?po=y>.

300. Press Release, Embassy of the Republic of Armenia, Parliamentary Elections, Referendum to be Held on May 25, 2003 (May 14, 2003) <http://www.armeniaemb.org/News/EmbassyPressReleases/Releases/ParliamentElections2003.htm>; Liz Fuller, *Armenian Parliament Approves Proposed Constitutional Amendments*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Apr. 3, 2003, <http://www.rferl.org/newsline/2003/04/030403.asp#2-tca>.

inexplicably was a reversion to an earlier draft.³⁰¹ The referendum did not pass, failing to receive the minimum vote required by the Constitution.³⁰²

Efforts to present another referendum to the Armenian voters began in January 2004.³⁰³ Three competing proposals were presented to the National Assembly,³⁰⁴ which accepted the proposal of the ruling coalition.³⁰⁵ The Venice Commission of the Council of Europe issued successive opinions on three iterations of the amendment.³⁰⁶

President Kocharian signed the order to hold the referendum on October 4, 2005, with the vote scheduled for November 27, 2005. News reports³⁰⁷ and the 2005 Needs

301. Venice Commission, *Interim Opinion*, *supra* note 297, ¶ 6; EUR. PARL. ASS., *Constitutional Reform Process in Armenia*, Resolution 1458, ¶ 5, 22nd Sess., Doc. 10601 (2005), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1458.htm> [hereinafter PACE Resolution 1458] (“This draft, however, underwent significant changes during its examination and adoption by parliament and the text submitted to referendum in May 2003 represented an important step backwards.”) (emphasis added).

302. The draft was approved by 46% of the 1.2 million voters who participated in the vote. *Armenian Voters Reject Proposed Constitutional Amendments*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, May 29, 2003, <http://www.rferl.org/newsline/2003/05/2-TCA/tca-290503.asp>. The 1995 Constitution required 50% of the participating voters, and no less than one-third of eligible voters, give their approval. ARM. CONST. OF 1995, art. 113.

303. Venice Commission, *Interim Opinion*, *supra* note 297, ¶ 8.

304. *Id.*

305. OSCE/ODIHR, REPUBLIC OF ARMENIA, CONSTITUTIONAL REFERENDUM 27 NOV. 2005, OSCE/ODIHR NEEDS ASSESSMENT MISSION REPORT 24–25 OCT. 2005 4 (Nov. 10, 2005), http://www.osce.org/documents/odihr/2005/11/16947_en.pdf [hereinafter 2005 NEEDS ASSESSMENT REPORT].

306. Venice Commission, *Interim Opinion*, *supra* note 297; Venice Commission, Council of Europe, *Second Interim Opinion on Constitutional Reforms in the Republic of Armenia*, Opinion no. 313/2004, CDL-AD(2005)016 (2005), [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)016-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)016-e.asp); Venice Commission, Council of Europe, *Final Opinion on Constitutional Reforms in the Republic of Armenia*, Opinion no. 313/2004, CDL-AD(2005)025 (2005), [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)025-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)025-e.asp) [hereinafter Venice Commission, *Final Opinion*].

307. See generally 2005 NEEDS ASSESSMENT REPORT, *supra* note 305 (describing news reports on the political context, constitutional amendments, legal framework, election administration, voter lists, media, and domestic observers).

Assessment Report of the OSCE/ODIHR revealed deep flaws in the process, including lack of access to the media for opponents of the referendum,³⁰⁸ potentially inaccurate or fraudulent voter lists,³⁰⁹ and violence perpetrated against participants in demonstrations against the referendum.³¹⁰ Although opposed to the proposal, the opposition parties failed to work cohesively or devise a viable plan of opposition. A campaign encouraging voters to vote “no” on the referendum was changed midstream to a campaign for voter boycott.³¹¹ Some opposition figures disagreed, alleging that a boycott would give electoral officials a greater opportunity for fraud.³¹²

The Republic declined to request observation by the OSCE/ODIHR³¹³ of the conduct of the referendum. Consequently, no OSCE/ODIHR observation mission was constituted nor was an OSCE/ODIHR election observation report issued on the referendum. However, contemporaneous press reports and opposition allegations center on discrepancies between voting activity and the number of “yes” votes reported by officials.³¹⁴ The Council of Europe, the E.U., and the

308. *Id.* at 8.

309. *Id.* at 7.

310. Liz Fuller, *Armenian Police Detain ‘Dozens’ of Opposition Activists*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Dec. 6, 2005, <http://www.rferl.org/newsline/2005/12/2-TCA/tca-061205.asp>.

311. Liz Fuller, *Armenia: Both Sides Gear Up for Constitutional Referendum*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Nov. 21, 2005, <http://www.rferl.org/featuresarticle/2005/11/436ab37d-54eb-47f6-b34e-e2af0d31503e.html>.

312. 2005 NEEDS ASSESSMENT REPORT, *supra* note 305, at 3.

313. Richard Giragosian, *See U.S. Calls on Armenia to Address Reported Referendum Fraud*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Dec. 1, 2005, <http://www.rferl.org/newsline/2005/12/011205.asp#2-tca>. The 2005 Needs Assessment Report makes clear the OSCE/ODIHR’s readiness to commit resources to an election observation mission for the referendum. *See* 2005 NEEDS ASSESSMENT REPORT, *supra* note 305, at 8–9.

314. *See, e.g.*, Liz Fuller, *Armenian Opposition Decries ‘Unprecedented’ Referendum Fraud . . .*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Nov. 29, 2005, <http://www.rferl.org/newsline/2005/11/291105.asp#2-tca>.

government of the United States have questioned the accuracy of the reported “yes” vote.³¹⁵ Demonstrations arose following the announcement that the referendum had passed,³¹⁶ continuing a seemingly inevitable feature of the Armenian political scene whenever the people are asked to exercise their quintessential democratic power—the right to vote.

3. *Implications for the Future*

Whatever may be the advantages or beneficial aspects of the new Constitution, the conduct of the plebiscite, as well as official reaction thereafter,³¹⁷ reveal contempt for the rule of law and a thinly masked trend toward authoritarianism. The exclusion from the drafting process of opposing viewpoints, including the opposition parties, problems with voter lists, violence directed against and intimidation of opposition figures and supporters, and limited media access all reveal a power structure that operates on its own terms, with little room for the input of others.

The question then arises—why bother to go through the motions of reform, if resources will then be dedicated to limiting the effects of those reforms? Theatrical non-reform reforms operate as the smoke and mirrors that hide the true nature of the regime, and act as carrots to stimulate continued Western aid and engagement, while giving the regime cover to continue its consolidation of power.

315. See *id.* (reporting that “the Council of Europe’s election monitoring group also observed the discrepancy between the modest number of people who were witnessed voting and turnout figures which they suggested were ‘overstated in a significant number of polling stations[]’”); Liz Fuller, *EU Registers Concern Over Conduct of Armenian Referendum*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Dec. 6, 2005, <http://www.rferl.org/newsline/2005/12/061205.asp#2-tca>; Richard Giragosian, *U.S. Calls on Armenia to Address Reported Referendum Fraud*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Dec. 1, 2005, <http://www.rferl.org/newsline/2005/12/011205.asp#2-tca>.

316. See Liz Fuller, *Thousands Join Armenian Referendum Protest*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Nov. 30, 2005, <http://www.rferl.org/newsline/2005/11/301105.asp#2-tca>.

317. Liz Fuller, . . . *As Officials Downplay Violations*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Nov. 29, 2005, <http://www.rferl.org/newsline/2005/11/291105.asp#2-tca>. (responding to accusations of fraud, a deputy parliamentary speaker noted that “it is impossible to hold a perfect vote” in Armenia).

The 2005 Constitution of the Republic of Armenia addresses a majority of the structural balance of power issues of the 1995 Constitution discussed earlier in this Part. After three rounds of comments,³¹⁸ the Venice Commission of the Council of Europe substantially approved the third version of the proposed amendment in the form that emerged from the third reading in the National Assembly.³¹⁹

Principal changes included curtailment of the President's power to dissolve the National Assembly³²⁰ and limitations on the President's power to appoint the Prosecutor-General and remove deputies of the Prosecutor-General.³²¹ Most importantly for the purpose of judicial independence, among other things, the 2005 Constitution increased the input of the Armenian Judiciary and National Assembly in the composition of the successor to the Judicial Council,³²² and, for the first time, created individual access to the Constitutional Court.³²³ Also symbolically important, "the Constitution and laws"³²⁴ replaced the President as guarantors of the independence of Armenia's

318. See *supra* notes 301–05 and accompanying text.

319. Proposed legislation is "read" in the National Assembly—the process by which legislation is debated, amended, and adopted. See RULES OF PROCEDURE OF THE NATIONAL ASSEMBLY, art. 77(1) (2002) (Arm.), available at <http://www.parliament.am/parliament.php?id=bylaw&lang=eng#10>.

320. See ARM. CONST. arts. 55(3), 74(1).

321. See *id.* art. 55(9).

322. Compare ARM. CONST. art. 94.1 ("The Council of Justice shall consist of up to nine judges elected by secret ballot for a period of five years by the General Assembly of Judges of the Republic of Armenia . . .") with ARM. CONST. OF 1995 art. 94 ("The [Judicial] Council shall include fourteen members appointed by the President of the Republic . . .").

323. Compare ARM. CONST. art. 101 ("[T]he application to the Constitutional Court may be filed by . . . every person in a specific case when the final judicial act has been adopted. . . .") with ARM. CONST. OF 1995, art. 101 (providing that the Constitutional Court may only hear cases from the President, deputies, presidential and parliamentary candidates and the government).

324. See ARM. CONST. art. 94.

courts.³²⁵ Importantly (and controversially), the Constitution provides an avenue to citizenship for nonresident Diaspora Armenians and, almost certainly, a concomitant right to vote.³²⁶

These and other changes appear to bring Armenia's constitutional framework into closer congruence with European standards.³²⁷ However, the non-inclusive and heavy-handed process of amending the Constitution, together with allegations of fraud surrounding the November 27, 2005 referendum, undermine the image of progress in rule of law reform. Despite the exhortations of the Venice Commission³²⁸ and of PACE,³²⁹ the Armenian authorities appear to have pursued the now familiar unilateralist approach of ignoring input that comes from outside the administration.

325. Compare ARM. CONST. art. 94 ("The independence of courts shall be guaranteed by the Constitution and laws.") with ARM. CONST. OF 1995, art. 94 ("The President . . . shall be the guarantor of the independence of the judicial bodies.").

326. See ARM. CONST. art. 11.3 ("Armenians by birth shall acquire citizenship of the Republic of Armenia through a simplified procedure."); *id.* art. 30 ("Eighteen year old citizens of the Republic of Armenia have the right to take part in the elections and referendums The rights and obligations of persons having dual citizenship shall be defined by law.").

327. See, e.g., Venice Commission, *Final Opinion*, *supra* note 306, ¶ 40.

328. See *id.* ¶ 41 ("It is certainly important that the discussions of the final text be pursued in an open and transparent manner with the opposition forces and civil society in Armenia. The broadest political consensus must be found.").

329. PACE Resolution 1458 on the constitutional reform process in Armenia provides, at paragraph 13:

The Assembly therefore calls on the Armenian authorities and the parliamentary majority to:

. . .

- ii. undertake clear and meaningful steps in order to resume an immediate dialogue with the opposition;
- iii. adopt the text at second reading without altering the agreement reached with the Venice Commission on the above-mentioned points and no later than August 2005;
- iv. provide live broadcasting of the parliamentary sittings where the constitutional amendments will be discussed and voted;
- v. start a well-prepared and professional awareness-raising campaign immediately after the adoption of the text at the second reading;
- vi. implement without delay the Assembly recommendations with regard to media pluralism in order to guarantee the broadest possible public debate;
- vii. urgently update voters' lists[.]

PACE RESOLUTION 1458, *supra* note 301, ¶ 13.

Indeed, based on previous conduct of the Armenian authorities, it is logical to question the manner in which the 2005 Constitution will function following its coming into effect. This is an administration accustomed to undermining the rule of law, while appearing and claiming to adhere to it. Whether the 2005 Constitution is but another theatrical non-reform reform, another smokescreen and mirror held up to the gaze of the international community, remains to be “seen.”

VI. THE JOKER IN THE PACK?

The joker is the trump card in the pack; it throws the other players and perhaps wins the game.³³⁰ But what *is* the game? Is it the process of transition to democracy and the rule of law? Or is the evolution of transitional countries in Central Asia and the Caucasus merely a sideshow of the “Great Game”³³¹ that continues to be played in that region of the world? In the new Great Game,³³² might the *prospect* of the success of such a transition be the joker in the pack?

The joker could be an active sentient agent that manipulates the smoke and mirrors of apparent reform for his or her own benefit. Or it could be a nonsentient force or background reality that undercuts efforts toward reform. In the context of the smoke and mirrors of Armenian post-Soviet political reform, who or what is the joker?³³³

330. See BENHAM, *supra* note 4.

331. The term the “Great Game” was coined to describe the nineteenth century struggle for dominance in Central Asia and the Caucasus by Russia and the British Empire. See, e.g., PETER HOPKIRK, *THE GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA* 2–6 (1992) (describing the stimulus for, and broad parameters of, the Great Game).

332. See *id.* at xv. Hopkirk hypothesizes that a new Great Game is now being played in the region as a result of the termination of Soviet dominance. *Id.* Russia, the United States, and China are now the powerful actors seeking to protect and further their interests through engagement in the region. *Id.* at xv–xviii. See, e.g., Guy Chazan, *Russia Reasserting Itself in Mideast*, WALL ST. J., Mar. 3, 2005, at A6 (suggesting the sweeping play of the New Great Game); Emil Danielyan, *Caucasus: Russia Boosts Alliance With Armenia As U.S. Gains Foothold in Georgia*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, June 6, 2002, <http://www.rferl.org/features/2002/06/06062002162402.asp> [hereinafter Danielyan, *Caucasus: Russia Boosts Alliance*].

333. The Author poses this question and attempts to answer it in this Part of the Article with full realization that the very illusion-making mechanisms identified

A. *Endogenous Suspects*

1. *Geo-Political Realities*

Is it possible that Armenia's geographic and geopolitical location condemns it to instability and stillborn reform? The Republic is a Christian island (together with the Republic of Georgia) surrounded by a sea of Muslim countries, in a region that is a crossroads of three storied empires.³³⁴ The Russian, Ottoman, and Persian Empires are long gone, yet the tensions live on or have found new manifestations among their political descendants. Iran, Persia's modern incarnation, threatens the world's security with nuclear dreams.³³⁵ Ongoing tensions with Turkey, direct successor to the Ottoman Empire, stemming from the unresolved issue of the 1915 Armenian Genocide,³³⁶ mean that the Turkey-Armenia border is closed.³³⁷ Russia, heir, via the U.S.S.R., to the Russian Empire, is Armenia's friend, but a friend that holds the upper hand.³³⁸

The potential instability of the South Caucasus region also includes the ceasefire brokered by the Council of Europe between Armenia and the Republic of Azerbaijan. Little

elsewhere in this Article make this a potentially futile task. See discussion *supra* Parts IV. & V. The Author is, in effect, "looking through a glass darkly," but points to some likely suspects that may fill the role.

334. See BOURNOUTIAN, *supra* note 25, at 211–15.

335. See *Western Powers Seek UN Council Pressure on Iran*, THE EPOCH TIMES, Mar. 15, 2006, available at <http://en.epochtimes.com/news/6-3-15/39323.html>; Nazila Fathi, *Iran is Defiant, Vowing to U.N. It Will Continue Nuclear Efforts*, N.Y. TIMES, Dec. 25, 2006 at A14.

336. Editorial, *Turkey, Armenia and Denial*, N.Y. TIMES, May 16, 2006, at A24.

337. See *supra* note 69 and accompanying text.

338. In the 1997 Russian-Armenian Treaty of Friendship, Cooperation and Mutual Assistance between Armenia and the Russian Federation, Russia agreed to provide the troops that guard Armenia's closed border with Turkey. *Armenia Signs Military Alliance with Russia*, 3 FORTNIGHT REV., Sept. 12, 1997, available at http://www.jamestown.org/publication_details.php?volume_id=4&&issue_id=217. In addition, in 2002 through 2003, in repayment for outstanding debts from the Soviet-era, Russia "demanded and received" the Medsamor nuclear plant, a primary source of Armenia's energy supplies, as well as other industrial assets. See LIBARIDIAN, *supra* note 29, at 289–90. Russia, therefore, has control of a crucial piece of Armenia's economy. See *id.* at 292 ("With Russian control of Armenia's energy sector, major industrial concerns, and supply of arms, Russia can now take Armenia for granted.")

progress has been made in finding a lasting resolution,³³⁹ which means Armenia is located in a region with the potential to flare into deadly conflict.

This potential instability, in addition to the financial and energy resource opportunities presented by Azerbaijan's oil and gas, keeps the world's focus on the region. It may explain the active engagement in the Transcaucasus of the world's sole current superpower, the United States, and the continued interest of the successor of that superpower's erstwhile Cold War competitor—the Russian Federation.³⁴⁰

2. *Resistance to Change – Inertia*

Perhaps, instead, the joker in the pack is the resistance to change in times of uncertainty. It is possible that awareness of the potential instability of Armenia's geopolitical location creates a psychological resistance to change. That awareness may make the prospect of true democracy appear to be a dangerous possibility that might harm Armenia's long-term interests. Such resistance is even more pronounced in a nation at war,³⁴¹ among the average citizens, the political elites, and the military.

3. *Corruption and Clientelism*

Another key suspect is the corruption of public officials and the primacy of clientelist networks in the economic, political, and social spheres of the Republic. Corruption, including bribe

339. See, e.g., Katrin Bennhold, *Armenia and Azerbaijan Remain Stalled in Talks*, N.Y. TIMES, Feb. 12, 2006, at A4 ("During two days of talks, President Robert Kocharian of Armenia and his Azeri counterpart, Ilham Aliyev, came no closer to resolving their differences over the future status of the enclave, according to a joint statement issued by French, Armenian and Russian mediators.").

340. See, e.g., Danielyan, *Caucasus: Russia Boosts Alliance* *supra* note 332 (describing the jockeying for power in the Caucasus by the Russian Federation and the United States).

341. Despite the ceasefire, so long as there is no resolution of the Nagorno-Karabagh conflict, Armenia and Azerbaijan are nations at war. See LIBARIDIAN, *supra* note 29, at 260–64. See C.J. Chivers, *Sun and Surf, but Also Lines in the 'Russian' Sand*, N.Y. TIMES, Aug. 20, 2006 at A12 (describing the Armenia-Azerbaijan stalemate over Nagorno-Karabakh as one of four "frozen conflicts" that arose with and remain unresolved since the breakup of the Soviet Union).

seeking and receiving by judges and police officers, undermines both democracy and the rule of law as it negates one of the rule of law's central tenets—the neutral and equal applicability of the law to all who are subject to its power.

a. The Judiciary

In Armenia, the Judiciary is perceived to be “on sale.” The ABA/CEELI Judicial Reform Index for Armenia of April 2002,³⁴² based on the survey of a cross-section of “judges, lawyers, journalists and outside observers with detailed knowledge of the judicial system,”³⁴³ notes “[b]ribery . . . is a common problem, caused, many respondents say, by low judicial salaries, mistrust of the Judicial system and historical practice. One respondent lawyer reported cases are often stalled by judges who are waiting for a sufficient bribe to be proposed.”³⁴⁴ Some respondents theorized that the consequences of such corruption were less deleterious to the rule of law than may be superficially apparent: “Many respondents did claim, however, that just because a bribe is transferred does not mean an illegal decision was made, implying that the judge evaluates the case, and then solicits a bribe from the party he thinks, by law, should win.”³⁴⁵

In the 2002 Transparency International Country Corruption Assessment, a survey of public officials in Armenia revealed, in

342. ABA/CEELI has published a series of Judicial Reform Indexes covering various transitional countries in which ABA/CEELI operates. American Bar Association, Central European and Eurasian Law Initiative, The Judicial Reform Index: Overview, http://www.abanet.org/ceeli/publications/jri/jri_overview.html (last visited Apr. 1, 2007). The purpose of the Judicial Reform Index “is to assess a cross-section of factors important to judicial reform in emerging democracies.” AMERICAN BAR ASSOCIATION, CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, JUDICIAL REFORM INDEX FOR ARMENIA i (Apr. 2002), <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN017579.pdf> [hereinafter JUDICIAL REFORM INDEX FOR ARMENIA].

343. *Id.* at iii.

344. *Id.* at 32.

345. *Id.* at 32. If true, in effect, members of the Judiciary require the winning litigant to provide the Judiciary support that the public coffers cannot or will not provide. It is unclear whether support is shared among the participants in the system (such as court officers and security guards) or whether each functionary connected to the judicial system is responsible for obtaining his or her own contribution from litigants.

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their opinion, “the first three extremely corrupt institutions in Armenia are courts, the Prosecutor’s Office and Yerevan City Hall.”³⁴⁶ The depths of the cynicism of the Armenian populace are made clear by a 2005 survey conducted by the Armenian office of Transparency International. In response to a contemporaneous anti-corruption drive by the Republic, “less than 10% of Armenians expressed faith in the government’s campaign to combat corruption. . . .”³⁴⁷

b. Unequal Application of the Law

Corruption undermines the rule of law by allowing officials in the legal system (the courts, law enforcement officials, and the prosecutors) to prioritize their personal interests (obtaining monetary bribes or gathering influence) above the function of their offices. In addition, the influence created by bribe-taking or other illicit exercises of power undermines the equal application of law, a fundamental characteristic of the rule of law. For example, in the Judicial Reform Index for Armenia, respondents indicated that the influence of the Executive was felt in the Judiciary’s decision-making: “[O]ne lawyer respondent described ‘perceived potential government interests’ as another factor influencing judicial decisions. . . . One lawyer stated that an appellate judge told him directly that he could not resist the opposing pressure to decide a certain way for fear of jeopardizing his professional future.”³⁴⁸

The unequal application of the law was displayed in legal proceedings that took place before the presidential elections of March 2003. The Armenian media reported the case of a presidential (and later General Assembly) candidate and the conflicting interpretations of his eligibility to run for President and General Assembly office.

346. See TRANSPARENCY INTERNATIONAL SURVEY, *supra* note 278, at 30.

347. Richard Giragosian, *Armenian Government’s Commitment to Fighting Corruption Questioned*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Dec. 1, 2005, <http://www.rferl.org/newsline/2005/12/011205.asp#2-tca>.

348. JUDICIAL REFORM INDEX FOR ARMENIA, *supra* note 342, at 32. The strength of the pressure exerted by the Executive on members of the Judiciary is facilitated and enhanced by the factors discussed *supra* in Part V.B.2.

One presidential candidate who lost and decided to run for Parliament was not allowed to do so because he did not meet the residency requirement. How he could have met the requirement two months earlier in the presidential contest was unclear to the media as well, who hounded the Central Electoral Commission without receiving an answer.³⁴⁹

Pursuant to Armenia's Electoral Code, in addition to having attained at least thirty-five years of age, presidential candidates must have been citizens and permanent residents of the Republic for the preceding ten years.³⁵⁰ Candidates for the General Assembly, in addition to attaining twenty-five years of age, must have been citizens and permanent residents of the Republic for the preceding five years.³⁵¹ Based on the statute, it would appear to be impossible for a candidate to satisfy the eligibility requirements for presidential candidature but not those for the General Assembly.

In contrast, although repeated questions and court challenges have been raised about President Kocharian's eligibility to run for the Armenian presidency, as a native of Nagorno-Karabagh, he twice was qualified to run for presidential office in the Republic, and challenges to his eligibility were summarily dismissed by the courts in 1998³⁵² and again in 2003.³⁵³ The questions and challenges stemmed from Nagorno-Karabagh's Soviet-era status as a part of the Republic of Azerbaijan. If Kocharian was born in, and was a citizen of, Azerbaijan who was not naturalized as an Armenian citizen, he would not have satisfied the constitutional requirements of citizenship and residence in Armenia.

349. See *Elections Recapped*, *supra* note 211, at 44.

350. ELECTORAL CODE OF THE REPUBLIC OF ARM. art. 65.

351. *Id.* art. 97.

352. See LIBARIDIAN, *supra* note 29, at 250.

353. 2003 PRESIDENTIAL ELECTIONS REPORT, *supra* note 98, at 15; Liz Fuller, *Armenian Court Rules Incumbent Eligible to Contest Presidential Election*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Feb. 14, 2003, <http://www.rferl.org/newsline/2003/02/140203.asp#2-tca>.

c. *Popular Loss of Confidence*

Among the deleterious effects of corruption is the lack of confidence engendered in the citizenry. That lack of confidence leads to general disregard of the rule of law by the average person. A former chairman of the anticorruption commission of the Georgian Parliament is reported to have explained the effects of corruption as follows:

Corruption is a way of life. People don't believe that the state will ever provide services or enforce the law, so they don't pay taxes. There are only two ways to survive here. To become financially strong yourself, or to place yourself under the protection of someone who is stronger. But there is no way to be a citizen; there is only a kind of feudalism, in politics, government and business.³⁵⁴

The effects of the corruption of public officials in the Republic are intensified by the clientelist patronage networks that control the conduct of public and private business in Armenia.³⁵⁵ Christoph H. Stefes describes the phenomenon of the sale of the position of police officer. The office is sold for more than the annual public salary earned from the position; therefore it is clear the officeholder must take bribes to repay the money loaned to purchase his position. In addition, the officer must surrender specified amounts to superior officers,

354. Christoph H. Stefes, *Clash of Institutions: Clientelism and Corruption v. Rule of Law*, in *THE STATE OF LAW IN THE SOUTH CAUCASUS* 13 (Christopher P.M. Waters ed., 2005) (citing Anatol Lieven, *Georgia: A Failing State?*, EURASIA INSIGHT, Jan. 30, 2001, <http://www.eurasianet.org/departments/insight/articles/eav013001.shtml> (quoting David Usupashvili, former chairman of the anti-corruption commission of the Georgian Parliament)).

355. See, e.g., *id.* at 1 (describing the Ter-Petrossian regime's strategy of government).

The government's basic strategy was to create extensive patron-client networks. Building on connections they had developed during the war years, ANM [Armenian National Movement] leaders acquired influence among substantial groups of industrialists, businessmen, and bureaucrats. By pledging loyalty to their patrons and involving them in the profit-making of a business or a government strategy, these individuals were assured survival in Armenia's uncertain economic and political climate.

Id. (citing Ian Bremmer & Corry Welt, *Armenia's New Autocrats*, 8 J. DEMOCRACY 77, 83 (1997)).

who pass a mandatory sum of money further up the chain of command. The officer must also make sure to secure sufficient bribes to maintain his own standard of living, which exceeds the standard he would have been afforded by his official salary.³⁵⁶

According to Stefes, the clientelist structures and networks in the republics of the South Caucasus have survived (and even thrived after) the upheaval caused by the end of the Soviet system.³⁵⁷ So widespread have the networks become that ordinary citizens are unable to conduct private or public business other than through the medium of a network—membership becomes essential to ensure survival.³⁵⁸ If membership in a network is essential for survival, and if participation in corruption is necessary to get a “fair deal,” establishment of the rule of law in Armenia faces steep obstacles.³⁵⁹

The undermining effect of corruption on the rule of law is replicated in its effects on democracy. Indirect democracy requires the exercise of choice by the *demos*. However, in the face of endemic corruption, it is rational for an individual member of the electorate to choose to sell his or her vote in return for ready cash.³⁶⁰ When the individual realizes her exercise of the vote will not (no *cannot*) make a difference, that her vote will be nullified through corrupt means, the incentive is created to receive an immediate personal benefit, however small,

356. Stefes, *supra* note 354, at 11. One memorable afternoon, the Author was a passenger in a vehicle traveling from Zvartnots International Airport to the city of Yerevan. In the brief (half hour maximum) trip, the vehicle was stopped by traffic police officers four times. During each stop a small gratuity changed hands.

357. *Id.* at 10–11.

358. Several Armenian acquaintances detailed to the Author the impossibility of starting a small business, for example, before first securing a “roof,” that is, a protective network. An individual who attempted to act outside of or without a roof would be subject to depredations of protectionist rackets operated by dominant networks. *See, e.g.,* Liz Fuller, *Armenian Businessmen Arrested After Protesting Extortion*, RADIO FREE EUR./RADIO LIBERTY NEWSLINE, Oct. 14, 2005, <http://www.rferl.org/newsline/2005/10/141005.asp#2-tca> (reporting the arrest on fraud and smuggling charges of business owners who had declined to pay out extortion bribes to customs officials).

359. *See* Stefes, *supra* note 354, at 12. Stefes notes “corruption and clientelism are formidable obstacles to the establishment of the rule of law.” *Id.*

360. *See supra* note 202 (describing carousel voting).

from the performance of a meaningless public act. The availability of the sealed official ballots utilized by the carousel networks is evidence that such a situation exists.³⁶¹ Only a powerful network would have access to the ballots, which are in a closely-guarded chain of custody from the time of printing until the time of counting.

Corruption and clientelist patronage networks, then, appear to be a key suspect in the search for the joker in the pack, perhaps shedding some light on the reasons for the stuttering transition to democracy and the rule of law in Armenia. While corruption in Armenia certainly existed prior to transition,³⁶² it is difficult to determine with exactitude the relationship between corruption and the halting transition, that is, the proverbial chicken-and-egg problem. Either the pervasive corruption gives rise to uneven democratic and rule of law reform, or uneven rule of law and democratic reform gives rise to endemic corruption.

4. *The Presidency*

Other potential suspects for the role of the joker include the President himself or the constitutionally mandated powers of his office. Some may wonder whether President Kocharian, the Armenian political figure who gained most from the confusion and uncertainty following the 1999 parliamentary assassinations,³⁶³ may be the joker in the pack. The stymieing of the development of the rule of law may lie with the attributes of the office of the Armenian Presidency: The power conferred to the office of the President by the Constitution and background maneuvering by the current officeholder also may have contributed to the halting substantive rule of law reform and lack of progress toward real democracy.

361. See *Armenia: Election Marred*, *supra* note 157.

362. See, e.g., Stefes, *supra* note 354, at 13.

363. See LIBARIDIAN, *supra* note 29, at 253 (describing the political consequences of the assassinations, which removed President Kocharian's two principal political rivals).

For the rule of law to develop and flourish, the substantive content of the legal framework must facilitate contributions from many points of the political spectrum. The 1999 assassinations of the opposition parliamentary leaders may have dealt a potentially mortal blow to the development of democracy and the rule of law in Armenia. The confused and conflicting response of the Armenian opposition to the proposed constitutional reforms in 2005,³⁶⁴ for example, demonstrate the weakness and inability to speak on the part of politicians outside the administration.

As discussed in Part V, the balance of power in the 1995 Constitution overwhelmingly favored the Executive branch over the other two branches of government. This characteristic of the Armenian political and legal framework stifled the inclusion of substantive content in the laws that serve to protect essential features of democracy and the rule of law. It also silenced interpretations of the law that would uphold the fundamental characteristic of equal and neutral applicability of the law to all.

In order for the *demos* to fulfill the role of watchdog in a democracy, the opposition and others who hold different viewpoints among the populace must have the ability to speak and influence decision-making. The domination of the Legislative and Judicial branches by the Executive, and the political advantages accruing to the incumbent following the 1999 assassinations have stifled those other voices.

B. Exogenous Suspects

1. Nationalism/the Genocide/the Diaspora

Other potential jokers in the pack are the 1915 Armenian Genocide and Armenian nationalism. The 1915 Genocide of the Armenian people scattered the survivors throughout the world.³⁶⁵ The Diaspora continues to be interested in and committed to Armenia, the acknowledgement of, and reparation for the Genocide, and the furthering of the Republic's

364. See discussion *supra* Part V.C.

365. See LIBARIDIAN, *supra* note 29, at 138–39.

prospects.³⁶⁶ Furthermore, the Diaspora in the United States has worked to gather political influence that can be deployed for the perceived benefit of Armenia.³⁶⁷ Could that power, that interest, be a joker in the pack, serving to undercut real impetus toward reform in the Republic?

The following two examples of the exercise of power by the Armenian Diaspora in the United States are telling.

a. The FREEDOM Support Act

The 1992 FREEDOM (Freedom for Russian and Emerging Eurasian Democracies and Open Markets) Support Act included Section 907 that provided:

United States assistance under this or any other Act (other than assistance under title V of this Act) may not be provided to the Government of Azerbaijan until the President determines, and so reports to the Congress, that the Government of Azerbaijan is taking demonstrable steps to cease all blockades and other offensive uses of force against Armenia and Nagorno-Karabagh.³⁶⁸

This provision was introduced by Senator John Kerry in the aftermath of the dissolution of the Soviet Union and was supported by many Congressional members of the influential Armenian Caucus.³⁶⁹ Section 907 prevented the United States from providing reform assistance to the Republic of Azerbaijan that might otherwise have been analogous in scope to the assistance offered to the other former Soviet Republics.³⁷⁰ The

366. *Id.* at 297–98.

367. BOURNOUTIAN, *supra* note 25, at 353–55.

368. Freedom Support Act of 1992, Pub. L. No. 102–511, § 907 (1992) (noted as Assistance to Azerbaijan in 22 U.S.C. § 5812 (2000)).

369. The membership of the Congressional Caucus on Armenian Issues comes from both houses of Congress and represents both the Democratic and Republican parties. Congressional Caucus on Armenian Issues, Members of the Caucus, <http://www.house.gov/pallone/armenia-list.html> (last visited Apr. 1, 2007) (listing the member of the caucus). The caucus represents widely-dispersed districts and exceeds 140 members. *Id.*

370. *Compare* 22 U.S.C. § 5402 (2000) (authorizing the President to provide support to former Soviet Republics) *with* Freedom Support Act of 1992 § 907 (noted as assistance to Azerbaijan in 22 U.S.C. § 5812).

provision also appeared to demand a unilateral lifting of the blockade by Azerbaijan, but it imposed no corresponding pressure on Armenia to work toward a resolution of the Karabagh dispute that might facilitate removal of the blockade.³⁷¹ The provision thus represents unequivocal United States support for Armenia in the complicated Nagorno-Karabagh conflict.

Not until after the events of September 11, 2001, when Azerbaijan allowed the United States to use its airspace and facilities to make strikes against Afghanistan, did a U.S. President (President George W. Bush), use the waiver provision of the FREEDOM Support Act³⁷² to allow analogous aid to flow to Azerbaijan.

b. Post-September 11 Registration of Nonimmigrant Aliens

The second development was even starker in its demonstration of the influence of the Armenian Diaspora in the United States. In December 2002, as part of the United States efforts to reform its immigration laws in response to the events of September 11, 2001, then-Attorney General John Ashcroft issued a list of countries whose nationals, if present in the United States, were required to register with the Department of Justice.³⁷³ The list included Armenia, Pakistan, and Saudi

371. See Freedom Support Act of 1992 § 907.

372. See *id.* (providing for a waiver of its terms as determined by the President of the United States); see also Aynura Ahmedova, *Azerbaijan: Freeing the Freedom Support Act*, EURASIANET.ORG, Feb. 2, 2002, <http://www.eurasianet.org/departments/insight/articles/pp020702.shtml> (noting that restrictions imposed on assistance to Azerbaijan under Section 907 of the Freedom Support Act of 1992 were temporarily lifted in February of 2002).

373. DEPT. OF JUSTICE, AG ORDER NO. 2636-2002, REGISTRATION OF CERTAIN NONIMMIGRANT ALIENS FROM DESIGNATED COUNTRIES, 67 Fed. Reg. 77,136, 77,136 (2002) [hereinafter December 16 Registration List]. The December 16, 2002 list was the third issued by the Department of Justice naming countries whose nationals in the United States were required to register their presence with the Department of Justice, and was issued pursuant to a policy first announced on August 12, 2002. See *id.*; DEP'T OF JUSTICE AG, REGISTRATION AND MONITORING OF CERTAIN NONIMMIGRANTS, ORDER NO. 2608-2002, 67 Fed. Reg. 52,584, 52,584 (2002). Those countries included Yemen, Morocco, Eritrea, Algeria, and Afghanistan, among other countries. Kathleen Cahill, *Who's On, Who's Off*, WASH. POST, Dec. 22, 2002, at B5 (discussing adjustments to the list of countries who must register, including the addition and subsequent removal of

Arabia.³⁷⁴ The reaction of Armenians at home and of ethnic Armenians in the United States was swift, immediate, and effective. The list was issued on Monday, December 16, 2002.³⁷⁵ By Wednesday, December 18, 2002, Armenia had been removed from the list.³⁷⁶ Facing official protest from Armenia and members of the Congressional Caucus on Armenian Issues, as well as an avalanche of faxes to the White House from Armenian Americans, the administration backed down and removed Armenia from the list.³⁷⁷

The depth of support for the Republic within the Diaspora is exemplified by billionaire Kirk Kerkorian. Kerkorian, a friend and supporter of President Kocharian, has, since approximately 2001, through the mechanism of the Lincey Foundation, poured an estimated \$180 million (USD) of his personal fortune into Armenia's roads and other infrastructure.³⁷⁸

The nationalism and power of the Diaspora do not create preconditions for reform; rather, they may play the role of a joker in the pack that undermines the transition to democracy and the rule of law. By ensuring blind and powerful support for Armenia's interests, no matter the merits of the particular circumstances, the Diaspora may facilitate the theatrical non-reform reform that has characterized Armenia since its

Armenia). With the exception of Armenia and North Korea, the countries listed were Muslim countries. Teresa Watanabe & Jennifer Meria, *INS Order Prompts Big Lines, Anger*, L.A. TIMES, Dec. 17, 2002, at B1.

374. See December 16 Registration List, *supra* note 373, at 77,136.

375. *Id.*

376. DEPT. OF JUSTICE, AG Order No. 2638-2002, REGISTRATION OF CERTAIN NONIMMIGRANT ALIENS FROM DESIGNATED COUNTRIES, 67 Fed. Reg. 77,642, 77,642 (2002) ("This Notice also rescinds an earlier Notice, Attorney General Order No. 263-002 of December 12, 2002, which appeared in the Federal Register on December 16, 2002 (67 FR 77136), and incorrectly listed Armenia as a designated country.").

377. *E.g.*, Karen Branch-Brisco, *U.S. Exempts Armenians from Registration Rule*, ST. LOUIS POST-DISPATCH, Dec. 18, 2002, at A6; John M. Broder, *U.S. Drops Armenian Men from List of Visitors Who Must Register*, N.Y. TIMES, Dec. 19, 2002, at A22; Alan Cooperman, *Armenians in U.S. Not on INS List*, WASH. POST, Dec. 18, 2002, at A4 (describing "furious round of lobbying").

378. See Armen Zakarian, *Kerkorian Handed Armenia's Top State Honor*, ARMENIALIBERTY.ORG, May 20, 2005, <http://www.armenialiberty.org/armeniareport/report/en/2005/05/AB551BCD-E9AC-4259-91B7-6D63E1A8DC60.asp>.

independence from the Soviet Union. Blind support does not encourage true reform; rather, it promotes the utilization of smoke and mirror mechanisms to create a simulacrum of reform.

In addition, donor countries have been too slow to recognize the existence and implications of nationalism for the transition of the former Soviet countries. Shlomo Avineri, in *On Problems of Transition in Postcommunist Societies*, attributed the West's blindness to the existence and ramifications of nationalism in former Soviet republics to "the way anticommunist movements of dissent in Central and Eastern European countries were almost exclusively understood in the West in liberal, democratic, and anti-totalitarian terms, overlooking a strong nationalist ingredient that gave many of these movements so much of their mobilizing power in their respective societies."³⁷⁹ He further warned "[w]hile Western attention is focused on the developments towards democracy and the free market, a serious realization of the power of nationalism in these societies is key to understanding their present development and the possible trends of their future course."³⁸⁰

The role of the Diaspora in post-Soviet Armenia has been a central one. It is, in large part, the ardent support for the Armenian cause among the Diaspora that has enabled the Republic to survive the many vicissitudes of the post-Soviet experience. That support has included political³⁸¹ and economic³⁸² investment enabling Armenia to retain control of the Azeri lands conquered during the Nagorno-Karabagh dispute by, for example, funding the construction of the road that connects Karabagh to Armenia through the Lachin Corridor.³⁸³

379. See Avineri, *supra* note 7, at 1926.

380. *Id.* at 1936.

381. See discussion *supra* note 373 (describing the effectiveness of the Diaspora lobby in getting Armenia removed from the INS special registration list).

382. See, e.g., Naush Boghossian, *Investors Shore Up Country*, DAILY NEWS OF L.A. (Glendale/Burbank), June 20, 2004, at N3 (mention of the Diaspora's involvement in renovating roads, airports, and housing developments in Armenia); LIBARIDIAN, *supra* note 29, at 259 ("In absolute terms, remittances to families and social assistance from the Diaspora constitute the largest infusion into the Armenian economy, making possible for a large segment of population to achieve minimal survival.").

383. Armenian Assembly of America, *Lachin Corridor Completed as Karabagh*

As we seek to identify the joker in the pack, however, the question lingers whether the physical survival (even expansion) of the Republic has come at the cost of the stimulation of democratic and rule of law reform. Unquestioning support of the status quo and protection of that status quo's interests abroad may, counter-intuitively, serve to stifle the very goal sought by the Diaspora—the flourishing of Armenia. The issue becomes even more immediate in light of the provisions of the 2005 constitutional amendment that grants citizenship and voting rights to members of the Armenian Diaspora. Their votes, cast from afar, may be based on a smoke-and-mirror-engendered illusion of rule of law and democratic reform.

2. Donor Country Motives

Looking further a field, there lurks another potential joker in the pack: the multilayered motives of donor countries whose ability to formulate clear policy is fractured by reluctance to apply too much pressure on fragile regimes in unstable neighborhoods. Donor countries such as the United States urge and fund reform efforts in transitional countries. However, donors are reluctant to take concrete action when their reform efforts are undermined and fail to flower. Instead, recalcitrant reformers and backsliders are often “given a pass.” For example, Thomas Carothers, in *Aiding Democracy Abroad* noted:

In 1998, for example, strongmen leaders in Armenia, Azerbaijan, and Cambodia manipulated electoral processes yet were let off fairly lightly by at least some of the international observers. The Council of Europe, for example, found only minor problems with the first round of the Armenian national elections of spring 1998, elections that were later heavily criticized by the OSCE.³⁸⁴

Marks 7th Year of Independence, ARMENIA THIS WEEK, Sept. 4, 1998, <http://www.aaainc.org/ArTW/article.php?articleID=975> (describing Diaspora funding of the road through the All-Armenia Hayastan Fund); KAPLAN, *supra* note 68, at 325 (2000) (“Armenia’s presence was established by a new road financed by [D]iaspora Armenians. . . . The road cost \$10.1 million, raised in telethons held in Los Angeles in 1996 and 1997 by Armenian-Americans . . .”).

384. CAROTHERS, *supra* note 26, at 132. Carothers also notes that:

In addition, donors are more disposed to a slow pace of reform—"evolution before revolution." William P. Alford suggests "U.S. governmental programs embrace a 'technocratic, gradualistic conception of democratization' that assumes a well-modulated sequencing. . . . Essentially, this model presumes that an authoritarian regime . . . will open to the possibility of reform as its legitimacy fades and its populace presses for greater freedoms."³⁸⁵ The international community's preference for a slow pace of reform, and aversion to sudden disruptive transformation may play the role of the joker in the pack, stifling revolutionary transformation that might more effectively lead to democratic reform.

The deeper motives of the donors also have an impact. Donor countries avow a desire to spread democracy and the benefits of capitalism to transitional and developing countries.³⁸⁶ However, actual policy adopted by donors reveals ambivalence regarding whether donors truly support democracy, and the self-determination of people and countries, or an illusory democracy where the power of the people is trammled.³⁸⁷

[I]f a leader is determined to undermine or compromise an election to stay in power, aid can do little to stop it. Technical undertakings to strengthen election administration can be nullified by a regime's decision to manipulate the process. Observers may be able to document the ways in which an electoral process is deformed by the ruling powers but often such publicity does not stop strongmen from doing so – largely because the United States and other countries have rarely exacted much punishment, economic, diplomatic, or otherwise, for electoral wrongdoing.

Id. at 130.

385. William P. Alford, *Exporting "The Pursuit of Happiness"*, 113 Harv. L. Rev. 1677, 1685 (2003).

386. Mathurin C. Hounnikpo, *Pax Democratica: The Gospel According to St. Democracy* (Columbia Int'l Affairs Online, Working Paper, 2000), <http://www.ciaonet.org/isa/hou01/> (subscription required).

387. See Fareed Zakaria, *The Limits of Democracy*, NEWSWEEK, Jan. 29, 2007, at 35; Bruce Ledevitz, *The Promise of Democracy*, 32 CAP. U. L. REV. 407, 421–422 (2003) (reviewing Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*).

Multilayered donor motives also include a desire to access the resources of transitional countries, such as the oil and gas reserves of Azerbaijan.³⁸⁸ One might hypothesize that the United States will never push either a resistant Azerbaijan or unwilling Armenia too far if such pressure would limit U.S. industries' access to Azerbaijan's resources. One might also theorize that the United States will push both countries only so far as to ensure that its access to those resources continues to be protected.

Thomas Carothers describes the effects of donor partiality on the implementation of democracy in developing and transitional countries: "The U.S. government finances observers for some transitional elections because it wants to convince the policy community that a favored government is successfully democratizing."³⁸⁹ One implication of Carothers's analysis is that the United States, as a donor, may facilitate acceptance of theatrical non-reform reform for its own underlying motives.

The Baku-Ceyhan pipeline was completed in 2005, winding circuitously through the Republic of Georgia on its way to the Black Sea and Western markets, instead of following the more direct route through Armenia.³⁹⁰ The question of the most pressing motivation of Western donors—democratic transition in Armenia and Azerbaijan; final settlement of the Nagorno-Karabagh conflict; or maintenance of the rather superficial stalemate in the region to ensure continued Western access the energy reserves in the Caspian Sea—is still open to debate.

One may doubt, of course, whether increased pressure by its Western donors would effectuate a greater and more substantive change in Armenia. The alternate viewpoint is that such pressure would send Armenia headlong into the arms of Russia,

388. See, e.g., David E. Sanger, *There's Democracy, and There's an Oil Pipeline*, N.Y. TIMES, May 29, 2005, A3 (describing conflict between the "clarion call for democracy" and the reality on the ground in Central Asia and the Caucasus).

389. See CAROTHERS, *supra* note 26, at 132 (describing the funding of election observations missions by interested donor countries, with the intent of extending an imprimatur of legitimacy to favored leaders and governments).

390. See LIBARIDIAN, *supra* note 29, at 289.

a Russia already giving ample lessons to the former Soviet Republics of how to conduct theatrical non-reform reform.³⁹¹

3. *Mirroring the West*

Other potential suspects for the role of the joker in the pack strike closer to home. The multilayered motives of donors were discussed above. Might the *example* of donors be another potential joker in the pack? Brian Tamanaha notes that:

It is an odd paradox that the unparalleled current popularity of the rule of law coincides with widespread agreement among theorists that it has degenerated in the West. Theorists on both ends of the political spectrum, right and left, have concurred on this diagnosis, though the former have lamented this decline while the latter have celebrated it.³⁹²

Another scholar has declared “[a]t home, the expansive and increasing uses of the rule of law are becoming a threat to democracy, freedom, and equality.”³⁹³ As the Western countries encourage transitional states to mirror the West’s idealization of its own attributes, the transitional countries instead mirror and imitate the unpleasant realities of some Western democracies.

For example, in the post-September 11 world, the attributes of democracy in the United States appear to be shrinking under the onslaught of a monarchical model of the presidency. As the Bush administration advocates the wide-ranging power of the presidency, administration officials have defended the right to torture prisoners,³⁹⁴ to subject Americans in the United States

391. See ANDREW WILSON, *VIRTUAL POLITICS* 33–48 (2005) (describing the illusion of democracy manufactured in Russia (where all politics appear to be virtual) and pointing to the difficulty of distinguishing between the real and the faux in a country where elections, political parties, and even political candidates may be hired for the roles).

392. TAMANAHA, *supra* note 213, at 60.

393. David Kairys, *Searching for the Rule of Law*, 36 *SUFFOLK U. L. REV.* 307, 318 (2003).

394. See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dept. of Justice, Office of Legal Counsel, to Alberto Gonzalez, Counsel to the President 46, (Aug. 1, 2002), available at <http://www.tomjoard.org/bybeememo.htm> (concluding that

to wiretapping and other surveillance without issuance of a warrant,³⁹⁵ and to indefinitely hold American citizens in detention without trial or contact with the outside world.³⁹⁶ Challenges to these policies brought to U.S. courts have garnered mixed results,³⁹⁷ and the U.S. populace has not risen up in anger to defend the threat to democracy and the rule of law.

The foregoing developments cast doubt upon the strength and nature of the rule of law in the United States and whether it can export “democracy” to transitional countries. The impact of the inherent contradictions between the United States’ stated desire to spread democracy and its geostrategic interests prioritizing regional security and stability³⁹⁸—that *someone* or some *group* be in control and available for negotiation—may instead serve to undermine democratic reform. Added to these doubts is the example the United States has set in its own recent national election experiences—not only the debacle of the 2000 presidential election, but also the deeper anti-democratic electoral structures³⁹⁹ that led to those events.

“torture as defined in and proscribed by [the relevant U.S. statute], covers only extreme acts. . . . [And where] the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure.”).

395. See, e.g., Jonathan Schell, *The Hidden State Steps Forward*, THE NATION, Jan. 9, 2006, <http://www.thenation.com/doc/20060109/schell>.

396. See, e.g., Joseph Margulies, *Dodging Justice*, 28 LEGAL TIMES 50, Dec. 12, 2005 (discussing the Bush administration indictment of Jose Padilla after his designation as an “enemy combatant” and imprisonment without charge for three years).

397. Compare *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that due process requires a U.S. citizen designated as an enemy combatant be given reasonable opportunity to contest his detention) with *Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006) (rejecting as moot U.S. citizen Jose Padilla’s challenge of his indefinite and unindicted detention by the U.S. military based on his unexpected indictment in civilian court after three years of confinement). But see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006) (holding military tribunals proposal to try individuals detained at Guantanamo violated the Uniform Code of Military Justice and the Geneva Conventions).

398. See CAROTHERS, *supra* note 26, at 5.

399. See Editorial, *Drop Out of the College*, N.Y. TIMES, Mar. 14, 2006, at A26 (expressing dissatisfaction with the antidemocratic effects of the United States’ electoral college institution and support for a proposed end run of its constraints by state legislatures that would not require a constitutional amendment).

The causes of Armenia's halting progress toward democratic reform and adherence to the rule of law are complex and intertwined. While none of the potential suspects for the role of joker in the pack would appear to be sufficient, standing alone, to halt democratic reform, these phenomena, interests and policies appear to have, in combination, perverted the course of democratic and rule of law reform in the Republic.

VII. CONCLUSION

Genuine democratic and rule of law reform will take place in Armenia only in the context of structural legal changes that ensure true separation of powers and the "free, equal and secret expression" of the will of the Armenian people.⁴⁰⁰ However, to date, the process of transition in Armenia can be likened to a vast hall of mirrors in which reality and illusion are inextricably entangled, and reality is nearly impossible to discern.

While mirrors typically reflect the truth—an image of reality—sometimes a mirror is used for other purposes. For example, anthropologist Victor Turner has described "magical mirrors of social reality [that] . . . exaggerate, invert, re-form, magnify, minimize, discolor, re-color, even deliberately falsify. . . ." ⁴⁰¹ Some uses of mirrors in Armenia include:

Illusions: it is in the nature of a magic mirror, such as that of the Mirror of Erised,⁴⁰² or the funny mirrors at a carnival show to create images that do not exist. Such may be the mirror through which the West perceives its own self-conceived image of idealized democratic perfection—a perfection that may, in reality, be merely an aspiration.⁴⁰³

400. See Franck, *Democratic Entitlement*, *supra* note 19, at 5. The statement in the text remains true, even in light of recognition that change in the legal framework, on its own, cannot affect such reform.

401. See TURNER, *supra* note 1, at 42.

402. See J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 213 (1997) (explaining how individuals who look into the Mirror of Erised see their heart's desire).

403. Inherent in this image is a hierarchical conception of political evolution, with Western capitalist democracies as the evolved entities toward which the transitional countries must aspire. See, e.g., Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 76–77 (2004) (addressing development in general, the authors note: "Development is rooted in an evolutionary myth that reduces history to a series of formal stages. . . . Western industrialized nations are at the pinnacle of this

Expectation of Flattering Imitation: The West looks at transitional countries and expects they will transform into entities that mirror the West's idealized conception of itself.

Employing the Magician's Tools: Transitional countries may adopt reforms that will create an image of the West, for the West. Members of the governing elite educated in the West, or through trainings in democracy and the rule of law funded by Western taxpayers, are familiar with the images the West yearns for and expects to see. They hold up theatrical "non-reform" reforms—new legislation, new constitutions that uphold Western norms, ratifications of international treaties—as evidence that their countries have come to mirror the fundamental legal and political norms espoused by the West.

A reform effort that does not succeed in looking through the smoke and mirrors and identifying the potential jokers in the pack—the various elements that contribute to Armenia's faltering transition—is doomed to perpetuate a formalistic superficial reform. For example, reform of the Constitution to provide for the separation of powers was achieved in 2005 via the plebiscite discussed in Part V.C. However, the nature of the campaign to amend the Armenian Constitution of 1995, the lack of opposition and popular input, and inadequate information to the electorate arouses grave suspicions that these amendments, too, were mere smoke and mirrors.

Mechanisms deployed to address the jokers in the pack will determine the future of democracy and the rule of law in the Republic. Now that the straightjacket of Executive oversight of the Judiciary has been formally removed, whether the Judiciary will assume an independent role as guardian of the rule of law in Armenia will become clear as the post-amendment jurisprudence of the courts develop. However, as Professor Frank Emmert noted: "[J]udges . . . have to learn to apply the letter and the spirit of their new and democratic laws and to be truly independent in their decisions."⁴⁰⁴ He advises that

edifice[.] and the nations of the Third World are necessarily subordinate to those at the apex."); see also discussion *supra* Part VI.B.3.

404. Emmert, *supra* note 187, at 301.

“functioning control mechanisms must be established via checks and balances, that is, a true division of power between the Legislature, the Executive and the Judiciary, and a better comprehension of the specific tasks of each branch of the divided state authority.”⁴⁰⁵ Professor Emmert further cautions that “[i]t is easy to see that the adoption of Western-style legislation and the organization of training seminars for judges and administrators about these new laws alone are not going to be enough to achieve a fundamental administrative and court reform, or a real change in legal culture.”⁴⁰⁶ In that regard, changes in the nature of Armenia’s legal education system may provide avenues for reform. These changes include, for example, the introduction of clinical legal education and a greater emphasis on international and comparative law.

The reality of endemic corruption is unlikely to be cured by constitutional reform alone. The pervasive corruption within the Judiciary and other areas of Armenian public life also must be targeted. However, it is difficult to devise a strategy that does not amount to mere smoke and mirrors, where the levers of power are almost certainly controlled by corrupt clientelist networks. However, as the current crop of Soviet-era judges and other public officials are replaced by individuals whose professional training and experience post-date Armenian independence, corruption in the Judiciary may decline. While that possibility may be undermined where participation in a corrupt system is necessary for accession to, and maintenance of, such offices, and newcomers may be subverted by the existing clientelist networks, the opportunities for incremental change may nonetheless exist. True rule of law reform will be possible with commitment by the governing and professional elites, as well as genuine grass roots engagement and popular power to participate in governance.

There is little hope for the advancement of democratic and rule of law reform while the Republic remains in a state of armed readiness because of the unresolved Nagorno-Karabagh

405. *Id.*

406. *Id.* at 302.

conflict. Coincidentally, the two other South Caucasian republics, Georgia and Azerbaijan, also held elections in quick succession in 2003.⁴⁰⁷ Via the Rose Revolution of 2003–2004, the Georgian people rejected the results of presidential elections that were widely perceived and condemned as unfree and unfair,⁴⁰⁸ and successfully demanded the readministration of those elections. In contrast, in Azerbaijan, dying strongman and autocrat, Heydar Aliiev, handed over the Presidency to his son through the mechanism of a stagemanaged and fraudulent presidential election.⁴⁰⁹ Locked in a hostile stalemate, neither Armenia's nor Azerbaijan's military may be able to afford to allow a flowering of democratic expression that might threaten the existing status quo.

407. See OSCE/ODIHR, GEORGIA, EXTRAORDINARY PRESIDENTIAL ELECTION IN GEORGIA, 4 JANUARY 2004, OSCE/ODIHR ELECTION OBSERVATION MISSION REPORT 1 (Feb. 28, 2004), http://www.osce.org/documents/odihr/2004/02/2183_en.pdf [hereinafter GEORGIA ELECTION REPORT] (discussing the presidential election in Georgia); Farhad Husseinov, *Eurasia: A Caspian Revolution*, WALL ST. J., June 17, 2005, at A9 (referencing the disputed 2003 presidential election in Azerbaijan two years earlier).

408. See GEORGIA ELECTION REPORT, *supra* note 407, at 1, 3–4.

In contrast to the 2 November 2003 parliamentary elections that were characterized by systematic and widespread fraud, the authorities generally displayed the collective political will to conduct a more democratic election process. . . . The 4 January 2004 extraordinary presidential election . . . was widely viewed as a test for the newly installed authorities to demonstrate their level of commitment to the democratic election process. In the minds of many, the election also served as a popular referendum on the events of 22–23 November, also known as the “Rose Revolution. . . .”

Id.

409. See Husseinov, *supra* note 407; Hugh Pope, *Pro-West Leaders In Georgia Push Shevardnadze Out*, WALL ST. J., Nov. 24, 2003. Widespread public protests were violently repressed by the police and military. *Id.* Parliamentary elections held in Azerbaijan in 2005, were condemned by international observers and local opposition leaders. C.J. Chivers, *Monitors Report Fraud in Azerbaijan Parliamentary Vote*, N.Y. TIMES, Nov. 8, 2005, at A3. Public protests were met with a repetition of the violent repression of 2004. C.J. Chivers, *Police Break Up Peaceful Demonstration in Azerbaijan*, N.Y. TIMES, Nov. 27, 2005, at A16. In contrast, Georgia's military did not intervene to quell the pro-democracy expressions of the Rose Revolution. Seth Mydans, *Foes of Georgian Leader Storm Into Parliament Building*, N.Y. TIMES, Nov. 23, 2003, at A14 (“Troops and the police, mostly armed with truncheons, blocked roads around Parliament and the nearby presidential offices but made no effort to prevent the storming of the building.”)

The contrast suggests that the ultimate resolution of the Nagorno-Karabagh conflict is a necessary pre-condition for real democratic and rule of law reform in the Republic. However, it is a resolution unlikely to come about as long as Armenia believes that its consolidation of control on the ground in Karabagh will strengthen its claim to the territory, and so long as the active support of the Diaspora creates disincentives for compromise. The helpless acquiescence of Western policy on the issue leaves little room for encouragement of a ready resolution.

Further complicating the prospects of resolution are the inherent contradictions in Western policy to Armenia and the Transcaucasus—on one hand urging and providing financial support for democracy and rule of law reform, and on the other, offering almost unqualified support to the incumbent administration so as to prevent the eruption of further hostilities in the region.

However, the joker in the pack *is* the trump card, the one card that may win the game. The Armenian Diaspora, earlier identified as a potential joker, may play the role of just such a trump card. In *Diaspora Bonds*, Professor Anupam Chander describes in the context of his Diaspora model paradigm, a positive role for Diasporas in their countries of origin: “[t]he model locates in [D]iasporas the possibility of building bridges across the world, between rich and poor countries and between liberal and illiberal societies. Diasporas offer the possibility of uniting the world through a web of personal and community loyalties. . . .”⁴¹⁰ The influence exercised by the Armenian Diaspora, both within Armenia as well as with respect to issues concerning Armenia in their various host countries, opens the possibility that active, educated, and farseeing intervention by the Diaspora may act as a stimulus and guide for fundamental transformation of the Republic’s democratic traditions and its adherence to the rule of law. In order to fulfill the role, the Diaspora may have to choose between the kneejerk defense of Armenia, and well-thought-out strategies that apply pressure to the appropriate levers of power.

410. Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1050 (2001).

The positive role of the Armenian Diaspora may already be reflected in the use of smoke and mirror mechanisms, described earlier in this Article, to obfuscate the reality of non-transformative reform. While the regime in Azerbaijan, for example, may be free to demonstrate wanton disregard for international electoral standards,⁴¹¹ Armenia's continued need for the support of its Diaspora may serve to constrain the ability to utilize similar tactics if the ameliorative smoke and mirrors devices are not also employed. The 2005 Constitution's avenue for Diaspora citizenship opens a path for greater Diaspora voice in the Republic.

Analysis of Armenia's post-Soviet experiences is replete with lessons and implications for Western countries that seek to spread democracy and the rule of law abroad. First is an appreciation of the dangers of lack of informed and long-term planning and of hubristic intervention and expectations. Facts on the ground, allegiances, power balances, and culture maybe all too difficult for the outsider to discern. Even the well-intentioned activity of an outsider attempting to foster democracy and the rule of law may tip the balance or change events in unintended and destructive ways. Second, lack of clarity, internal contradictions in, or delusions about its foreign affairs objectives on the part of a donor country can and will be exploited by the local individuals, entities, and groups that prioritize acquisition or retention of their own power over the wellbeing of their compatriots. Third, the admittedly-flawed but cherished democratic traditions of the West did not come easily,⁴¹² and more than 15 years of experience with the former Soviet republics makes clear that democracy cannot be imported wholesale into countries with different political traditions. Those who desire to foster transitions must empower the people as a whole, not only targeted categories of actors, such as judges and government officials. In the final analysis, democracy is about the polity. It is the people who can, will, and must determine the path of their future. Finally, even a superficial reading of

411. See, e.g., *supra* note 100 and accompanying text (contrasting the styles of Armenia and Azerbaijan).

412. Think, for example, of the compromises (including slavery and the slave trade) enshrined in the U.S. Constitution signed by the Founders.

American history reveals democratic traditions have come at a high cost, with periods of darkness followed by fundamental amendments to the Constitution—leading to the regulation and protection of the rights and freedoms so vaunted today. Transition in Armenia, as well as in other transitional countries, will be strengthened by similar organic domestic developments.

VIII. APPENDIX⁴¹³

413. University of Texas at Austin, Perry-Castañeda Library, Map Collection, Caucasus and Central Asia, http://www.lib.utexas.edu/maps/commonwealth/caucasus_cntrl_asia_pol_00.jpg (last visited Apr. 1, 2007).