ROLE AND POWERS OF THE NON-EXECUTIVE PRESIDENT IN THE REPUBLIC OF ARMENIA: UNFINISHED CONSTITUTIONAL TRANSITION FROM A SEMI-PRESIDENTIAL SYSTEM OF GOVERNANCE TO THE ARMENIAN PARLIAMENTARY DEMOCRACY

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Abstract

With the constitutional change of 2015, Armenia made an uncomplete transition from the semi-presidential system of governance to parliamentary democracy. Within the first chapter, this article presents the constitutional role, functions of the President of Armenia, and the powers vested in the President in accordance with the constitutional architecture that has been in place since 2015. The adequacy of constitutional status attributed to the President as well as the scope of the powers and duties are assessed given the formation of the Government, election and resignation of the Prime Minister, applicable electoral system, applicable regime of the dissolution of the Parliament, formation of autonomous bodies stipulated by the Constitution (Central Bank, Central Electoral Commission etc.), the given solutions in deadlock situations when the political majority is not able to secure 3/5th of the votes and elect a member of the politically neutral body, the powers given to the parliamentary minority, and the quality of the political discourse. The second chapter discusses what are the main expectations from the President's office, what is the aim of establishing a non-executive president based on the nature of the Armenian parliamentary democracy and adopted constitutional architecture? Considering the models

set out in the guidelines provided by the International IDEA as well as based on the legal comparative research, the second chapter suggests what discretionary powers should be given to the President so that he or she can act as constitutional arbiter but meanwhile prevented from becoming a player in the political game.

Keywords: Head of State, Non-Executive President in the Parliamentary Democracy, Discretionary Powers of the Non-Executive President, Constitutional Arbiter, Amendments to the Constitution.

With the constitutional change of 2015, the Republic of Armenia made a transition from the semi-presidential system of governance to parliamentary democracy. Former President Serzh Sargsyan, who initiated the change, stated on many occasions that he had no aspirations to become Prime Minister and the amendments should not be interpreted as a way for him to hold onto power. Despite that promise, in April 2018 the parliament of Armenia elected Serzh Sargsyan as the country's first Prime Minister after the transition to the parliamentary system. That election prompted demonstrations, marches, and other acts of civilian disobedience of an unprecedented scale paralyzing the work of public institutions which became known as the "Velvet Revolution" (Commission on Security and Cooperation in Europe, 2018). Serzh Sargsyan stood down as Prime Minister on 23 April 2018, and the National Assembly elected the leader of the revolution, Nikol Pashinyan, to the office. In December of the same year, Armenia held snap parliamentary elections, in which the political bloc led by Pashinyan won most seats in the parliament. During the campaign ahead of the 2021 snap parliamentary elections, which came about after the loss of the 2020 44-day Nagorno Karabakh war against Azerbaijan, Prime Minister Pashinyan promised a constitutional revision. Nikol Pashinyan once again secured a confident win in the elections. In

2022, the Prime Minister formed the Constitutional Revision Council (**the Council**) and subsequently the Constitutional Revision Commission (**the Commission**). The Council instructed the Commission that Armenia should remain a parliamentary democracy, but the Commission is supposed to provide its assessment as to the changes that the President's Office should undergo, if any.

Within the first chapter, this article presents the constitutional role, functions of the President of the Republic of Armenia (**the President**), and the powers vested in the President in accordance with the constitutional architecture that has been in place since the constitutional change of 2015. The adequacy of constitutional status attributed to the President as well as the scope of his or her powers and duties are assessed given the adopted procedure for the formation of the government, election of the Prime Minister, applicable proportional electoral system (a guaranteed stable parliamentary majority), the resignation of the Prime Minister and its legal consequences, the applicable regime of the dissolution of the parliament, formation of autonomous (politically neutral) bodies stipulated by the Constitution (Central Bank, Central Electoral Commission, Audit Chamber etc.), the adopted solutions in deadlock situations when the political majority is not able to secure the required $3/5^{th}$ of the votes and elect a member of the politically neutral body, the powers given to the parliamentary minority, and the quality of the political discourse. The second chapter of this article discusses what are the main expectations from the President's office, what is the aim of establishing a non-executive president based on the nature of the Armenian parliamentary democracy and the adopted constitutional architecture. Considering the models set out in the guideline provided by the International IDEA on Non-Executive Presidents in Parliamentary Democracies (**the Guideline** (International IDEA Constitutional-Building Primer 6, 2017)) as well as based on the legal comparative research, the second chapter suggests what discretionary powers should be given to

the President so that he or she can act as a constitutional arbiter but at the same time prevented from becoming a player in the political game.

Non-Executive President in the 2015 Constitutional Change

With the constitutional change of 2015, the powers and duties of the President have been almost entirely transferred to the Prime Minister. The Constitution exhaustively defines all the powers and duties of the President without enabling the Parliament to bestow the President with additional powers by voting respective laws. According to Article 123 of the Constitution, *the President is the head of the state and observes the compliance with the Constitution. While exercising his or her powers defined by the Constitution, the President is impartial, guided exclusively by state and national interests*. The Constitution does not underline that the President embodies the unity and longevity of the nation or the unity of the state which is common in parliamentary democracies. The Constitution neither contains any reference to the cultural heritage, the shared moral values, and aspirations of the people. The only reference in this regard can be found in Article 127 (3) of the Constitution which stipulates the text of the presidential oath. In the inauguration oath, the President swears to exert all his or her efforts into promoting the national unity. As to its main function as constitutional guardian, there is no guiding provision in the Constitution as to what principles and values the President should protect while observing the compliance with the Constitution, particularly when, for example, he or she considers the constitutionality of individual appointments submitted before him or her. Can we assume that the President while considering appointments based on the proposal submitted before he or she should be guided by the principles of transparency, integrity, and professionalism, look at the entire selection procedure, its competitive and merit-based nature, including assessing the

integrity and past of the nominees in question? The Constitution does not give any hint in this regard leaving it entirely at the mercy of the Constitutional Court.

Of more than a dozen discretionary powers, usually vested in the President in a parliamentary democracy, and listed in the Guideline, the President mainly has three of them:

a. to nominate justices of the Constitutional Court (to be appointed by a 3/5th supermajority in the Parliament);
b. to apply to the Constitutional Court requesting to assess the constitutionality of laws, proposals for appointments of ministers, supreme command of the Armed Forces, ambassadors (upon recommendation of the Prime Minister), judges (upon recommendation of the High Judiciary Council), and motions (granting pardon and citizenship, conferring awards), or return the motion and proposal, together with his or her objections, to the body that filed the proposal or the motion; (Para 2 of Article 139 of the Constitution)
c. presidential discretionary powers in deadlock situations when the political forces fail to reach an agreement and make an election within the politically neutral bodies provided by the Constitution (appointment in the Central Bank, Central Electoral Commission, Audit Chamber, High Judiciary Council, Television and Radio Commission, as well as the nomination of the Human Rights Defender and the Prosecutor General).

The President of Armenia neither plays a role during the appointment of the Prime Minister (despite the fact that the heads of the state in countries with a parliamentary system of governance often moderate the negotiations between the political forces, in certain cases pick a candidate and enable him or her to conduct negotiations and receive a vote of confidence), nor has

any say in the process of dissolution of the parliament[1] (Poghosyan & Sargsyan, 2016). According to the Constitution, the leader of the majority by virtue of law becomes a Prime Minister. If no political force gets most of the mandates, then a coalition can be formed in the specified period, and the leader of the latter becomes a Prime Minister by virtue of law. If a political coalition is not formed, then two political forces (alliances) with a greater number of votes go directly to the second round of direct elections[2]. It should be noted that the political forces have overcome the threshold after the first round of elections can join any of them or can keep their mandates and enter the parliament without participating in the second round of elections with any force. The leader of the political force, which has received a greater number of votes in the second round of elections, becomes a Prime Minister by virtue of law. This proportional electoral system is known as a guaranteed stable parliamentary majority, where the winner gets the secured majority, and the elections always end up with the declaration of the winner and the formation of the Government. This two-stage electoral proportional system is unique, its details are elaborated by the Electoral Code of Armenia. As of today, the guaranteed stable parliamentary majority constitutes 52% while at the outset it was 54%.

As clearly demonstrated, the non-executive president has the status of a mere observer in the entire process of the appointment

[1] With the constitutional change of 2015, the Parliament in Armenia is dissolved by virtue of law, automatically when the office of Prime Minister remains vacant, and no one is elected in line with the Constitution. The dissolution of the Parliament by virtue of law is unusual. The international constitutional practice demonstrates that the dissolution of the parliament is within the ambit of the powers of the head of the state who has some discretion in this matter. This was literally mentioned by the authors involved in the constitutional change of 2015.

[2] In the case when the first two political forces with a greater number of votes form an alliance, they go to the second round of the elections with the third political force or the political alliance united around the latter.

of the Prime Minister. Similarly, in case of the office of the Prime Minister becomes vacant (resignation, death etc.), the Constitution does not assign any role to the President. The parliamentary factions are entitled to present a candidate, who must get the support of most of the members of the Parliament (**MP**s), otherwise, the Parliament will be dissolved by virtue of law, automatically, and new elections will take place[3]. Many examples of the decisive role of the president in the comparative constitutional law can be cited such as Italy, where the president moderates the negotiations, and can give a mandate to a concrete leader so that the latter tries to form a government. As to the non-confidence vote against the Prime Minister, the Constitution introduced a constructive vote of no-confidence. The motion should contain an alternative candidate's name with no role assigned to the President. If the motion is voted, then the alternative candidate becomes a new prime minister.

In the process of adoption of laws, the President does not have the power to delay legislation pending further review and scrutiny or to suspend a bill that has been passed by the Parliament pending approval in a referendum. The President does not have discretionary powers when granting pardon, citizenship, or conferring honorary titles. As mentioned above, he or she should act on the submitted motion with two available options-return the motion with his or her objections (including applying to the Constitutional Court) or give a green light.

The role of the President in the formation of the politically neutral bodies stipulated by the Constitution is not significant. He or she can nominate a candidate for the justice of the Constitutional Court on the one hand and ensure interim nominations in the autonomous institutions stipulated by the

[3] The National Assembly is dissolved according to the Constitution, if the National Assembly does not elect a Prime Minister in the prescribed manner after the position of the Prime Minister becomes vacant or after the rejection of the Government's program (see Articles 92, 149 and 151 of the Constitution)

Constitution (deadlock situations) on the other hand. The Parliament is the ultimate decision maker, who elects by a 3/5th of the total number of votes the justices of the Constitutional Court and the judges of the Court of Cassation, the Prosecutor General, the Human Rights Defender, the members of the politically neutral bodies stipulated by the Constitution, as well as the chairs of the Central Bank, the Central Electoral Commission, and the Audit Chamber. Half of the members of the Supreme Judicial Council- legal scholars and other prominent lawyers are elected by the National Assembly, and the other half, professional judges, are elected by the General Assembly of Judges. There is no competitive and merit-based constitutional procedure in place for the election or short-listing of the candidates. Neither the joint formation of the election commission by the parliamentary majority and the minority, nor direct appointments by the parliamentary opposition or the opposition leaders is envisaged by the Constitution. The existing regulations set out in the Constitution refer only to the requirement of a 3/5th of the total number of votes. At first glance, it seems that the high threshold makes the political forces negotiate over the nomination process. However, two scenarios are possible. First, the ruling political force may have a 3/5th supermajority in the Parliament in which case the parliamentary minority theoretically has no role, which we have witnessed in the recent years after the constitutional change of 2015 became effective. The second scenario is when the political force in power does not have the required 3/5th and does not reach an agreement with the parliamentary minority. The constitutional solution then is focused on the President who should secure the interim nominations. Given that the President is elected by the political majority, the final say goes again indirectly to the political majority in power without leaving any leverage to the parliamentary minority. Considering that the President is appointed for a term of seven years, theoretically, it is possible that at a certain moment, there can be a president not elected by the political majority in power. However, given that

the interim candidates are not appointed by the President for a defined period, the Parliament can replace interim presidential nominees at any time. Within this constitutional design, many candidates would not agree to be temporarily appointed by the President, because they can be fired even before assuming the position. In other words, the existing system, in particular the lack of security of tenure, is not attractive for professional candidates. With little choice, the President will likely be forced to consider mainly the candidates supported by the political majority in power.

Apart from the discussed discretionary powers, the non-executive president holds several ceremonial powers such as accepting the credentials and letters of recall of diplomatic representatives of foreign states and international organisations, conferring the highest diplomatic and military ranks, etc. The Constitution is silent on his or her duties as a civic leader. The civic leadership functions of the president may include patronising arts and culture, supporting or encouraging charitable activities, visiting local communities, making speeches, and hosting cultural events (International IDEA Constitutional-Building Primer 6, 2017). The only reference in this regard can be found in Art 128 of the Constitution which states that the President may deliver an address to the National Assembly on issues falling under his or her competencies.

The Ceremonial Figurehead or Constitutional Arbiter with the Limited but Discretionary Powers?

When discussing the functions of the President, as well as the powers vested in the President for performing them, it is necessary to reveal the expectations from the Presidential office in the Armenian parliamentary governance. Particularly, what is the aim of establishing a non-executive president? Shall he or she, as a head of the state, be a ceremonial figurehead, or a constitutional arbiter, with a limited amount, but, nevertheless, with certain discretionary powers, closely associated with the

autonomous, politically neutral institutions established by the Constitution?

Before answering these questions, we need to look at the main features of the Armenian parliamentary democracy and compare it against the Westminster parliamentarism and the German model both often referred to by the Armenian drafters of the constitutional amendments of 2015. Lord Sumption, the former UK Supreme Court's judge, in his lecture at Oxford Martin School noted that the British parliament and other parliaments of the Westminster model are unusual among democratic legislatures. *Parliament is not just a lawmaker and an external check on governance, it is itself an instrument of the government. Its main function is to support the government or to change it for another that it can support. And that is reflected in the fact that the ministers sit in the parliament together with the parliamentary secretaries, they comprise about a fifth of the House of Commons* (Lord Sumption). The Armenian reality is different, the parliament is accepted as a lawmaker and external check over the government. Moreover, parliamentary sovereignty is not a prevailing principle of Armenian constitutional law, and the legitimacy of the government's actions does not entirely depend on the parliamentary sentiment. Second, when designing the office of the President, it is necessary to consider the arrangements made by the Constitution in their entirety, in particular, to take into account ‘’the entrenched regulations’’ that are unlikely to be changed such as the appointment of the Prime Minister without the involvement of the President, the automatic dissolution of the National Assembly, a constructive vote of non-confidence against the Prime Minister, etc. The introduction of these regulations has already widely restricted the role of the President. If the President does not have the necessary powers to be a civic leader and constitutional guardian with a significant role in the formation of the politically neutral institutions established by the Constitution, then the need for maintaining the office of the President may be questioned. This concern was also

raised many times by Armen Sargsyan, the first President of the Republic of Armenia in parliamentary democracy, who even cited the insignificance of powers as one of the reasons for his resignation. Moreover, there is no powerful local governance in Armenia (such as German federalism, British devolution, etc.). The Armenian Parliament does not have a second chamber, which would have been involved in the adoption of laws and could counter the first chamber of the parliament, preventing the latter from adopting populist bills to please the electorate. In such conditions, the Constitution makers should at least consider bestowing the President with powers delaying the bills pending further scrutiny and review as well as calling for a referendum. Otherwise, how to understand the situation when the President does not possess any course of action against the bill adopted with irregularities which do not amount to unconstitutionality? By the way, this concern was also raised by the European Commission for Democracy through Law in its first opinion issued on the Draft Amendments to the Constitution of 2015 (CDL-AD (2015) 037).

As discussed in the 1st chapter, there is no guiding provision in the Constitution as to what principles and values the President should protect while observing the compliance with the Constitution, particularly when, he or she considers the constitutionality of proposals and motions. The Constitution should elaborate and enshrine that the President observes the compliance with the Constitution, protects the rule of law, and contributes to the implementation of principles of transparency, integrity, responsibility, and professionalism, particularly in the formation of public administration. With the strong statement in the Constitution, the potential constitutional disputes related to the scope of the presidential powers will likely be resolved in favour of the President.

A non-executive president should be closely associated with politically neutral institutions established by the Constitution. It is of paramount importance to increase the role of the President in

ensuring the political neutrality of these autonomous bodies and the transparency of the appointments with professionals of high integrity. The President may have multifaceted participation nominating candidates before the National Assembly as a result of the competitive and merit-based selection, making direct appointments to these institutions as well as providing interim nominees when the political factions of the National Assembly have not been able to reach an agreement over a particular nomination and the position remains vacant. As discussed in detail in the first chapter, in line with the current constitutional regulations the President has only the power to nominate a candidate for the justices of the Constitutional Court and plays no role in the formation of the autonomous institutions stipulated by the Constitution. It is necessary to consider, first, empowering the President based on a competitive and merit-based selection process to directly appoint justices of the Constitutional Court, Chairs of the Central Electoral Commission, the Central Bank, and the Audit Chamber[4] (Constitution of Estonia). Secondly, when the National Assembly has not been able to make a selection for the autonomous institutions stipulated by the Constitution (considering that a 3/5th of the total number of MPs is required for the election, such situations may occur often in the future), it is recommended that the President make interim nominations until the convocation of the newly elected National Assembly, but not less than for two years. With these amendments, the National Assembly will be able to come back and make its selection after two years, while it is also a sufficient time for interim nominees to prove themselves in those positions and enjoy a relevant security of tenure. Finally, from the

[4] The President of Estonia is entitled both to make direct appointments such as the appointment of the president of the bank of Estonia on the recommendation of the board of the Bank of Estonia and nominates candidates for the position of Auditor General, Chairman of the Board of the Bank of Estonia and Chancellor of Justice for consideration of the Parliament of Estonia.

perspective of ensuring the political neutrality of the autonomous institutions stipulated by the Constitution, the President should be bestowed with the power to provide a legally non-binding advisory opinion to the National Assembly when the latter considers terminating the mandate of the member of the politically neutral body for his or her unlawful engagement in the political activities.

As a civic leader, the President should speak about the issues bothering the public the most. He or she should act as the conscience of the people, provide a public platform for debate, and contribute to the improvement of the political discourse in society. The parliamentary form of governance has implied a complete transformation of the relationship between the legislative and executive in terms of the balance of powers and political pluralism, as the "dividing line" passes mainly between the political majority and the parliamentary minority. The legislative and executive powers are somehow merged because both branches are virtually in the same hands (Divellec, 2016). Hence, the relationship between the political majority and the parliamentary minority should be viewed from the perspective of the leverages provided to the parliamentary opposition, discussing the effectiveness of the prescribed instruments, and the steps necessary for making their implementation more effective. Furthermore, modern political philosophy places the "procedural concept of democracy" at the heart of democracy when the democratic nature of the decision is explained not by the will of the majority or by the truth revealed by the expert but based on the quality of the process of making that decision. This concept brings into focus the ethics of discourse and the rules and culture of interaction and decision-making among the political forces (Viala, 2014; Habermas, 1997; Habermas, 1987). Therefore, the existing constitutional regulations should be assessed as to what extent they ensure the high quality of the discourse, the implementation of the basic principles of parliamentarism, those of publicity and debate (Schmitt, 1988; Jouanjan, 2016). The

established constitutional architecture often labelled prime ministerial governance or uncompleted transformation into the parliamentary democracy need undergo substantial changes to ensure high quality of public discourse, the constitution makers should tackle the balance of powers and consider giving a significant role to the non-executive president. Saying this, the President however should display leadership in limited cases, intervene in crisis situations, have a necessary arsenal of powers to ensure the compliance with the Constitution and protect the political neutrality of the state through his or her strong association with the institutions that are supposed to be non-partisan. The President should not possess powers, which will enable him or her to impose a political agenda; should not have the right to initiate legislation, preside over the Security Council, and be the commander-in-chief of the armed forces of the Republic of Armenia.

The President can play the role of an additional filter, who is guided by state and national interests, and in tandem with the parliamentary minority he or she can largely contribute to the implementation of two main principles of the parliamentarism and improvement of public discourse. The Constitutional makers can consider bestowing him or her with the powers to delay legislation pending further review and scrutiny, suspend a bill that has been passed by the Parliament but that has not yet received the presidential assent, pending approval by the people in a referendum, return the draft bill to the National Assembly for additional consideration. He or she should carry out these functions if requested to do so by a specified number of MPs and limited times a year. It is worth mentioning that in the Nordic countries (Sweden, Denmark, and Latvia), the minority delay mechanisms and minority-veto referendums have a huge moderating effect. Governments try to modify their proposals in advance to accommodate any specific objection or concern the opposition may have. These tools have contributed to the high quality of public discourse. To avoid a year of delay, the

Government in Sweden tries to respond more carefully to events, with some attempts to build consensus (International IDEA Constitution-Building Primer 22, 2021). Different scenarios of constitutional amendments can be envisaged:

- The President can return the bill on grounds other than unconstitutionality if at least a 1/3rd of the membership of the Parliament requested the President to do so[5].
- The President can suspend the bill that has been passed by the Parliament pending approval in a referendum (i.e. call for a referendum) if at least a 2/5th of the MPs appealed to the President.
- The President can delay legislation pending further review and scrutiny. Given the best practice of the Nordic countries, there can be two separate regimes: one for the bills affecting fundamental human rights and freedoms that can be suspended for six months if at least a 1/3rd of the MPs requires so and any bill can be suspended for up to two weeks if a 1/6th of MPs wishes to do so. The purpose of this delay is to draw the attention of civil society, to put the bills under intensive scrutiny, and force the Government to negotiate with the opposition, particularly when fundamental human rights are at stake.

While reconsidering the balance of powers between the political majority and parliamentary minority, and designing additional mechanisms for the improvement of public discourse, the constitution makers should not neglect the office of the President and consider bestowing him or her with powers and duties sufficient to generate a debate. The President should be able to speak about the issues that bother the public the most, he or she should act as the conscience of the people. It is

[5] All the figures are provisional and can be reconsidered. The idea is to fix a specific number of the MPs who applies to the President with a specific request (return a bill, suspend a bill or call for a referendum).

recommended to consider the following additional powers for the President by the Constitution:

- The power to address the public, and attend the sessions of the Parliament, and its committees. The president should be entitled to make a speech whenever he or she decides to do so.
- The right to participate in the sessions of the Security Council, to require the Government and its members to come up with a report on any issues that fall within the ambit of his or her powers. This should not be considered an element of political responsibility typical of presidential or semi-presidential forms of governance, the non-executive president seeks information in order to be able to generate an effective public debate.
- The national values, recognized as such by the Government (the Byurakan Astrophysical Observatory, The Armenian Genocide Museum-Institute, Mesrop Mashtots Institute of Ancient Manuscripts), along with natural, historical and cultural monuments should be under his or her patronage. Furthermore, the participation of the President can also be envisaged in the selection of the President of the National Academy of Sciences. It is worth mentioning that the President of Albania nominates the Chairman of the Academy of Sciences and the rectors of the universities (Art 92 (g) of the Constitution (Constitution of Albania)) while the President of Hungary confirms the President of the Hungarian Academy of Sciences and the President of the Hungarian Academy of Arts in his or her position (Art 9 (3) (l) of the Constitution (Constitution of Hungary)).

Given that it is impossible to predict the whole spectrum of issues that might arise, where the involvement of the Office of the President might seem reasonable and desirable, it is recommended that the Constitution does not exhaustively define all the presidential powers and leave room to the Parliament to

bestow the President with additional duties in line with the presidential functions stipulated by the Constitution.

Conclusion

The non-executive president of the Republic of Armenia holds mostly ceremonial powers with little guidance and regulations coming from the Constitution. The Constitution stops short of declaring the President as a symbol of national unity and does not stipulate his or her powers as a civic leader. As far as his or her status as a constitutional guardian is concerned, it is not clear how far the President can go in observing the compliance with the Constitution, particularly while approving the appointments in specific positions or acting on motions. As to the discretionary powers that the Constitution vests in the President as a constitutional arbiter, it is evident that they are weak and the main question that remains to be answered is can we afford to have a head of the state with little powers within the new constitutional design, what the main expectations from the Office of the President are? While the dividing line between the political majority and parliamentary minority should be the main focus for further constitutional reforms, to complete the transition into a parliamentary democracy the Office of the President should undergo substantial changes given the cultural perception of the leadership as well as the main current constitutional regulations on the formation of the Government, electoral proportional system, dissolution of the Parliament and its legal consequences, a constructive vote of non-confidence against the Prime Minister. The introduction of these regulations has already widely restricted the role of the President. If the President does not have the necessary powers to be an efficient civic leader and constitutional guardian with a significant role in the formation of the non-political neutral institutions established by the Constitution, then the need for maintaining the office of the President will likely be questioned.

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