



POWERS OF THE PRESIDENT IN THE RUSSIAN FEDERATION AND THE REPUBLIC OF AZERBAIJAN

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Abstract

The current work tries to show the relevant place of powers of the presidents in the Russian Federation and the Republic of Azerbaijan in light of the traditional notion of separation of powers, trying to show which constitutional system is closer to the initial intent of promoters of the doctrine of separation of powers. The paper compares the most essential powers of the presidents in two systems in pursuance of its purpose. The main finding of the work is that even though both systems omit violations of the doctrine of separation of powers, that the constitutional system of the Republic of Azerbaijan is closer to the traditional notion of separation of powers than that of the Russian Federation.

“In questions of power, then let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution” – Thomas Jefferson, 1798.

Introduction

One of the central notions of the doctrine of separation of powers is that the state power shall be divided among three state branches – legislative, executive and judicial. The role of each of them is crucial for the constitutional system, since the legislature enacts, the executive implements it and the judiciary challenges the implementation for lawfulness. As we can see, the executive stands right in the middle, because it will be meaningless for the legislature to enact, if the enactment is not implemented and impossible for the judiciary to challenge an unimplemented enactment (taking into account that the law is constitutional from the enactment). So as we can see, the executive branch has a very important and at the same time central role in the whole constitutional system and provides for the interplay between the state branches.

The idea of promoters of the doctrine of separation of powers was that the state power shall be divided equally among all three state branches with a carefully crafted system of checks and balances, because otherwise it would turn into a mere tyranny of one branch. Here, it is even more crucial that the executive has certain powers that do not overlap with the powers of other state branches, because if the executive has law-making and judicial powers, then, once again, the state power will be consolidated in one hand. Moreover, at the present moment, the democratic countries of the world deem it necessary to split the executive power between the president and the government (i.e. Cabinet of Ministers), so that to make it partially accountable before the legislature.

Where the executive is headed with a strong president, there grows the peril of encroachment by the president upon other branches, by excessively exercising power over the legislature, the judiciary and the government. Whenever the president is endowed with such amount of powers over the other state branches, there is not only divergence from the principle of separation of powers, but also a danger of establishment of an autocratic rule. This phenomenon has more dangerous effects in developing countries, facing transition to democracy, such as the Russian Federation and the Republic of Azerbaijan, which have both impractically balanced system of separation of the state power and insufficient practice of democratic statehood.

Comparison of presidential powers in two hereinabove mentioned countries is of special interest, since these two countries share the common past, experience transition to democracy, have close economic and political relations, similar legal systems, weak civil society, etc. This issue represents a special interest for the Republic of Azerbaijan, first, since Azerbaijan re-established its independence from the Soviet Union and had an opportunity to develop separately, because before it constituted a small part of the big empire and actually had no right to develop independently from Moscow. Secondly, the interest and importance of this topic is explained by the fact that, unlike the Russian Federation, there is no developed legal scholarship on powers of the president of the Republic of Azerbaijan and any research in this field today may result positively in the future. Moreover, if we compare the exposure of these countries to Western democratic values, their economic state and state governance experience, we will see that Russia is far ahead of Azerbaijan. But, while it's believed that both of them represent a presidential

rather than a parliamentary system,¹ it is also true that these two states have clear differences in their constitutional systems and the role of the presidents is substantially different in the scheme of separation of powers.

It becomes evident from the above paragraph that the purpose of this paper is to compare powers of the presidents of two countries, essential for the doctrine of balanced separation of powers, and try to show which constitutional system is closer to the traditional notion of balanced separation of powers. The paper will deliberate from legal point of view on such powers of the presidents as law-making, judicial, veto, emergency powers and powers over the parliament and the government (the appointment powers of the presidents will not be dealt separately, since the paper indirectly deals with them in different parts).

The paper will be presented in four consecutive chapters. The first part of the first chapter will introduce to a reader the basic notion of doctrine of separation of powers, its historical development, forms and key features, by providing examples of notion mainly from the American philosophers. The second part of the first chapter will elucidate on the process of constitution-making and on the division of the state power in two above-mentioned countries. Building the first chapter in this sequence comes from the necessity of showing a reader the role of presidential powers in the actual division of powers and in constitution-making in both countries. The second and third chapters will describe powers of the presidents in the Russian Federation and the Republic of Azerbaijan respectively and the fourth chapter will compare both countries, trying to show which constitutional system is more in concordance with the doctrine of separation of powers. Finally, the conclusion

¹ Actually these two countries are “semipresidential in structure, but presidential in practice.” See THOMAS M. NICHOLS, *THE LOGIC OF RUSSIAN PRESIDENTIALISM* 9-10 (The Carl Beck Papers in Russian and East European Studies, no 1301, 1998)

will sum up the whole paper and will try to show which constitutional system adheres more to the traditional doctrine of separation of powers.

Chapter 1 – Concept of separation of powers and constitution-making in the Russian Federation and the Republic of Azerbaijan

1.1 – Concept of Separation of Powers

Today, almost all scholars would agree that the doctrine of separation of powers is a central institution of modern constitutionalism and one of the prerequisites of democracy. The notion of separation of powers as a core concept of a modern statehood comes not from the American Revolution, but from earlier works of Locke,² Blackstone, Montesquieu³, etc (further developed by Madison and Jefferson). One of the merits of the American Revolution is that during the constitution-making process, the founders managed to use the progressive ideas on separation of powers and drafted the Constitution as a document representing this institution in a carefully-crafted and effective mechanism.

Professor John Braithwaite dates the practice of separating powers at least from the date of the Code Hammurabi, describing it as a deterrent both for the subjects of the king and

² Unlike contemporary scholar, Locke viewed the legislature as the “supreme” power, since it had direct legitimacy from the people and it established general rules, which were to be implemented by the executive. See RICHARD BELLAMY, THE POLITICAL FORM OF THE CONSTITUTION: THE SEPARATION OF POWERS, RIGHTS AND REPRESENTATIVE DEMOCRACY [hereinafter *Bellamy, The Political Form*], reprinted in THE RULE OF LAW AND THE SEPARATION OF POWERS 257 (Richard Bellamy ed., Dartmouth Publishing Company, 2005); ERIC BARENDT, SEPARATION OF POWERS AND CONSTITUTIONAL GOVERNMENT [hereinafter *Barendt*], reprinted in THE RULE OF LAW AND THE SEPARATION OF POWERS 277 (Richard Bellamy ed., Dartmouth Publishing Company, 2005).

³ Montesquieu does not introduce the doctrine of separation of powers, rather he “synthesis” it with three other elements: mixed government (combination of monarchy, aristocracy and democracy), balance of power and system of checks and balances. He created this kind of combination in order to “avoid some of the problems with the pure doctrine [of separation of powers].” *Bellamy, The Political Form*, supra note 2, at 257

king himself.⁴ The entrenchment of separation of powers in the United States came even before the revolution, when the liberating States were adopting various Declarations and Bills. For instance, the necessity of separateness and distinction of state powers from each other can already be found in Article VI of the Maryland Declaration of Rights of 1776⁵ and in Article V of the Virginia Bill of Rights of 1776.⁶ Later, Article 16 of the French Declaration of the Rights of Man of 1789, which is exemplified by most scholars and is one of the central documents of the French Statehood, declared that:

A society in which the guarantee of rights is not assured, nor the separation of powers provided for, has no constitution⁷

The lack of preciseness in the definition of Article 16 entailed no specific framework for distributing the power among state branches, which made the definition flexible and applicable to different circumstances. Rather, the purpose of the definition was to eliminate a possibility of concentration of governmental powers in one body,⁸ which is still the central requirement of the modern notion of separation of powers.

In modern constitutionalism people is the only source of power and the latter should be exercised for the people's benefit. This maxim cannot be reversed and subordinate people before the power. The social compact between the people and the government, as defines Locke, gives the government as much power as it is necessary for securing the rights of the people, including their life, liberty and property.⁹ The government cannot deprive people of

⁴ See JOHN BRAITHWAITE, ON SPEAKING SOFTLY AND CARRYING BIG STICKS: NEGLECTED DIMENSIONS OF A REPUBLICAN SEPARATION OF POWERS [hereinafter *Braithwaite*], reprinted in THE RULE OF LAW AND THE SEPARATION OF POWERS 297 (Richard Bellamy ed., Dartmouth Publishing Company, 2005)

⁵ *Maryland Declaration of Rights of 1776* (visited April 3, 2007)

<<http://www.lonang.com/exlibris/organic/1776-mdr.htm>>

⁶ *Virginia Bill of Rights of 1776* (visited April 3, 2007) <http://www.constitution.org/bor/vir_bor.htm>

⁷ *French Declaration of Rights of Man of 1789* (visited April 3, 2007)

<<http://www.theorderoftime.com/info/humanrights1789.html>>

⁸ See GERHARD CASPER, SEPARATING POWER, ESSAYS ON THE FOUNDING PERIOD (Harvard University Press, 1997)

⁹ See BERNARD H. SIEGAN, DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM 5 (George Mason University Press, 2nd ed., 1994)

their rights, simply for two reasons: first, the social compact does not provide for it and, secondly, the government has fiduciary role, which purpose is to secure rights of the people.¹⁰ Here, the doctrine of separation of powers is designed to avoid the concentration of power (given by the people) in one hand and to separate and distinguish it into three branches, legislative, executive and judicial. In other words, this separation is to guarantee that those who formulate laws are different from those who implement it and challenge it.¹¹ Further it requires that these three branches of state power shall be exercised by three separate and independent state agencies. For the drafters of the American Constitution, introduction of separation of powers, judicial review and system of checks and balances were designed for the purpose of protecting the liberty of an individual in his personal, professional and business life, because “liberty was regarded as providing the greatest encouragement to human progress.”¹²

The division of state power into three branches is justified by the fact that for the proper functioning of an organized state, laws are needed, which will regulate and bring order into the society. For this purpose, the state needs a body that will adopt these laws, implement them and justify them, if they are challenged. One body cannot be entrusted with all these powers, since it cannot stay impartial at the same time. The following excerpt from the Federalist Paper 47, illustrates this problem very clearly:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.¹³

¹⁰ *Id.*

¹¹ Bellamy, *The Political Form*, *supra* note 2, at 254

¹² SIEGAN, *supra* note 9, at 6

¹³ See THE FEDERALIST PAPER NO. 47 (James Madison)

This passage shows the importance of separating powers for the purpose of preventing tyranny and providing for a more reliable governmental organization.

The doctrine of separation of powers mentioned above can be referred as a “pure” separation of powers. Maurice Vile has identified three components of “pure” separation of powers doctrine: functional distinction between act of the legislative, judiciary and executive; division of government into three separate agencies; and, impermissibility of serving in more than one of the agencies.¹⁴ While these three components are prerequisites of separation of powers, in reality the governmental functions are so complicated and so intertwined that sometimes it becomes very difficult to distinguish between them and one body executes functions of other bodies. Take for instance, the judiciary which also legislates when it renders a decision or the executive which also legislates when it implements laws by creating rules.¹⁵ State branches cannot operate in isolation; otherwise their work will be ineffective and may be oppressive itself. This conclusion was also affirmed by decisions of the Supreme Court of the United States, when it stated that “hermetic sealing off of the three branches of the Government from one another would preclude the establishment of a Nation capable of governing itself effectively”¹⁶ and that “we [the Court] have never held that the Constitution requires that the three Branches of Government operate with absolute independence.”¹⁷ It is already accepted that cooperation and coordination of state power between the state branches is one of the main features of the modern notion of separation of powers.

¹⁴ Bellamy, *The Political Form*, *supra* note 2, at 254

¹⁵ *Id* at 256

¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)

¹⁷ *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988)

Besides functioning separately, usually each branch of the government has certain authority over the other and can restrain them at certain points. The purpose of this kind of authority over the other branches is that it “binds” the branches at certain points, makes them subject to other branches.¹⁸ This system, known as a system of checks and balances, is intended not to make dependent the branches of the government, rather to provide for a system that will not permit one branch to dominate and subordinate other branches, and ultimately, is intended to disperse the governmental authority and eliminate arbitrary rule,¹⁹ so that it does not consolidate in one branch. The system of separation of powers with checks and balances between state branches is usually called “partial” separation of powers.²⁰ Put James Madison’s words, the government should be structured so “that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”²¹ In fact, the system of checks and balances does not contradict the doctrine of separation of powers and is complementary to it. James Madison mentioned already in Federalist Paper 51 that it is necessary that “an ambition must be made to counteract ambition.”²²

The American constitutional system can serve as a good example of a division of state power with a carefully drafted system of checks and balances. Unlike Locke, who viewed the legislature as the “supreme” body representing the will of the people, the founding fathers decided to disperse the state power as evenly as possible between the state branches and were already aware of the “dangerous potential” of a strong legislature.²³ The

¹⁸ See ROBERT J. SPITZER, *PRESIDENT & CONGRESS* 11-12 (McGraw Hill Inc, 1993)

¹⁹ *Barendt, supra* note 2, at 279

²⁰ See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 77 (Oxford University Press, 2004)

²¹ See THE FEDERALIST PAPER NO. 51 (James Madison)

²² *See id.*

²³ Subsequently, the threat of legislative branch’s extending powers was described by James Madison in Federalist Paper 48, where he wrote that: “The legislative department is everywhere extending the sphere of

President's veto power of legislative bills, as a limitation on the Congress, is an example of the system of checks and balances in the USA and is desirable as a part of legislative process.²⁴ The veto power of the President is regarded as a deterrent on legislature's possible depraved propensity. The requirement to override the veto by 2/3 parliamentary majority, in order for the bill to become law, seeks to eliminate doubts on Congress' any depraved propensity and to make certain the people's will is truly represented by the Congress.²⁵ Finally, still if an oppressive law passed the legislative and executive branches, the judicial branch shall stand as a fire-wall and declare a particular measure inconsonant with the Constitution.²⁶

The doctrine of separation of powers not only provides for division of state power, but also sets the basics of interaction between state branches. For instance, one of the basic tenets is that the only body that can adopt obligatory for execution laws is the legislature and that the legislature cannot delegate its powers to other branches. The impermissibility of delegation of powers to other branches comes from the principle of *delegata potestas non potest delegari* ("delegated power cannot be delegated"), which means that even if the other branch, for instance the executive, gets delegation from the legislature, it is not a legislative power in essence, but rather administrative or regulatory.²⁷ The other major rule which comes after this principle is that the legislature adopts general rules,²⁸ which are to be implemented by the executive, who can establish rules and procedures for their carrying

its activity, and drawing all power into its impetuous vortex". See THE FEDERALIST PAPER NO. 48 (James Madison)

²⁴ SIEGAN, *supra* note 9, at 14

²⁵ *Id.* at 15

²⁶ Barendt, *supra* note 2, at 286

²⁷ See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 88 (University Press of Kansas, 4th ed., revised, 1997)

²⁸ This is known as a *Wesentlichkeitstheorie* in German law, pursuant to which the Constitutional Court requires that the legislature regulates the most important principles of state governance, including human rights provided by the Basic Law. See Barendt, *supra* note 2, at 281

out²⁹ and that the administrative legislation cannot serve as a substitute for laws which are adopted by the legislature.³⁰ Here the doctrine of separation of powers serves as a useful tool, because it permits the legislature to concern itself less with various administrative activities.³¹ Another important principle is that, for instance, the US Constitution puts forward a requirement before the President that laws be “faithfully executed,”³² which means that the President is under the obligation to interpret and implement laws pursuant to the intent and purpose of the Congress.³³

It’s worth saying that the doctrine of separation of powers is a mechanism which is designed not only for the decentralization and dispersal of state power into three separate and distinct branches, but also for a better governance and, in particular, protection of personal liberty which is definitely at peril, if it is in one hand. And finally, as mentioned James Madison, “in framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.”³⁴

²⁹ In the USA there is a concept that whenever there is no parliamentary act regulating the implementation of a law by the executive, the executive relies on implied powers to implement the law. James Madison formulated it in the Federalist Paper 44 in the following way: “No axiom is more clearly established in law, or in reason, than that whenever the end is required, the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included.” See THE FEDERALIST PAPER NO. 44 (James Madison)

³⁰ FISHER, *supra* note 27, at 107

³¹ CASPER, *supra* note 8

³² U.S. Const. art. I, § 3. See GEOFFREY STONE ET AL., CONSTITUTIONAL LAW (Aspen Publishers, 5th ed., 2005)

³³ FISHER, *supra* note 27, at 106

³⁴ See THE FEDERALIST PAPER NO. 51 (James Madison)

1.2 – Constitution-making in the Russian Federation and the Republic of Azerbaijan

1.2.1 – Russian Federation

After Mikhail Gorbachev's resignation in 1991, it was Boris Yeltsin who assumed command over Russia on December 25, 1991,³⁵ whose primary task was to reinforce the former empire, bring both political and economic stability to the country and establish a constitutional government. But the first attempt of establishment of a constitutional government was already made in the beginning of 1990's, when a special Constitutional Commission was set up for drafting a new constitution, which would have replaced the 1978 Soviet Constitution³⁶. The work of the Commission was obstructed by the opposition of the Soviet-oriented elite and by the political disorder, reigning over the state since the collapse of the Soviet Union. Finally, the draft was finalized and put to the referendum by 1993.

Till 1993 Russia was governed under the repeatedly amended Soviet Constitution of 1978, which originally established a parliamentary state.³⁷ On April 13, 1993, President Boris Yeltsin, trying to speed up the process of constitutional reform, proposed his new draft of a Russian Constitution with a strong executive branch, thus leading to wide debates over the adoption of the new Constitution in the former Congress of People's Deputies, elected in 1990.³⁸ Even though the proposal of the new Constitution was an abrupt

³⁵ See EUGENE HUSKEY, *PRESIDENTIAL POWER IN RUSSIA* 25 (Armonk, New York, 1999)

³⁶ See Robert Sharlet, *Transitional Constitutionalism: Politics and Law in the Second Russian Republic*, 14 WIS. INT'L L.J. 495

³⁷ *Id.*

³⁸ See Alexander Yakovlev, *Russia: The Struggle for a Constitution*, 7 Emory Int'l L. Rev. 277

movement, still bearing some vestiges of the former Soviet Union and facing opposition from the legislative branch, it was widely welcomed among the people.

Introduction of the new draft of the Constitution also marked the beginning of power struggle between the Parliament and the President. The essence of the problem was that pursuant to then in force constitution, it was the Congress of People's Deputies which was authorized to adopt a new constitution and not the people through direct elections. Yeltsin simply could not request the Congress to adopt his draft because the Congress was still dominated by those devoted to the former system and if the Congress rejected his request, then it meant that the Congress would remain in power till 1995.³⁹ Yeltsin decided to demand the Congress to grant him "extraordinary lawmaking powers"⁴⁰ and quite suddenly he granted that power.⁴¹ Then in view of the political turmoil, Yeltsin's support both by the military and the people, and the power to rule by decree, Yeltsin issued a decree No. 1400 on September 21, 1993, dissolved the Congress, introduced a period of "gradual constitutional reform" and called for general free elections on December 12, 1993.⁴² Certainly, opponents in the Congress responded to this by an attempt of a coup, but unfortunately failed.⁴³ Finally, President Yeltsin managed to get the new Constitution of the Russian Federation adopted by a disputed majority of the electorate and make it effective on the same day, December 12, 1993.⁴⁴

The 1993 Constitution of the Russian Federation providing for democracy, human rights and strong executive branch, also fixed the doctrine of separation of powers in

³⁹ *Id.*

⁴⁰ HUSKEY, *supra* note 34, at 26

⁴¹ Yakovlev, *supra* note 38, at 277

⁴² See Ara J. Balikian, *The New Russian Federation Constitution: A legal framework adopted and implemented in a post-soviet era*, 18 Suffolk Transnat'l L. Rev. 237

⁴³ HUSKEY, *supra* note 34, at 33-34

⁴⁴ *Id.* at 34-35

Article 10. Pursuant to this Article, the state power in the Russian Federation shall be divided among three independent state bodies – legislative, executive and judicial. Legislative power is represented by the Federal Assembly for the term of four years, which consists of a upper house, the Council of Federation, and a lower house, the State Duma (Art. 95). Judiciary is represented by law courts, on the top of which is placed the Constitutional Court⁴⁵ (note that unlike the US Supreme Court, the Constitutional Court of the Russian Federation does not resolve disputes between individuals and it is the Supreme Court of the Russian Federation that can serve as the highest instance for the settlement of private disputes)⁴⁶ and the executive branch belongs to the Government (Art. 110). Finally, the President acts as the Head of the State and is vested with other essential powers (Art. 80).

1.2.2 – Republic of Azerbaijan

First Azerbaijan declared its independence from Russian Empire on 28 May 1918, by establishing the Democratic Republic of Azerbaijan⁴⁷ which was ruling the country till the invasion of Russian troops in 1920. Already in late 80's when the Soviet Union was unwilling and impotent to solve illegal territorial pretensions and civil disorders of Armenians in Azerbaijan, the democratic forces of Azerbaijan began opposing the

⁴⁵ As it is known, only the state authorities have direct access to the Court, but not individuals. So the only way for an individual to have his case heard by the Constitutional Court is through lower courts, when they refer on a question of constitutionality to the Constitutional Court. So if the lower courts find no constitutional contradiction, then individuals are automatically barred from the access to the Constitutional Court and lose their right of appeal. But there is also another gap created by Article 104.1 of the Constitution, which provides for the Constitutional Court's, the Supreme Court's and the Higher Arbitration Court's legislative initiative. The matter is that here the objectivity of the Constitutional Court may be disputed in case if it has to rule on the constitutionality of the law, initially proposed by itself. See Amy J. Weisman, *Separation of powers in Post-Communist government: a constitutional case study of the Russian Federation*, 10 Am. U. J. Int'l L. & Pol'y 1365

⁴⁶ *Id.*

⁴⁷ See generally: VLADIMIR BABAK, DEMIAN VAISMAN, ARYEH WASSERMAN, *POLITICAL ORGANIZATION IN CENTRAL ASIA AND AZERBAIJAN* 21-24 (MPG Books Ltd, Bodmin, Cornwall, 2004)

communist regime (for instance, the number of democratically-oriented parliamentarians rose in the Supreme Soviet, who were causing a great deal of opposition). The new Parliament elected in 1990 announced about independence of Azerbaijan and elected Ayaz Mutalibov as the first President.⁴⁸ The activity of young democrats was upheld by the President Ayaz Mutalibov's signing of the Constitutional Act on the State Independence of the Republic of Azerbaijan on October 18, 1991.⁴⁹

The form of government of Azerbaijan was already discussed during the existence of the Democratic Republic of Azerbaijan and the presidential form of government was objected from the beginning by a most suitable candidate Mamed Amin Rasulzadeh.⁵⁰ The establishment of a strong executive was objected on the basis of Azerbaijan's belonging to the Orient, which tends to worship strong leaders and which consequently may hinder democratic reforms within the Azerbaijani society. However, in early 90's, the emerging presidential systems in the post-communist territory were perceived as a trend of that time and like others Azerbaijan also opted for a presidential system.

The first President Ayaz Mutalibov inherited the compliant executive authority from Soviet Azerbaijan. Later in 1992 he conceded his post to Abulfaz Elchibey, the leader of the then growing National Front of Azerbaijan.⁵¹ But both of them were unable to deal with persisting problems of Azerbaijan, including the invasion of Armenian troops, economic backwardness, political instability, etc and, soon after, proved to be ineffective. Azerbaijan needed a strong leader who could free it from all these misfortunes. The flee of the second

⁴⁸ See Fikret Bagirov, *Istoriia Parlamentarizma v Azerbaidjane*, (visited April 3, 2007) <<http://www.azhumanrights.org/cgi-bin/e-cms/vis/vis.pl?s=001&p=0035&n=000039&g=>>>

⁴⁹ See *Istoriia Parlamentarizma*, (visited April 3, 2007) <<http://www.demaz.org/cgi-bin/e-cms/vis/vis.pl?s=001&p=0073&n=000012&g=>>>

⁵⁰ See Rahman Badalov & Niyazi Mehdi, *The Political Insitutions of Azerbaijan: a dichotomy between text and reality*, (visited April 3, 2007) <http://www.idea.int/europe_cis/upload/Badalov+Mehdi_en.pdf>

⁵¹ VLADIMIR BABAK, DEMIAN VAISMAN, *supra* note 47, at 27

president enabled election of Heydar Aliyev,⁵² the first Deputy Prime of the former Soviet Union, as a new President of the Republic of Azerbaijan by the Parliament on June 24, 1993.⁵³

Azerbaijan re-gained its independence from Soviet Russia, declared its independence and restored itself as a continuation of the Democratic Republic of Azerbaijan (1918-1920). There is a reason to state that the Republic of Azerbaijan is a continuation of the Democratic Republic of Azerbaijan. The matter is that the Preamble of the Constitutional Act on the State Independence of the Republic of Azerbaijan of October 18, 1991, directly states the continuity of independent Azerbaijan from Democratic Republic of Azerbaijan. Later, when the 1995 Constitution was adopted, its Preamble⁵⁴ deliberately took as a basis the Constitutional Act on the State Independence of the Republic of Azerbaijan of October 18, 1991, thus, first reaffirming the continuity of the Republic of Azerbaijan, and secondly, reaffirming the principles contained within the Constitutional Act.⁵⁵

The Constitution itself was drafted by a special commission headed by the President Heydar Aliyev.⁵⁶ Foreign constitutions and their statehood practice were researched by the drafters of the constitution and in the end it was decided to provide for a presidential republic. The draft of the Constitution was adopted by the majority of the population on the

⁵² At that time he served as the Deputy Chairman of the Supreme Council of Azerbaijan, who was invited by the President Abulfaz Elchibey. Bagirov, *supra* note 48.

⁵³ See generally: *Id.*

⁵⁴ The text of the Preamble follows: "Continuing the centuries-long statehood traditions, taking as a basis the principles expressed in the Constitutional Act "On the State Independence of the Republic of Azerbaijan", desiring to provide prosperity and welfare of the whole society and each individual, wishing to establish freedom and security, understanding the responsibility before the past, present and future generations, using the right of its sovereignty declares solemnly its following intentions..."

⁵⁵ See A Djafarov, *Razdelenie vlastey po Konstitutsii Azerbaydjanskoy Respubliki*, (visited April 3, 2007) <<http://law.edu.ru/doc/document.asp?docID=1120588>>

⁵⁶ See Murtuz Alaskarov, *Mustaqil Dovlatimiz: 87 il onca va bu gun*, (visited April 3, 2007) <http://www.azerbaijan.az/_StatePower/_LegislativePower/legislativePower_01_a.html>

referendum of November 12, 1995.⁵⁷ Adoption of the Constitution, which included the principles of democratic governance and the principle of separation of powers, was also welcomed by foreign countries.

Actually, the principle of separation of powers was not introduced for the first time by the Constitution, rather it was already proclaimed in Article 13 of the Constitutional Act on the State Independence of the Republic of Azerbaijan.⁵⁸ The current Constitution reinforces this principle in its Preamble and also fixes it in Article 7. Section 3 of Article 7 states that: “State Power in the Republic of Azerbaijan is based on the principle of separation of powers: Milli Majlis (unicameral body consisting of 125 members)⁵⁹ exercises legislative power, law courts exercise judicial power⁶⁰ and; executive power belongs to the President” and in the following section (Art. 7.4) states that “according to provisions of the present Constitution, legislative, executive and judicial powers interact and are independent within the limits of their authority”, thus constitutionally eliminating complete isolation and dependence of any state branch.⁶¹ And finally, Article 135 provides for the separation of powers in the Nakhichevan Autonomous Republic.

⁵⁷ See *Mnenie spetsialistov o Konstitutsii Azerbaidjana*, (visited April 3, 2007) <http://news.bakililar.az/news_mnenie_spetsialistov_o_2600.html>

⁵⁸ Rahman Badalov & Niyazi Mehdi, *supra* note 50

⁵⁹ See generally: Alaskarov, *supra* note 56

⁶⁰ The Constitutional Court of the Republic of Azerbaijan was set up to begin operating in 1997, but factually its operation began only in 1998. Initially only the government had access to the Constitutional Court, but as a result of amendment of Article 130 by a 2002 constitutional reform, physical and judicial persons were enabled to file complaints to the Constitutional Court to repeal unconstitutional regulations of the executive and local authorities, and rulings of courts. But even enactment of this change did not solve the problem, since local authorities were not given the right to file a complaint and citizens' complaints were dismissed under various pretexts. Rahman Badalov & Niyazi Mehdi, *supra* note 50

⁶¹ Moreover, Article 95 ties the legislative branch with other branches, since the Milli Majlis cannot use alone the powers envisaged in paragraphs 6 through 17 of Article 95, which ultimately makes it to cooperate with other branches. *Id.*

Chapter 2 – Powers of the President of the Russian Federation

2.1 – Powers over the Parliament

Unlike the USA, the President of the Russian Federation has power to dissolve the Parliament in certain cases. For example, the President has power to dissolve the Parliament, but only the State Duma (Art. 84 paragraph b and 109.1) and not the Federation Council. This could happen in two circumstances: first, when the Parliament rejects the candidate proposed by the President for the post of the Prime Minister of the Government (Art. 111 of the Constitution)⁶²; secondly, in case of the Parliament's no-confidence to the Government. Following the French model⁶³, the Constitution lists certain cases when the Parliament cannot be dissolved under any circumstances (Art. 109.3-5). But we must mention that the dissolution of the Parliament does not mean that the new Parliament will be favorable to the President. It may be quite otherwise, for example, when the President does not have the support of the majority of the electorate⁶⁴.

Another important aspect of the Parliament's dissolution is that it also runs against the principle of non-usurpation of power. The Constitution clearly states in Article 3 that:

1. The bearer of sovereignty and the only source of power in the Russian Federation shall be its multinational people 2. The people shall exercise their power directly, and also through the bodies of state power and local self-government 3. The Supreme direct expression of the power

⁶² The matter is that under the western doctrine of separation of powers, the government bodies must cooperate and compromise. But here the dissolution power of the President is not checked by the Parliament and he can propose the same person as much as he wants. If for the third time the Parliament does not agree with the President's nominee, then the President may disband the Federal Assembly. This provision in the Constitution gives the President little interest in cooperating with the Parliament. See Dana Dallas Atchison, *Notes on Constitutionalism for a 21st-Century Russian President* 6 CARDOZO J. INT'L & COMP. L. 239

⁶³ See Article 16 of the 1958 FRENCH CONSTITUTION, (visited April 3, 2007) <<http://www.assemblee-nationale.fr/english/8ab.asp>>

⁶⁴ Balikian, *supra* note 42, at 237

of the people shall be referenda and free elections 4. No one may usurp power in the Russian Federation. Seizure of power or usurping state authority shall be prosecuted by federal law

Invocation of articles on dissolution of the Parliament runs against the Constitution itself, which clearly states (Art. 3) that it is not the President who bears power, but the people, therefore, dissolution of the Parliament runs against the will of the people to be represented constitutionally for four years by a certain composition of the Federal Assembly.⁶⁵ In other words, for the President to disband the Parliament elected by the bearer of power (people) is to usurp the power.

2.2 – Law-Making Powers

The President of the Federation has also substantial law-making powers.⁶⁶ Article 90.1 of the Constitution provides that the President “shall issue decrees and orders” which “shall be obligatory for fulfillment in the whole territory of the Russian Federation” (Art. 90.2), only stipulating that they “shall not run counter to the Constitution of the Russian Federation and the federal laws” (Art. 90.3),⁶⁷ while strictly limiting the jurisdiction of both the Council of Federation and the State Duma (articles 102.2 and 103.2 respectively). Logically thinking we may come to a conclusion that the President can decree anything he wishes only if the Federal Assembly fails to adopt a certain piece of legislation and if there is no constitutional provision preventing him (the President) from doing so.⁶⁸ But at the same time this power may be used more rationally with the purpose of fast reaction to an

⁶⁵ Dallas Atchison, *supra* note 62, at 239

⁶⁶ Actually President Yeltsin used his constitutional power to legislate by decree in early days of the Republic. Although some of them had positive effect on constitutional implementation, most of them were in conflict with other decrees and laws of the Republic. President’s Chief of Staff Sergey Filatov began sequencing this field and by the beginning of the President Yeltsin’s second term, the President promised that the role of decrees will decrease gradually and will be substituted by laws. Sharlet, *supra* note 36, at 495

⁶⁷ NICHOLS, *supra* note 1, at 10

⁶⁸ Dallas Atchison, *supra* note 62, at 239

urgent problem,⁶⁹ only if it is not over-abused, because otherwise it will only strengthen the President's authority.

And finally, Article 84 (c) which provides that the President "announces a referendum" may also serve as a method of pushing forward his piece of legislation⁷⁰. This tool might be effective especially in case of a political turmoil and only if the President does not intend to abuse this power. The proposal adopted through referendum will have more legitimacy than the one adopted by the Parliament, and in case of adoption, will show the support of the President by the people. But now in light of a more stable situation, the use of this power by the President for the sake of legislating could not be justified (however, for the adoption of the 1993 Constitution, the President Yeltsin used exactly this technique, because otherwise it would have been impossible to adopt the current Constitution).

2.3 – Veto Power

Just like in the USA and France, the President of the Federation is given the right to veto laws adopted by the Federal Assembly. For instance, in the USA there is almost nothing a President can do, if the law was supported the second time by the Congress⁷¹. But here the Russian executive's right of legislative veto is closer to the French model, where the legislation cannot be implemented without President's issuance of decree and the Conseil Constitutionnel's determination of the proposal's constitutionality⁷².

Pursuant to Article 107.1 of the Federal Constitution, federal laws shall be submitted to the President for signing and making them public within five days after their adoption.

⁶⁹ Actually, the Russian President was granted the decree power in view of lack of stable legislative majority, which is a necessary prerequisite of parliamentary systems. HUSKEY, *supra* note 34, at 164

⁷⁰ Dallas Atchison, *supra* note 62, at 239

⁷¹ Balikian, *supra* note 42, at 237

⁷² Article 61 of the 1958 FRENCH CONSTITUTION, *supra* note 63

President has fourteen days to decide whether to sign them or not (Art. 107.2). In case the President refuses to sign, then the Parliament still has the opportunity to pass the bill with an absolute two-third majority of both chambers of the Parliament. If during the second vote the bill is sustained by the parliamentary two-third majority, then the President shall sign them in seven days and make them public (Art. 107.3).

But the Constitution is silent in case the President refuses to sign the Parliament's bill the second time. Adoption of the Trophy Art Laws can serve as a good example showing limits of the President's veto power.⁷³ This issue emerged when the President Eltsin refused the second time to sign the bill proposed and adopted by an absolute parliamentary majority. The problem was that there was no provision in the Constitution stating that after the second approval of the Parliament, the bill automatically comes into force and there was no provision declaring the refusal of the President to sign the bill the second time as unconstitutional. The Parliament referred the case to the Constitutional Court which ruled that the President may not neglect the will of the Parliament and obliged him to sign it into law (although note that later this issue re-emerged and, partially, that law was recognized void).⁷⁴

2.4 – Judicial Powers

Pursuant to Article 80.2 of the Federal Constitution, the President is responsible to “ensure coordinated functioning and interaction of all the bodies of state power”. Moreover, the President “may use conciliatory procedures to solve disputes between the bodies of state authority” (Art. 85.1) both on federal and subject state levels. It means that the

⁷³ See Alexander N. Domrin, «Trophy Art Law» as an Illustration of the Current Status of Separation of Powers and Legislative Process in Russia, (visited April 3, 2007) <<http://www.pvlast.ru/archive/index.216.php>>

⁷⁴ *Id.*

President has the constitutional right to interfere with the functioning of other branches of the state power, which is directly against the doctrine of separation of powers and which gives him a “disproportionate leverage”⁷⁵ against other branches of the state power. It must be noted that it might entitle the President to require that all governmental disputes be resolved by him and if he fails to do so, he still has the full discretion whether to “submit the dispute for the consideration of a corresponding court” or not. Finally, it must be noted that the President’s entitlement to such judicial prerogative is also directly against the other constitutional provision, namely, Article 118.1 which requires that only courts administer the justice in the Russian Federation.

Article 85 may also benefit the Government in case of adoption of financial bills. As required by Article 104.3 of the Constitution financial bills “may be submitted only upon the conclusion of the Government” meaning that the Parliament is obliged to consult with the Government the adoption of such laws⁷⁶. Here arises a question: what if the Government and the Parliament fail to cooperate and to adopt the bill? This gap can be filled only by the President’s conciliatory powers (pursuant to Art. 85.1). The provision may lead to the President’s abuse of this power and to a biased solution, favorable to the Government, but not the Parliament. Evidently, it would be more appropriate if the judiciary was entitled to this prerogative.

2.5 – Emergency Powers

Under the provisions of Article 87.1 of the Federal Constitution, the President is the Supreme Commander in-Chief of the Armed Forces of the Russian Federation and “shall

⁷⁵ *Id.*

⁷⁶ Dallas Atchison, *supra* note 62, at 239

introduce in the territory of the Russian Federation or in its certain parts a martial law and immediately inform the Council of the Federation and the State Duma” in case of aggression (Art. 87.2). But due to absence of the definition of the term “aggression” this provision gives even not so much, but still some discretion to the President to decide which situation could amount to an aggression.

The President Yeltsin used his emergency powers when the conflict in Chechnya was escalating. In view of absence of neither a federal law on the state of emergency nor the statute on martial law, Yeltsin enacted three decrees that regulated Russia’s military operations in Chechnya.⁷⁷ What is interesting is that there was declared neither martial law nor a state of emergency in Chechnya, nor the Federation Council’s approval was sought (pursuant to Art. 102), but the military operations began only “to restore constitutional order” under Article 80.2 of the Constitution.⁷⁸ Although later war decrees of the President were handed to the Constitutional Court for review on constitutionality, the Constitutional Court decided to dismiss petitions for political reasons.⁷⁹

2.6 – Powers over the Government

Russian Federation has a dual executive branch represented by the President and the Government. Article 110 vests the exercise of the executive power to the Government of the Russian Federation, which is headed by the Chairman of the Government, his Deputy and federal ministers⁸⁰. Although the Government may adopt decisions and orders in order to fulfill its obligations under Article 114, it must also “exercise other powers vested... by

⁷⁷ Sharlet, *supra* note 36, at 495

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Weisman, *supra* note 45, at 1365

the President” which he might take pursuant to Article 114.1 of the Constitution.⁸¹ Besides, the President of the Federation may rescind the decisions and orders of the Government “if they are inconsistent with the Constitution of the Russian Federation, federal laws and decrees of the President” (Art. 115.3). Here it would be more appropriate, first, if the Federal Assembly regulates the Government’s legislative authority, given the legislative nature of this entitlement (Art. 94), secondly, if the judiciary rescinds the decisions and orders of the Government, given the judicial nature of this entitlement (Art. 125).⁸²

Moreover, the President has a constitutional power to dissolve the Government and it worth mentioning that the Government may not even dissolve itself, because the President’s approval is still required (Art. 117) (note that unlike Russia, in France the President may terminate the tenure of the Government only upon the Prime-Minister’s tender of the Government’s resignation to the President).⁸³ Adding to this power the right of the President of the Russian Federation to chair the meetings of the Cabinet of Ministers (Art. 83), we may fairly say that the Government of the Russian Federation is under the substantial control of the President.

⁸¹ Dallas Atchison, *supra* note 62, at 239

⁸² *Id.*

⁸³ Article 16 of the 1958 FRENCH CONSTITUTION, *supra* note 63

Chapter 3 – Powers of the President of the Republic of Azerbaijan

3.1 – Powers over the Parliament

One of the features of the Azerbaijani constitutional system is that the President of the Republic is not vested with a right to disband the Milli Majlis. So once the Milli Majlis is elected by the people for the term of 5 years, it will serve the people for 5 years continuously (Art. 84). It cannot be disbanded neither in case the Milli Majlis rejects the candidate of the President for the post of the Prime-Minister (Art. 118), neither in case of vote of no-confidence to the Cabinet of Ministers (Art. 95, Section I, paragraph 14), nor in any other case. Rather the provisions dealing with the interaction between the President and the Parliament are mainly built on cooperation, where the President is obliged to call for elections to the Milli Majlis (Art. 109.1) and to give recommendations to the Milli Majlis (Art. 95).

3.2 – Law-making Powers

While the legislative power is implemented by the Milli Majlis (Art. 81), the Constitution also grants regulatory powers to the head of the executive, which in certain cases are very similar in nature to laws. Article 113 of the Constitution gives the President the right to issue decrees for “establishing general rules” and orders “as per all other questions.” Decrees and orders of the President are “obligatory for all citizens, executive power bodies, legal entities” pursuant to Article 149.4. The only limitation to the President’s regulatory power is its compliance with the Constitution and laws of the

republic (Art. 149.4). Taking into account that the Parliament has limited legislative powers pursuant to Article 94 of the Constitution and that Article 109.32 of the Constitution confers the President the power to “settle all other questions which under the present Constitution do not pertain to the competence of Milli Majlis and law courts of the Azerbaijan Republic,” we may come to a conclusion that first, the President may decree in any field, except those that explicitly pertain to the Parliament and secondly, the President may decree in the Parliament’s domain, only if the Parliament previously failed to regulate a certain issue by law. An example of the second conclusion is Article 30 of the “Law on Police,” which states that the President decides “all questions, rules and basis of presentation and conferment of special police titles,”⁸⁴ which is manifestly the domain of the legislative branch.

But at the same time the Constitution establishes another counter-balancing mechanism against abuse of the regulatory power by the President. First, even though the legislative domain of the Milli Majlis is restricted, the Constitution entitles it to broaden its domain by adopting a supplemental constitutional law (Art. 94.3). This means that the Milli Majlis can enable itself to legislate in all fields only: if it adopts a constitutional law authorizing itself for such power; if this new prerogative does not contradict the Constitution (for instance, President’s exclusive powers), and; if the parliamentary majority acts unanimously, in order to be able to adopt the constitutional law. And secondly, the supremacy of primary legislation is upheld by Articles 148.1 and 149.4 which provide for the hierarchy and priority of laws over decrees in case of their possible conflict (possible, if the Constitutional Court fails to find non-correspondence of decrees to laws (Art. 130.3)).

⁸⁴ Djafarov, *supra* note 55

Talking about the possibility of evading Parliament's consent and pushing the legislation through referendum, we must state that the Constitution limits the President's authority. First, the power to call for referendum does not solely pertain to the President; he shares it with the Parliament, so here they both have equal opportunities of promoting their legislation. Secondly, the questions that could be put to referendum are strictly limited by Article 3 of the Constitution (acceptance of the Constitution of Azerbaijan Republic and introduction of amendments; change of state borders of the Azerbaijan Republic). This provision deprives both of the branches to promote an ordinary legislation through referendum, which makes potent only the Parliament in this field. So it seems that the only way to influence the Parliament's legislative monopoly in ordinary legislation is through promulgation of laws, which is still not absolute (will be discussed below).

3.3 – Veto Power

The veto power of the President is expressed through the promulgation of laws, without which laws will not come into force (Art. 110.2). Drafts of adopted laws are presented to the President within 14 days after their adoption (Art. 97.1) and the President has 56 days to promulgate them (Art. 110.1). The President may object to a law and return it to the Milli Majlis "without signing together with his comments" (Art. 110.1). If the Parliament re-adopts the returned law ("by a majority of 95 votes laws that have been adopted by majority of 83 votes; and by 83 votes the laws that have been adopted by majority of 63 votes"), then the said law comes into force automatically, i.e. without President's signature. The only gap is that Article 110 does not specify whether the President's veto power is also applicable to constitutional laws.

3.4 – Judicial Powers

One of the significant powers of the President is his power to appoint judges. Article 109.9 provides that the President “submits proposals to the Milli Mejlis on appointment of judges of the Constitutional Court, Supreme Court and Court of Appeals of the Republic of Azerbaijan” and that “appoints judges of other courts of the Republic of Azerbaijan” (without the consent of the Parliament). This provision gave the President a possibility to abuse his powers and was deemed destructive for the system of check and balances, but recently the order of appointment of judges was changed.⁸⁵ The President of the Republic of Azerbaijan decreed establishment of a Judicial-Legal Council on December 1, 1998, which is a consultative body and the primary task of which is organization of courts, selection of judges and other issues (which might be entrusted by the President).⁸⁶ The Council is answerable only before the President and the membership (consisting of 7 members) includes the Minister of Justice, Presidents of the Constitutional Court, Supreme Court, Court of Appeal, Court on Serious Crimes, Economic Court and Supreme Court of the Nakhichevan Autonomous Republic.⁸⁷ So currently, it is the Judicial-Legal Council that advises the President on candidates for the post of judges of high courts, and then the President proposes their candidacy to the Milli Majlis and in case of Parliament’s approval, the President appoints them. Even though this body is answerable only before the President, I think that establishment of such body is a positive fact, since this body can advise the

⁸⁵ See Rustam Aliyev, *Razvitie kontseptsii razdeleniya vlastey: mekhanizm eye realizatsii v Konstitutsii AR*, (visited April 3, 2007) <<http://www.azhumanrights.org/cgi-bin/e-cms/vis/vis.pl?s=001&p=0035&n=000034&g>>

⁸⁶ See *Evaluation of Azerbaijan’s Judicial System*, (visited April 3, 2007) <<http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2002Azerbaijan.pdf>>

⁸⁷ *Id.*

President to appoint competent judges and can serve as an element to disperse the President's power of appointment of judges.

One of the shortcomings of the Constitution is that it entitles the President to act as a “guarantor of independence of the judicial power” (Art. 8.4). Leaving aside its evident noncompliance with the doctrine of separation of powers, where the state branches shall be independent, it is not clear what the mechanism for implementation of this constitutional duty is.⁸⁸ Another very violent error is committed when the Constitution granted the President the power to set aside decrees and orders of the Cabinet of Ministers (Art. 109.8), which is the direct competence of the judiciary, pursuant to the traditional notion of separation of powers. Finally, the last encroachment upon the judiciary is committed when the President was entitled to settle questions concerning citizenship (Art. 109.20).

3.5 – Emergency Powers

Though the Constitution bestows the President the right to decree, his right is not absolute and is scrutinized by the Constitutional Court. For instance, Article 109.29 which grants the President the power to announce state of emergency and martial law, is succeeded by Articles 111 and 112 which provide that decrees introducing martial law and state of emergency must be submitted for Parliament's approval within 24 hours after their issuance, on the basis of Article 95.8 of the Constitution. While normally decrees of the President are scrutinized by the Constitutional Court, the Parliament's approval of the presidential decrees does not exempt them from the scrutiny by the judiciary. This means that all decrees of the President can be challenged for constitutionality, no matter whether they are adopted by the President or approved by the Parliament.

⁸⁸ Djafarov, *supra* note 55

3.6 – Powers over the Government

The Status of the Cabinet of Ministers of the Republic of Azerbaijan can be best described in four ways, pursuant to Article 114: first, it is the President who establishes the Cabinet of Ministers, for “implementation of executive powers”⁸⁹; secondly, it is the “highest body of executive power of the President” (so it “belongs” to the President); thirdly, it is “subordinate to the President and reports him”, and; fourthly, its “procedure of activity is defined by the President”. Taking into account that the executive power belongs only to the President (Art. 7 & 99) and the provisions of Article 114, we may say that the Government is completely answerable before the President, who ultimately controls it.

The only thing that connects directly the Cabinet of Ministers and the Parliament is the appointment of its head, the Prime-Minister.⁹⁰ Article 118.1 of the Constitution stipulates that the Prime-Minister be appointed by the President upon Milli Majlis’ consent. Milli Majlis has one week to consider the nominee of the President for the post of the Prime-Minister since its proposal. In case the Milli Majlis violates the said timeframe or rejects three times the nominee of the President, the President gets constitutional authorization to appoint the Prime-Minister without the consent of the Milli Majlis (Art. 118.3). The only

⁸⁹ Article 119 lists the domain of Cabinet’s activities and also provides that it could be supplemented by other questions, which the President delegates to it.

⁹⁰ A very controversial case took place in the pre-presidential elections of 2003, which, though, was completely constitutional. The term of the President Heydar Aliyev’s office was coming to the end and in light of his illness, a referendum was held approving that the second person after the President is the Prime-Minister, in case the President is unable to deliver his functions. Later on August 4, 59 parliamentarians suggest considering Ilham Aliyev (the son of Heydar Aliyev), who was the Deputy Chairman of the ruling party “New Azerbaijan”, for the post of Prime-Minister. The Prime-Minister does not object and says that his illness can let him serve only as a Deputy of the Prime-Minister. Parliament approves Ilham Aliyev’s nomination for the post of the Prime-Minister by a majority of 101 votes out of 125. After 1 day Ilham Aliyev asks to terminate his powers as a Prime-Minister, in order to be eligible for October 15 presidential elections. Later the President Heydar Aliyev gives up his candidacy for presidential elections and calls the electorate to vote for his son. Certainly, the people “elect” his son as the President and the former Prime-Minister gets back his position as the head of the Cabinet. See Igor Galkin, *Papa darit sinu vlast*, (visited April 3, 2007) <<http://www.russedina.ru/?id=3854>>

problem with this procedure is that Article 118.3 does not stipulate whether the President has a right to appoint the same candidate three times sequentially or must propose different candidates after every rejection. Talking about the appointment and dismissal of Ministers of the Cabinet, Constitution completely entrusts this task to the President, without obliging him to consult with the Parliament (Art. 109.5).

Chapter 4 – Comparison of Powers of the President in the Russian Federation and the Republic of Azerbaijan

4.1 – Powers over the Parliament

Unlike Azerbaijan, the Russian Constitution grants the President a solid power to disband the Federal Assembly in two situations and try to discipline it. If this power is used extensively and not out of necessity by the President, then we can claim that it goes directly against the principle of non-usurpation of power and represents in itself the consolidation of power in the hands of the President. But, unlike the Russian Federation, the Azerbaijani Constitution provides for no form of subordination of the Milli Majlis to the President: once the parliament is elected for its five year term, no one can disband it, which is definitely an advantage in comparison with Russia, because the will of the people will be represented continuously and the power will not be usurped. Moreover, looking at the relevant provisions of the Azerbaijani Constitution we can see that relations between the President and the Milli Majlis are built in a “cooperative spirit,” unlike Russia (for instance, in case of a tension with the Federal Assembly, the President can solve the problem in his own favor). Also taking into account the power of the Milli Majlis to initiate impeachment against the President, it becomes evident that the only way for the President to cope with the Milli Majlis is to have the support of the majority, because otherwise in case of a tension, the Milli Majlis can make a big deal of opposition to the executive. But at the same time a strong parliament in the Republic of Azerbaijan provides for a lack of flexibility in interaction between the two branches, which may work as an obstructive element in certain circumstances.

4.2 – Law-making Powers

The constitutions of both countries grant considerable power to the presidents to adopt decrees, which are obligatory for implementation in the whole territory of the state and for all state bodies and, besides, are very similar to laws in their nature. Usually, presidents can decree in any field that is not direct domain of the parliament, if parliament is passive in a certain field and if the adopted decree does not run contra the constitution and laws. At the same time this power can serve as a very practical tool when a fast and coordinated action is required, of course, on condition that it is not abused. Otherwise this power will run contra the exclusive right of the legislature to adopt laws for the implementation by the executive.

Comparing two systems, we can mention that the Constitution of the Republic of Azerbaijan creates less favorable conditions for the President to use his decree power at least in two aspects: 1) while in both countries parliaments have restricted legislative domain, the Russian Constitution fails to ascribe the law-making power exclusively to the Federal Assembly. Article 94 of the Constitution limits itself only to declare that “the Federal Assembly... shall be the representative and legislative body” and no word about its exclusiveness, whereas the Azerbaijani Constitution declares twice (in Articles 7.3 & 81) that the Milli Majlis is the only law-maker. Ultimately, this situation may serve as a good reason for the Russian President to use his decree power and try to regulate questions that fall explicitly within the legislature’s domain; 2) despite the fact that the President of the Republic of Azerbaijan is empowered to “settle other questions... that do not pertain to the competence of the Milli Majlis” (Art.109.32), if the Milli Majlis decides to strip the President of a certain non-exclusive right, it needs only to form a majority and extend its

own legislative domain by adopting a supplemental constitutional law (pursuant to Art. 94.3).

The following significant difference is in the right of holding referendum. While in the Russian Federation it is the President who calls for referendum and while there is no constitutional provision defining questions acceptable for a referendum (meaning that the President is free to put any question or piece of legislation), in the Republic of Azerbaijan, first, the President shares this initiative with the Parliament and, secondly, questions that can be solved via referendum are strictly defined within the Constitution. These constitutional provisions make the Milli Majlis the only body capable of adopting ordinary legislation, which ultimately make the President to cooperate with the Parliament. It becomes obvious from the above-stated that the Constitution of the Republic of Azerbaijan shares the right to call referendum between state branches and at the same time tries to eliminate the possibility for the President to push his own piece of legislation through referenda, which eventually can be assessed as corresponding to the theory of separation of powers.

4.3 – Veto Power

In both countries, the constitutions provide that bills do not come into force without presidents' promulgation and in both countries presidents do not have absolute veto power, which means that parliaments can re-adopt the same law with an absolute majority. The insignificant difference is that the Russian President can constitutionally avail himself from a gap in the constitution, which leaves him free to sign the bill or not (but the Constitutional Court of the Russian Federation has already ruled in Trophy Art Laws cases that the president shall not disregard the will of the parliament, so there is already a precedent

obliging him to sign the bill). But in the Republic of Azerbaijan, the Parliament's bill does not depend on the President and a bill automatically comes into force after the second adoption by the Parliament, i.e. there is no way for the President to block Parliament's bill. One of the distinguishing features of the Russian constitutional system is that because of the Federal Assembly's bicameral composition (which not always represents similar interests), it is nearly impossible both for the Federal Assembly to override the presidential veto (because it is difficult to form the 2/3 majority) and for the President to push its piece of legislation.⁹¹ So it seems that the only way for the President to circumvent this mechanism is to issue decrees.⁹²

4.4 – Judicial Powers

One of the gross violations of separation of powers omitted by the Russian Constitution is that the President is entrusted with a power to regulate all issues concerning interaction between state bodies and use his conciliatory powers for this purpose. This power goes directly against the principle that no one shall act as a judge in his own dispute, if the President is involved into the dispute. Besides, the judiciary may intervene only upon the President's invitation to solve the issue, if he does not manage to do so. These provisions imply that the President is constitutionally entrusted with a power to intervene with the normal functioning of state bodies and regulate the problem the way he considers appropriate. The same applies to the issue of adoption of state budget, where if the Parliament and Government do not come to one common point, the President intervenes

⁹¹ HUSKEY, *supra* note 34, at 165

⁹² *Id.*

and solves the problem (possibly, in favor of the Government, because it is subordinate to the President).

The picture is completely different in the Republic of Azerbaijan, where it is the Constitutional Court that intervenes whenever there is a conflict between state authorities (Art. 130.3). With regard to adoption of the state budget, the Government only prepares the draft of the bill (Art. 119) and submits it to the President, who in his turn submits it to the Parliament (Art. 109.2). Moreover, it is the Parliament that exercises control over the implementation of the state budget (Art.95.5). It seems that the only way for the President to influence the judiciary is through his appointment powers, which recently were modernized (judges of the high courts are appointed by the President upon Parliaments approval, judges of the lower courts are appointed directly by the President).

Constitutions of both countries have two similar shortcomings: first, the presidents are entitled to revoke decrees and orders of the government (i.e. Cabinet of Ministers) and; secondly, settle questions concerning citizenship. Additionally, the Constitution of the Republic of Azerbaijan grants the President the most dangerous right – the right to act as a guarantor of independence of the judicial power. I think that it would be more appropriate to reform these powers of the presidents and transfer them to the judiciary, since it is within the traditional domain of the judiciary.

4.5 – Emergency Powers

Constitutions of both countries grant the presidents the power to declare a state of emergency and introduce martial law. In Russian Federation the only requirement is that the President informs the Federal Assembly, but in the Republic of Azerbaijan, the requirement is that the President seeks the Parliament's approval and in case of disapproval

by the Parliament, his decree may be challenged before the Constitutional Court (but it does not mean that the emergency power of the Russian President cannot be scrutinized). We can see from the above-stated that unlike the Russian Constitution, the emergency power of the President of the Republic of Azerbaijan is granted with a constitutionally-enabled system of checking, which I think is a more careful step and is in complete concordance with the requirements of a democratic state.

4.6 – Powers over the Government

The main difference on the exercise of the Presidents' control over their proper Governments comes from the place of the Government in the whole system of separation of powers. While in the Russian Federation the Government is entrusted with representation of the executive power (Art. 110.1) and the President acts only as the Head of the State (Art. 80.1), the picture is completely different in the Republic of Azerbaijan, where it is only the President who exercises the executive power (Art. 7.3 & 99) and the Government is only the highest body of the executive (Art. 114.2), which is directly answerable before the President. The following excerpt may clearly explain the place of the Government in the constitutional system of the Republic of Azerbaijan:

Talking about executive authorities, we mean the President and his team, whereas the Cabinet somehow remains in the shade. This redundancy, first of all, strips the Prime Minister of any authority, so that the public does not seem to regard him as a being in charge of anything. Second, almost all ministers are aware of being dependent on the President and his administration, and, instead of doing their jobs, they have to be responsive to nomenclature games, intrigues and the like.⁹³

Another important element of relations between the President and the Government is that while the Azerbaijani Constitution is silent on the question of Government's self-dissolution (exception is that it resigns itself when a new president is elected), in Russian

⁹³ Rahman Badalov & Niyazi Mehdi, *supra* note 50

Federation only the President can dissolve the Government, which makes it more dependent and tied to the President. The possible implication is that it makes possible for the President to leave in power the Government which lost the support of the parliamentary majority and thus cause tensions between state branches. Certainly in the end, these tensions are regulated by the President in his own favor. Here, the advantage of the Azerbaijani constitutional system is that the President is not entrusted with such powers as in Russia and that the Government may not be used as a tool of pressure upon the Parliament. Finally, another peril comes from the possible dissolution of the Federal Assembly during the appointment of the Prime-Minister, while in the Republic of Azerbaijan the continuity of the Milli Majlis' term of office is constitutionally secured.

Conclusion

After the collapse of the Soviet Union, two countries, Russian Federation and the Republic of Azerbaijan, once closely linked to each other, began looking for their own independent future. Adoption of new constitutions via referendum in both countries, which were drafted in both occasions by the presidents, signaled commencement of a new period, with a strong presidential system. Although both countries introduced such a principle as separation of powers, in fact invasive powers of the presidents were not balanced by other state branches, thus leading to gross violations of the principle of separation of powers.

The common feature for both countries is that the presidents are elected through direct elections, which ultimately makes them strong and not liable before the other state branches. Even though powers of the presidents encroach upon other branches of state power, at the same time the intensity of intervention varies in these countries. As we have seen in Russian Federation the power is “inclined” to serve more the interests of the strong president. This proposition can be sustained by the facts that the Federal Assembly is relatively unresponsive to the president’s dissolution and veto powers; the president has a more favorable constitutional basis for ruling by issuing decrees; the judiciary is “stripped” of its traditional domain, which is transferred to the president; and the president exercises substantial power over the government.

Unlike the Russian Federation, the drafters of the Constitution of the Republic of Azerbaijan have tried to keep some traits of the traditional parliamentary government. I think that as a first proof to this proposition can serve the fact that the drafters of the Constitution of the Republic of Azerbaijan placed the regulation of the legislative branch directly after the enlistment of basic human rights, in order to show presumably its

precedence and importance, while in the Constitution of the Russian Federation, the legislative branch comes only after the executive. Secondly, in comparison with the Russian Federation, the President of the Republic of Azerbaijan is not vested with such invasive powers over the parliament, decree power, judicial prerogatives, etc.

In conclusion, I must note that, surely, the abovementioned proposition should not be construed as meaning that the constitutional system of the Republic of Azerbaijan is perfect or that there are no gaps in the Constitution. What I have tried to show was that, there is a more proportional system of separation of powers in the Republic of Azerbaijan, rather than in the Russian Federation, which is more in concordance with the traditional notion of separation powers.

Bibliography

Books

- Bernard H. Siegan, *Drafting A Constitution For A Nation Or Republic Emerging Into Freedom* (George Mason University Press, 2nd Ed., 1994)
- Eugene Huskey, *Presidential Power In Russia* (Armonk, New York, 1999)
- Geoffrey Stone Et Al., *Constitutional Law* (Aspen Publishers, 5th Ed., 2005)
- Gerhard Casper, *Separating Power, Essays On The Founding Period* (Harvard University Press, 1997)
- Louis Fisher, *Constitutional Conflicts Between Congress And The President* (University Press Of Kansas, 4th Ed., Revised, 1997)
- Neal Devins & Louis Fisher, *The Democratic Constitution* (Oxford University Press, 2004)
- Richard Bellamy, *The Rule Of Law And The Separation Of Powers* (Dartmouth Publishing Company, 2005)
 - *Eric Barendt, Separation Of Powers And Constitutional Government*
 - *John Braithwaite, On Speaking Softly And Carrying Big Sticks: Neglected Dimensions Of A Republication Separation Of Powers*
 - *Richard Bellamy, The Political Form Of The Constitution: The Separation Of Powers, Rights And Representative Democracy*
- Robert J. Spitzer, *President & Congress* (McGraw Hill Inc, 1993)

- Vladimir Babak, Demian Vaisman, Aryeh Wasserman, Political Organization In Central Asia And Azerbaijan (MPG Books Ltd, Bodmin, Cornwall, 2004)

Law Journals

- Alexander Yakovlev, Russia: The Struggle For A Constitution, 7 Emory Int'l L. Rev. 277
- Amy J. Weisman, Separation Of Powers In Post-Communist Government: A Constitutional Case Study Of The Russian Federation, 10 Am. U. J. Int'l L. & Pol'y 1365
- Ara J. Balikian, The New Russian Federation Constitution: A Legal Framework Adopted And Implemented In A Post-Soviet Era, 18 Suffolk Transnat'l L. Rev. 237
- Dana Dallas Atchison, Notes On Constitutionalism For A 21st-Century Russian President 6 Cardozo J. Int'l & Comp. L. 239
- Robert Sharlet, Transitional Constitutionalism: Politics And Law In The Second Russian Republic, 14 Wis. Int'l L.J. 495
- Thomas M. Nichols, The Logic Of Russian Presidentialism (The Carl Beck Papers In Russian And East European Studies, No 1301, 1998)

Legal Documents

- Constitution of the United States of 1787 with amendments, (visited April 3, 2007) < <http://www.constitution.org/cons/constitu.htm>>
- Constitution of the French Republic of 1958, (visited April 3, 2007)
<<http://www.assemblee-nationale.fr/english/8ab.asp>>
- Constitution of the Russian Federation of 1993, (visited April 3, 2007)
<<http://www.russianembassy.org/RUSSIA/CONSTIT/>>
- Constitution of the Republic of Azerbaijan of 1994, (visited April 3, 2007)
<<http://www.meclis.gov.az/cons/index.htm>>
- The Federalist Paper No. 44 (James Madison), (visited April 3, 2007)
<<http://www.constitution.org/fed/federa44.htm>>
- The Federalist Paper No. 47 (James Madison) , (visited April 3, 2007)
<<http://www.constitution.org/fed/federa47.htm>>
- The Federalist Paper No. 48 (James Madison) , (visited April 3, 2007)
<<http://www.constitution.org/fed/federa48.htm>>
- The Federalist Paper No. 51 (James Madison) , (visited April 3, 2007)
<<http://www.constitution.org/fed/federa51.htm>>
- French Declaration Of Rights Of Man Of 1789 (visited April 3, 2007)
<<http://www.theorderoftime.com/info/humanrights1789.html>>
- Maryland Declaration Of Rights Of 1776 (visited April 3, 2007)
<<http://www.lonang.com/exlibris/organic/1776-mdr.htm>>
- Virginia Bill Of Rights Of 1776 (visited April 3, 2007)
<http://www.constitution.org/bor/vir_bor.htm>
- Buckley V. Valeo, 424 U.S. 1, 121 (1976)

- Morrison V. Olson, 487 U.S. 654, 693-94 (1988)

Internet Resources (Visited April 3, 2007)

- Djafarov, Razdelenie Vlastey Po Konstitutsii Azerbaydjanskoy Respubliki,
<<http://law.edu.ru/doc/document.asp?docid=1120588>>
- Alexander N. Domrin, «Trophy Art Law» As An Illustration Of The Current
Status Of Separation Of Powers And Legislative Process In Russia,
<<http://www.pvlast.ru/archive/index.216.php>>
- Evaluation Of Azerbaijan's Judicial System,
<<http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2002azerbaijan.pdf>>
- Fikret Bagirov, Istoriia Parlamentarizma V Azerbaidjane,
<[http://www.azhumanrights.org/cgi-bin/e-
Cms/Vis/Vis.Pl?S=001&P=0035&N=000039&G=>](http://www.azhumanrights.org/cgi-bin/e-Cms/Vis/Vis.Pl?S=001&P=0035&N=000039&G=>)>
- Igor Galkin, Papa Darit Sinu Vlast, <<http://www.russedina.ru/?id=3854>>
- Istoriia Parlamentarizma, <[http://www.demaz.org/cgi-bin/e-
cms/vis/vis.pl?s=001&p=0073&n=000012&g=>](http://www.demaz.org/cgi-bin/e-cms/vis/vis.pl?s=001&p=0073&n=000012&g=>)>
- Mnenie Spetsialistov O Konstitutsii Azerbaidjana,
<http://news.bakililar.az/news_mnenie_specialistov_o_2600.html>
- Murtuz Alaskarov, Mustaqil Dovlatimiz Va Parlamentimiz: 87 Il Onca Va Bu
Gun,
<[http://www.azerbaijan.az/_statepower/_legislativepower/legislativepower_01_a.
html](http://www.azerbaijan.az/_statepower/_legislativepower/legislativepower_01_a.html)>

- Rahman Badalov & Niyazi Mehdi, The Political Insititutions Of Azerbaijan: A Dichotomy Between Text And Reality, http://www.idea.int/europe_cis/upload/badalov+mehdi_en.pdf
- Rustam Aliyev, Razvitie Kontseptsii Razdeleniya Vlastey: Mekhanizm Eye Realizatsii V Konstitutsii AR, <http://www.azhumanrights.org/cgi-bin/e-cms/vis/vis.pl?s=001&p=0035&n=000034&g>