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**CURBING PRESIDENTIAL POWERS: CASES OF AZERBAIJAN,
GEORGIA, AND TURKEY**

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Abstract

An unlimited concentration of power in the hands of one person, namely a President may impose a certain number of dangers on society and state and this, therefore, should be prevented. Existing work analyses arguments of proponents and opponents of application various constitutional mechanisms that limit presidential powers. It examines the legal framework of presidential powers and possible means for curbing them from three different jurisdictions. Comparative analysis of cases confirms that instruments applied to limit presidential authority are not always useful. Politicians, who are wishing to stay in power indefinitely, may defeat these instruments through numerous tactics. The paper proposes a strict application of robust constitutional means altogether to guarantee prevention of potential risks through limiting presidential powers.

Introduction

"A "constitutional" regime that identifies itself with a single leader poses a real threat", the phrase through which constitutional scholars Andras Sajó and Renata Uitz warn us about potential dangers of unlimited presidential powers.¹ In presidential systems, the executive branch of the government, namely the President may possess a wide range of powers enshrined in a constitution. The latter, besides presidential powers, defines instruments limiting those powers to prevent potential risks that may occur. The fundamental principle of the concept of constitutionalism prescribes a system of government in which governmental powers are limited.² Some scholars widely discussed the idea and its core elements. For instance, Juan Linz and Alfred Stepan define constitutionalism as a basic standard of consolidation and highlight that, without constraints of law imposed on a government, the latter would not be able to guarantee full exercise of people's political rights and other fundamental freedoms.³

Most of the scholars advocating for limited governmental powers argue that chances of tyranny, arbitrariness and dictatorship naturally increase when constitutions do not define means curbing presidential powers. Fombad and Inegbedion highlight that, 'the absence of a clear constitutional mechanism for alternation of power did not only result in leaders remaining in office too long, but also in them losing touch with grassroots and ruling in a manner that was unresponsive to the needs and wishes of the people'.⁴

¹ Andras Sajó and Renata Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (1st edn, Oxford University Press 2017) 269.

² Moses Adagbabiri, 'Constitutionalism and Democracy: A Critical Perspective' (2015) 5(12) *International Journal of Humanities and Social Science* 108, 109.

³ Juan J Linz and Alfred Stepan, 'Toward Consolidated Democracies' (1996) 7(2) *Journal of Democracy* 14, 18-19.

⁴ Charles Fombad and Nathaniel A. Inegbedion, 'Presidential Term Limits and Their Impact on Constitutionalism in Africa' in Charles Fombad and Christina Murray (eds), *Fostering Constitutionalism in Africa* (PULP 2010) 1, 15.

Besides term limits, the concept of separation of powers designed to establish a balance among different governmental branches was subject to discussions by a large number of legal scholars.⁵

The Venice Commission, the Council of Europe's advisory body on constitutional matters, praised limiting the presidential mandates in its several reports.⁶ Appealing to international practice, the Commission underlines that, in presidential systems, constitutional checks and balances ensures that the president cannot 'exercise arbitrary power while in office, and in any event the term of office is limited'.⁷ It warns that 'in a presidential system, the unlimited mandate creates the danger of having "republican monarch"'.⁸

Unlike topics such as historical context and elements of constitutionalism, the importance of curbing presidential powers, and means that used to achieve this purpose, the question whether existed constitutional principles and mechanisms are sufficient to constrain presidential powers in practice has received limited attention. Most of the relevant works have been focused on specific issues overwhelmingly in Latin American and African political

⁵ For a discussion on separation of powers and its models, see Charles Louis de Secondat and Baron de Montesquieu, *The Complete Works of M. de Montesquieu* <<http://oll.libertyfund.org/titles/montesquieu-complete-works-vol-1-the-spirit-of-laws>> accessed 25 March 2018

Charles Fombad, 'An Overview of Separation of Powers under Modern African Constitutionalism' in Fombad (eds), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 58-92.

CDL-AD (2013)018 Opinion on the Balance of Powers in the Constitution and the Legislation of the Principality of Monaco, adopted by the Venice Commission at its 95th Plenary Session (14-15 June 2013)

<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)018-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)018-e)> accessed 25 March 2018

⁶ CDL-AD 2018(010) Report on Term Limits Part I – Presidents, adopted by the Venice Commission at its 114th Plenary Session (16-17 March 2018) 10

<[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)010-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)010-e)> accessed 1 April 2018

⁷ *ibid.*

⁸ CDL-AD (2012)027rev Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions, adopted by the Venice Commission at its 93rd Plenary Session (14-15 December 2012) 13

<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)027rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)027rev-e)> accessed 1 April 2018

contexts. For instance, Juan Bautista Alberdi, "the Father of the Argentine Constitution of 1853" expressed his concern that separation of powers is not sufficed to curb governmental powers since incumbent presidents enjoy a certain number of advantages.⁹ Oda van Cranenburgh emphasised that, in Africa, both the lack of separation between executive and legislative and the great powers assigned to presidents insinuate a deficiency of instruments to keep the executive power accountable.¹⁰

The current paper indicates that application of constitutional mechanisms to curb presidential powers are not always useful in practice. Politicians in different parts of the world use instruments, including constitutional ones, to defeat those instruments to stay in office indefinitely possessing concentrated and comprehensive powers. The aim of this paper to explore details and elements of legal as well as political mechanisms aiming to undermine those instruments designed to curb presidential powers.

It examines constitutional provisions on presidential powers and power-limiting instruments as well as their practical application in Azerbaijan, Georgia and Turkey.

A comparative methodology was applied to determine and analyse the scope of presidential powers in three above mentioned jurisdictions. A literature review was used as the primary method to gather knowledge and information about theories that already exist about the thesis topic. Thus the most relevant ideas and opinions are discussed.

Existing paper consists of three chapters. The first chapter seeks answers to questions why executive powers shall be limited and how to proceed? Here the research problem is discussed in the framework of the relevant theoretical and normative framework.

⁹ Alexander Baturo, *Democracy, Dictatorship and Term Limits* (The University of Michigan Press 2014) 28.

¹⁰ Oda van Cranenburgh, 'Restraining Executive Power in Africa: Horizontal Accountability in Africa's Hybrid Regimes' (2009) 16(1) South African Journal of International Affairs 49, 49.

The second chapter indicates the scope of presidential powers in three jurisdictions analysed in this paper from a comparative perspective. This chapter also discusses the question whether parliamentary mechanisms aiming to curb presidential powers are useful in these countries.

The final chapter describes lessons learnt on the impact of constitutional provisions regulating presidential powers to the situation in three jurisdictions, and suggestions how shortcomings can be fixed.

Chapter I. Limiting executive powers: a normative and theoretical framework

1.1 Why governmental powers shall be limited?

1.1.1 Introduction

A significant number of legal and political scholars argued in favour of constraints imposing over executive powers, and substantial works justify their position. The concept of constitutionalism and its historically developed elements, and possible negativities of unlimited government, which were and still are observed, are main arguments applied by supporters of this approach. However, there are thoughts stipulating limitations on governmental powers as an unnecessary and their proposals will be examined in this chapter as well. It is necessary to note that current work argues that constraints over presidential powers are essential to prevent negativities that may occur and impact the daily lives of ordinary people.

This chapter requires a proper discussion to be able to understand theoretical and practical reasons behind limitations of governmental powers. At the same time, this chapter is necessary to examine propositions of various theories on the matter.

1.1.2 Limiting governmental power: a concept of constitutionalism

Constitutionalism as a term started to be used by political theorists at the beginning of the nineteenth century, reacting to absolutism inflicted by kings and monarchs.¹¹ Criticism of state power occupied public agenda, which simultaneously triggered claims to fundamental rights.¹² It was a sign of the increased ‘power of social actors against King and state that enables the selecting out of rights-supporting sentiments’.¹³ During the process, an overwhelming majority did not reject principles that impose governmental restrictions, such

¹¹ Sajo and Uitz (n 1) 13.

¹² Andras Sajo, *Constitutional Sentiments* (Yale University Press 2011) 47.

¹³ *ibid.*

as separation of powers, a government with the consent of the governed and the rule of law.¹⁴ These constitutional sentiments are neutral in their nature and neutrality ‘relates to the shared need to live in a common state, where there is a protection against arbitrary power’.¹⁵ Therefore, revolutionary processes of the eighteenth century allowed the societal majority to impose limitations on power-holders.

Constitutional scholar Andras Sajó argues that the inherent sentiments of people involved in revolutions were concerned with the abuse of political power: ‘A large segment of the society felt threatened by governmental abuse, and the sense of abuse could, therefore, become central in the constitutional sentiment... The emerging constitutional sentiments expressed fear and outrage regarding past practices of abuse; in the frame of these emotions, moral intuitions proposed new arrangements to curtail government power. These unique sentiments have animated the universalistic claims which were accepted in a new genre of the written constitution’.¹⁶

Thus, past practices of abuse of power applied by despotic and autocratic regimes stipulate limiting governmental powers. Consequently, in many countries limits on political powers were introduced ‘in reaction to a specific fear of perpetual executive that a country experienced in the past’.¹⁷ For instance, 1949 German Basic Law does not contain a provision that allows conducting a referendum at the federal level to prevent the experience of plebiscites under Hitler.¹⁸ Since independence in 1960’s, almost all African leaders presented themselves as “indispensable and irreplaceable” ones, thus undermining the importance of checks over the government to guarantee to stay in power as long as possible.¹⁹ Hence, lack of a constitutional mechanism for the alternation of power and consequently,

¹⁴ *ibid.*

¹⁵ *ibid.* 48.

¹⁶ *ibid.*

¹⁷ Baturo (n 9) 29.

¹⁸ *ibid.*

¹⁹ Fombad and Inegbedion (n 4) 15-16.

imperial presidencies without constraints resulted in civil wars and forceful removal from power through bloody *coup d'état*.²⁰ A re-election ban in Mexico was introduced and agreed when President Obregon has re-elected again.²¹ Next subchapter will examine practical reasons behind constraints in the context of term limits.

According to a political scholar Carl Friedrich there is a natural need of each human being to achieve a balance between the government and individual 'in some system of restraints which protects the individual, or at least minorities, against any despotic exercise of political authority'.²² Consequently, he describes constitutionalism as 'a system of effective restraints upon governmental action' provided by power division.²³

As Sajo and Uitz define, 'constitutionalism stands for a set of interrelated concepts, principles and practices of organising and thereby limiting government power in order to prevent despotism'.²⁴ Separation of powers, checks and balances, and the protection of fundamental rights are central elements of constitutionalism limiting the power.²⁵

According to Fombad, a modern constitutionalism is fundamentally designed to fight against tyranny and anarchy.²⁶ To be able to achieve its goal a constitution, on the one hand, must enable the government to operate effectively, from another hand to impose reasonable limitations on it, which would not dramatically weaken the government and lead to anarchy.²⁷ It shall be acknowledged that without constitutional provisions that stipulate constraints on governmental power it is almost impossible to prevent potential arbitrariness of the

²⁰ *ibid.* 15.

²¹ Baturu (n 9) 29.

²² Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (4th edn, Blaisdell Publishing Company 1968) 25.

²³ *ibid.* 24.

²⁴ Sajo and Uitz (n 1) 13.

²⁵ *ibid.*

²⁶ Charles Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* 1, 6.

²⁷ *ibid.*

government. ‘The absence of meaningful restrictions made it almost impossible for many countries to practice constitutionalism’.²⁸ He argues that the modern concept of constitutionalism has a clear description: ‘a government should not be only sufficiently limited in a way that protects its citizens from the arbitrary rule but also that such government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations’.²⁹ Sajo and Uitz argue that design of government only with limitations does not work: ‘the limitations seeking to prevent concentration and perpetuation of abusive power make sense where the same design provides for the actual operation of government’.³⁰

McIlwain states that ‘in all its successive phases constitutionalism has one essential quality: it is a legal limitation on government’.³¹ Stephen Holmes argues that, constraints that imposed to government strengths latter’s effective operation.³² Sajo and Uitz emphasise that limited government is the most effective way to enable an order of liberty and contribute to the welfare of people.³³ Scott Gordon describes the importance of political constraints from ancient times till today.³⁴

To conclude, and therefore to answer the first question of this subchapter it is necessary to mention that, constitutionalism requires the limited political power of the state; otherwise the concentration of power leads to its abuse, and the latter leads to despotism, violation of human rights, lack of individual liberty, tyranny and anarchy, civil wars and

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Sajo and Uitz (n 1) 14.

³¹ C.H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press 1940) 24.

³² Stephen Holmes, *Passions and Constraints: on the Theory of Liberal Democracy* (1st edn, University of Chicago Press 1995) 271.

³³ Sajo and Uitz (n 1) 14.

³⁴ Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge: Harvard University Press 1999).

other adverse events victimising ordinary people. We need to keep in our minds these fears in order to prevent them through an application of the constitutionalism and its core elements.

But is there any disagreement with the concept of constitutionalism among legal and political scholars?

Although constitutionalism with its universalised liberal idea of limiting governmental power spread around the world widely, there are critical theories on the matter as well. Wil Waluchow, a Canadian philosopher, divides critics into two groups: hard critics and democratic critics.³⁵ Former critics argue that ‘rights-protective constitutions cannot effectively and legitimately serve to protect individuals against the oppressive forces of governments. On the contrary, they only serve to mask legal and political practice in a false cloak of legitimacy’.³⁶ They are very sceptical of theories defining constitutionalism as an idea standing against oppression by the government through power the latter may use.³⁷ Central claim here is that even historically to secure their superior status, dominant groups used constitutions.³⁸

Democratic critics concerned of the role that judges play in the interpretation of the constitutions.³⁹ They argue that judges are empowered to interpret provisions of constitutions, including scope and extent of governmental powers when they are democratically uncountable since in most of the countries judges are appointed, not elected, and as a rule, judges come from privileged groups of the society.⁴⁰ Therefore, they do not represent ordinary people, but those small groups who appointed them and consequently political

³⁵ Wil Waluchow, ‘Constitutionalism’ The Stanford Encyclopedia of Philosophy (Spring edn, 2018) <<https://plato.stanford.edu/entries/constitutionalism/#CriThe>> accessed 14 March 2018

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

decisions may easily impact their interpretation.⁴¹ Legal scholar Jeremy Waldron criticises the fact that, judges possess the substantial power to provide final answers to the deeply controversial issues related to relations between individuals and governments through constitutional review when they are not directly accountable to the community.⁴²

Murray Rothbard argues that constitutionalism is incapable of restraining governmental powers and does not protect the rights of citizens from their governments.⁴³ He acknowledges that constitutions may impose strict limits on executive powers, however, ‘no constitution can be interpreted or enforce itself; it must be interpreted by men’.⁴⁴ Concerning the United States, he emphasises, that, ‘if the ultimate power to interpret a constitution is given to the government’s own Supreme Court, then the inevitable tendency is for the Court to continue to place its imprimatur on ever broader-powers for its own government’.⁴⁵

So what critics of constitutionalism suggest? One of the main suggestions is that practice of constitutional review shall be abandoned and political decisions shall be solved between the people and their elected and thus, accountable representatives.⁴⁶ Stephen Gardbaum recommends weaker forms of constitutional review to achieve a better balance between fundamental rights protection and political sovereignty.⁴⁷ Waluchow notes that, ‘whatever the preferred solution, all critics of constitutionalism seems to agree that progress can be made only if the myths surrounding constitutional protection – the constraining force

⁴¹ *ibid.*

⁴² Jeremy Waldron, ‘Constitutionalism – A Skeptical View’ in Thomas Christiano and John Christman (eds), *Contemporary Debates in Political Philosophy* (WileyYBlackwell 2009) 265, 278.

⁴³ Murray Rothbard, *For a New Liberty: The Libertarian Manifesto* (2nd edn, Ludwig von Mises Institute 2006) 58.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Waluchow (n 35).

⁴⁷ Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2012) 49 *American Journal of Comparative Law* 707, 756.

of original understanding, intention, history, and so on – are all exposed and that the true political forces at work in constitutional practice are acknowledged and dealt with openly’.⁴⁸

In my opinion, despite some convincing elements of statements by constitutionalism critics to apply their suggestions in practice may be resulted with the strengthening of autocratic ruling as well as the weakening of the judiciary, which in many cases is last resort for citizens to be able to protect their rights against the government. It is true that in a majority of countries judges are not elected, but appointed by presidents, legislative bodies or specialised judiciary bodies that established by the executive or legislative. But people elect of those who are appointing judges, therefore, to consider judges uncountable is a complicated statement. The question arises: what shall citizens of countries do where an executive is powerful and through various mechanisms, which will be examined in our next chapters control the legislature to protect their right and curb governmental powers? The first option is judiciary, but in countries where one person or one party control executive and legislative branches of the government it is naïve to think that court will be independent. Thus, the task is to enhance elements and principles of constitutionalism to be able to curb governmental powers and consequently to prevent evils, which may occur.

1.2 Limiting executive (presidential) powers: how to do it?

1.2.1 Introduction

For purposes of this thesis, I would like to focus on restricting executive, namely presidential powers in next parts of the work. The executive branch of the government may be considered as the strongest and the same time dangerous one due to several reasons. Following subchapters will examine in details those reasons, but it is necessary to note a few generalised approaches here. In presidential systems where a single leader is head of

⁴⁸ Waluchow (35).

government and the same time head of state with enormous powers, the possibility of absolutism is very high. Not only broad, and sometimes extraordinary personal powers of a president, but “an ever-expanding bureaucracy (public administration or the civil service)” operating under a president impose potential danger as well.⁴⁹

It is undoubtedly necessary to curb presidential powers when he or she may impose personal religious preference on an entire nation, like the Zambian President Chiluba?⁵⁰ Is it not essential to seek ways how to curb presidential power in a country where two main constitutional offices belong to husband and wife, like in Azerbaijan?⁵¹ The answer is undoubtedly yes.

Since we acknowledge the importance of curbing of governmental, particularly presidential powers, we shall examine means designed to achieve this purpose. Next subchapters cover this question in theoretical context. Second and third chapters of this thesis discuss a matter whether these mechanisms can curb presidential powers.

1.2.2 Separation of powers

The doctrine of separation of powers requires merely that three branches of government, namely executive, legislative and judiciary shall be kept separate from each

⁴⁹ Sajo and Uitz (n 1) 268.

⁵⁰ In December 1991, Zambian President Chiluba declared his country Christian nation, even though Zambia has been a secular state since its independence with a culturally and religiously pluralistic society. H. Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2008) 35 Hastings Const. L. Q. 761, 762.

⁵¹ New figures of first Vice-President and Vice-Presidents were introduced in 2016, appointed by the sole power of the President. In case of incapacity of the President to perform his duties, first Vice-President performs all functions belonging to her/him.

CDL-AD (2016)029 Opinion on the Draft Modifications to the Constitution, endorsed by the Venice Commission at its 108th Plenary Session (14-15 October 2016) 16

<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)029-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)029-e)> accessed 16 March 2018

'Aliyev Appoints Wife as First Vice President of Azerbaijan' (Radio Liberty 21 February 2017)

<<https://www.rferl.org/a/azerbaijan-aliyev-names-wife-aliyeva-vice-president/28322210.html>> accessed 16 March 2018

other and independently interact.⁵² Sajo and Uitz consider a lack of serious cooperation among the three branches as a threat, which may be resulted in the incompetence of the government to protect individual freedom.⁵³ In their opinion, the constitutional issue is not whether one branch will be powerful than others.⁵⁴ A real concern is whether each office would be able to force another branch to stay in the frame of its competence; otherwise "accumulation and monopolisation of power" will not be prevented.⁵⁵

Historically, this doctrine 'is driven by the suspicion and distrust of power in general and the concentration of power in particular'.⁵⁶ French revolutionaries included the principle of separation of powers to the 1789 Declaration of Rights of Man and the Citizen: 'Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution'.⁵⁷ Justice Brandeis in one of his dissenting opinions emphasised that the separation of powers in the United States was adopted by the Convention of 1787 'to preclude the exercise of arbitrary power. The purpose was, not at all to avoid friction. Instead, the Founders found that inevitable friction resulting from to the distribution of the governmental powers among three departments will save the people from autocracy'.⁵⁸ Quotations from William Pitt and Lord Acton would demonstrate the evolutionary importance of the separation of powers in British historical context. Pitt warned that 'unlimited power is apt to corrupt the minds of those who possess it; and this I know, my lords, that where laws

⁵² Charles Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana' (2005) 25 B.C. Third World L.J. 301, 303.

⁵³ Sajo and Uitz (n 1) 136.

⁵⁴ *ibid.* 135.

⁵⁵ *ibid.*

⁵⁶ Fombad (n 26) 12.

⁵⁷ Declaration of Rights of Man and the Citizen of 26 August 1789, Article 16

<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf> accessed 16 March 2018

⁵⁸ Sajo and Uitz (n 1) 133.

end and tyranny begins'.⁵⁹ According to Lord Acton, 'all power tends to corrupt, and absolute power corrupts absolutely'.⁶⁰

According to Fombad, there are three primary models of the doctrine from which modern constitutions are benefited: (1) the US model with its semi-rigid presidential form; (2) the French model, which contains cooperation rather than a strict separation, but with domination of the executive and subordination of the judiciary; and (3) Westminster model, which provides for fusion of all three branches, but mainly executive and legislative.⁶¹ 'Whichever the model adopted, the modern doctrine of separation of powers does not require a rigid watertight separation of the three powers but rather a system in which the risks of a concentration of powers, and the attendant dangers that go with it, can be forestalled through limited interference by each of the three powers in each other's domain'.⁶²

In presidential systems, power tends to be concentrated on the president, while that of the legislature or the judiciary is relatively weaker.⁶³ Modern constitutions today provide the principle of separation of power, and it is one of the leading ways for influential presidents to present their government as democratic one.⁶⁴ Consequently, a question arises whether the doctrine of separation of power accumulated to modern constitutions is efficient in order to curb presidential powers? To what extent constitutions of Azerbaijan, Georgia and Turkey, three jurisdictions examined in this paper, envisage this principle? (See second and third chapters).

⁵⁹ Case of Wilkes (January 9, 1770) Speech, William Pitt Quotes,

<https://www.brainyquote.com/quotes/william_pitt_126086> accessed 17 March 2018

⁶⁰ James A. Curry, Richard B. Riley and Richard M. Battistoni, *Constitutional Government: American Experience* (5th edn, Kendall/Hunt Pub. Co. 2003) 7.

⁶¹ Fombad (n 26) 13.

⁶² *ibid.*

⁶³ CDL-AD (2009)010 Opinion on the Draft Amendments to the Constitution of Republic of Azerbaijan, adopted by the Venice Commission at its 78th Plenary Session (13-14 March 2009) 4

[http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD\(2009\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD(2009)010-e) accessed 21 March 2018

⁶⁴ Fombad (n 26) 13.

1.2.3 Term limits

A term limit is a constitutional restriction limiting the number of terms any person may serve in a specific elected position. In presidential systems term limits aim to curb the potential for concentration and thus, monopolisation of power in hand of one single person seeking lifetime presidency.

Alexander Baturo differs presidents of the world whether term limits regulate their re-election or whether there are term limits at all.⁶⁵ There is a much opinion among scholars pointing out that the lack of term limits is fundamentally undemocratic: ‘... many, from ancient political philosophers to contemporary opponents of presidential third term bids, see term limits as an institutional demarcation line that separates democratic rulers, however powerful, from tyrants’.⁶⁶

Fombad and Inegbedion believe that, ‘the only way to break the deep-seated patterns of clientelism and neo-patrimonialism that have dominated African politics since independence and today still threaten to undermine the faltering and hesitant steps towards constitutionalism and democracy is to ensure that there is a regular leadership change at specified periods and that former leaders are held to account. In short, term limits provide great scope for leadership renewal, genuine political competition and accountability’.⁶⁷

Some legal and political scholars, such as Baturo, Prezeworski emphasise the importance of term limits for democratic consolidation.⁶⁸ In their opinion, term limit, if binding, is an important democratic safeguard.⁶⁹ The fundamental importance of the term limits in the context of democratic consolidation was mentioned in the Opinion of the Venice

⁶⁵ Baturo (n 9) 10.

⁶⁶ *ibid.* 11.

⁶⁷ Fombad and Inegbedion (n 4) 17.

⁶⁸ Baturo (n 9) 11.

⁶⁹ *ibid.*

Commission on 2009 constitutional amendments in Azerbaijan.⁷⁰ Paragraph 16 of the Opinion reads: ‘Explicit constitutional limitations on successive terms of a president are particularly important in countries where democratic structures and their cultural presuppositions have not yet been consolidated’.⁷¹ Even countries with a democratic system of governance and other robust checks over the presidential powers have included term limits to their constitutions. For instance, term limits for the US presidency were introduced through the 22nd Amendment to the Constitution in 1951.⁷² The French Parliament adopted a law amending Article 6 of the Constitution and thus, applying a constitutional limit of two presidential terms.⁷³

Although there is an overwhelming opinion in favour of term limits, some scholars of presidentialism raise the question whether term limits are necessary for the democratic system, where a system of checks and balances exist, and regular elections are conducted. Consequently, questions whether term limits should be included in any constitution, and whether they qualify as one of core elements of modern constitutionalism⁷⁴ are raised.

Shugart and Carey mention that ‘presidentialism requires that the chief executive be elected by popular vote’ and ‘there should be as few restrictions as possible on the will to be expressed in that vote’.⁷⁵ Jose Cheibub, as a supporter of approach mentioned above, argued that ‘term limits may be too blunt an instrument because it fundamentally interferes with the relationship between voters and presidents and preempts the possibility that elections may operate as mechanisms of accountability’.⁷⁶ Hence, the main argument mentioned by

⁷⁰ CDL-AD (2009)010 (n 63) 5.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ Fombad and Inegbedion (n 4) 18.

⁷⁵ Matthew Soberg Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (1st edn, Cambridge University Press 1992) 90.

⁷⁶ Jose Antonio Cheibub, *Presidentialism, Parliamentarism, and Democracy* (Cambridge University Press 2007) 167.

opponents of term limits is the conduct of elections, through which people express their will to choose a person who governs and for how long this person should rule.

In my opinion, arguments based on the possibility to conduct regular elections are not reliable since they do not consider efficient mechanisms in the hands of incumbent presidents that can be used to undermine the importance of the polls. It is necessary to examine the question whether elections may really play a crucial role to curb presidential powers?

Unfortunately, incumbent governments, particularly presidents or political parties chaired by them use numerous mechanisms in practice to prevent potential “danger for their career” derived from elections. For example, Ilham Aliyev, the incumbent President of Azerbaijan empowered himself to call early elections through constitutional amendments in 2016. One and a half year later he unexpectedly called snap presidential elections six months before it was originally planned to conduct,⁷⁷ thus preventing already weakened traditional opposition parties to consolidate forces in order to defeat the potential fourth presidency of Aliyev; or, ‘new nationality clauses were introduced into the constitutions by the incumbents in Cote d’Ivoire and Zambia to exclude serious competitors from the presidential race’.⁷⁸

Blatant electoral shortcomings observed during elections in different parts of the world stipulate another barrier for accepting an election argument. How one can imagine free, fair and democratic elections, which will guarantee a rotation of office holders in North Korea, where necessary circumstances for competition do not exist? In Azerbaijan, not only 2013 controversial presidential elections were held without following democratic principles that stipulate free and fair elections,⁷⁹ but the 2015 parliamentary elections were accompanied

⁷⁷ Zulfugar Agayev, “Azeri Leader Aliyev Calls Snap Presidential Elections for April” (Bloomberg Politics, 5 February 2018) <<https://www.bloomberg.com/news/articles/2018-02-05/azeri-leader-aliyev-calls-snap-presidential-election-for-april>> accessed 20 March 2018

⁷⁸ Charles Fombad, ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects’ (2011) 59 Buffalo Law Review 1007, 1021.

⁷⁹ OSCE/ODIHR Election Observation Mission Final Report (24 December 2013): “the election was undermined by limitations on the freedoms of expression, assembly and

with a high number of frauds⁸⁰ as well. Thus, *Yeni Azərbaycan Partiyası* (YAP), a ruling party and a group of deputies, who as a rule vote in support of ruling party,⁸¹ have the overwhelming majority in the *Milli Majlis*, Parliament of Azerbaijan.

To conclude, it is necessary to note that the advantages of incumbency assist politicians to monopolise the use of public funds, enforcement of the laws and creation of electoral institutions in order to guarantee victory during the elections indefinitely. Non-electoral means, therefore, such as term limits became crucial to limit absolute power of Presidents.

Baturo emphasises that, ‘... elections do not guarantee a rotation in office, only the prospect thereof, as individual politicians can repeatedly be re-elected. In contrast, the institution of term limits, if binding, ensures mandatory periodic rotation of office-holders

association that did not guarantee a level playing fields for candidates. Continued allegations of candidate and voter intimidation and a restrictive media environment marred the campaign. Significant problems were observed throughout all stages of election day processes and underscored the serious nature of shortcomings that need to be addressed in order for Azerbaijan to fully meet its OSCE commitments for genuine and democratic elections” <<https://www.osce.org/institutions/110015?download=true>> accessed 21 March 2018

⁸⁰ This qualification is based on numerous arguments, firstly, OSCE/ODIHR were not able to monitor 2015 parliamentary elections due to restrictions imposed by the Government of Azerbaijan. “Restrictions Imposed by Azerbaijan Compel Cancellation of Parliamentary Elections Observation Mission, says ODIHR Director Link” (11 September 2015) <<https://www.osce.org/odihr/elections/azerbaijan/181611>> accessed 21 March 2018

Secondly, 2015 parliamentary elections were conducted by the same election commissions who have been involved in a number of serious violations recognized by the European Court of Human Rights in a group of cases *Namat Aliyev v. Azerbaijan* (22 cases), which is currently under monitoring of the Committee of Ministers of the Council of Europe. Assessment Report on the Follow-up of the Electoral Recommendations in Azerbaijan by the Election Monitoring and Democracy Studies Centre (12 September 2017) <<https://www.osce.org/odihr/339521?download=true>> accessed 21 March 2018

⁸¹ This qualification is based on minutes of all sessions of the Parliament since 2015 when last parliamentary elections were held. There were just a few episodes when a small number of independent deputies vote against or abstained during the vote to laws and decisions initiated by the ruling party or the President, who is a Chairman of the ruling party. A number of cases, when independent deputies proposed legislative initiatives is very low. Minutes of Milli Majlis <<http://meclis.gov.az/?/az/stenogram/>> accessed 21 March 2018

irrespective of voter preferences'.⁸² Likewise, the Venice Commission expressed its disagreement with the argument that removal of term limits would strengthen the freedom of voters to choose their President.⁸³ Harry Bailey, an American political scientist, noted the importance of "advantage of the incumbent" argument to answer the question how much time does an incumbent serve in the office?⁸⁴ His interpretation of the two-term tradition declares that an incumbent President 'can have the advantage over all comers for even a third term. This notion seems to have been a logic which led to the adoption of the Twenty-Second Amendment limiting the presidential tenure of two elective terms'.⁸⁵

There is another portion of questions raised by opponents of term limits: why such limitations are not applied in parliamentary regimes, where Prime Ministers have a possibility to be elected indefinitely?⁸⁶ Whether term limits are a display of double standards by the Western countries when these countries lack term limits, but at the same time they require an application of such limitations from another state?⁸⁷

Here to debate the first question it has to be noted that, an appointment of Prime Minister constitutes a different legal situation, which is not comparable to the case, where Presidents are elected.⁸⁸ The Venice Commission emphasises that 'in a parliamentary regime, the Prime Minister must constantly enjoy the support from a parliamentary majority, which is

⁸² Baturu (n 9) 3.

⁸³ CDL-AD (2009)010 (n 63) Paragraph reads: "While this argument may sound rather attractive at least in theory, explicit limitations are needed in practice, because an incumbent President may easily use various plebiscitary means in order to strengthen her/his position and secure her/his re-election. The constitutional limitations on successive terms are therefore meant to limit the risk of negative consequences for democracy arising from the fact that the same person has the possibility of occupying the presidency for an excessive period of time".

⁸⁴ Harry A. Bailey, Jr., 'Presidential Tenure and Two-Term Tradition' (1972) 2 *Publius* 95, 96.

⁸⁵ *ibid.*

⁸⁶ Botsalo Ntuane, 'Democratic Forces Must Safeguard Presidential Term Limits' (2006)

<<http://mmegi.bw/2006/May/Monday22/236196386145.html>> accessed 21 March 2018

'Interview with Ilham Aliyev, President of Azerbaijan'

<<https://www.youtube.com/watch?v=yDsxn21yHiA>> accessed 21 March 2018

⁸⁷ Fombad and Inegbedion (n 4) 19.

⁸⁸ CDL-AD (2009)010 (n 63) 5.

not the case for a President in a presidential regime. The personal factor is therefore much stronger in the latter system'.⁸⁹ Additionally, mechanisms usually securing democratic rotation in the office of the Prime Minister are not effective in presidencies.⁹⁰

Fombad and Inegbedion consider “double standards of the West” argument as an unsatisfactory one on several grounds.⁹¹ First, he mentions that term limits have solid historical roots in Europe and ‘well grounded in classical liberal models of limited, democratic government’. Secondly, there is a strong culture of political accountability and tolerance that promotes power-sharing in most of the Western countries.⁹²

It suffices to look at alternation history of governments in Western countries to argue against the two questions mentioned above. Short research illustrates that there is no any Prime Minister staying in power for too long in member states of the European Union, except Germany up to the date of March 2018. The Freedom House, an independent watchdog organisation analysing the challenges to freedom, including political rights defines Germany as a free country with 95 scores out of 100.⁹³ Hence, it is an exception rather than the rule.

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ Fombad and Inegbedion (n 4) 19.

⁹² *ibid.*

⁹³ Freedom in the World Report (2017)

<<https://freedomhouse.org/report/freedom-world/freedom-world-2017>> accessed 21 March 2018

II. The scope of presidential powers in Azerbaijan, Georgia and Turkey: Comparative description and analysis

2.1 General powers of Presidents

2.1.1 The role and the mandate of Presidents

The first question that I would like briefly to discuss in this subchapter is related to the political affiliation of the Presidents and its impact on the relations between the executive and legislative branches in respective countries. The Georgian Constitution prohibits the President to have any other position, including in a political party,⁹⁴ which was considered as justified provision introduced to the Constitution in 2010 by the Venice Commission.⁹⁵

Unlike Georgia constitutions of Azerbaijan and Turkey do not contain a requirement for Presidents to leave any position in political party they could have before the elections. The Turkish Constitution before amendments introduced in April 2017 declared, ‘if the President-elect is a member of a party, his/her relationship with his party shall be severed and his/her membership of the Grand National Assembly of Turkey shall cease’.⁹⁶ After amendments, the requirement on severing relations with a political party was removed from the Constitution.⁹⁷ In the context of another amendment to the Turkish Constitution, which stipulates that presidential and parliamentary elections shall be held simultaneously, it raises the potential danger that ‘one party will dominate the executive and also have a majority or at

⁹⁴The Constitution of the Republic of Georgia (1995) Article 72

<<http://www.parliament.ge/uploads/other/28/28803.pdf>> accessed 28 March 2018

⁹⁵ CDL-AD (2010)028 Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, adopted by the Venice Commission at its 84th Plenary Session (15-16 October 2010) 8

<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)028-e)> accessed 21 March 2018

⁹⁶ The Constitution of the Republic of Turkey (1982) Article 101

<https://global.tbmm.gov.tr/docs/constitution_en.pdf> accessed 28 March 2018

⁹⁷ CDL-AD (2017)005 Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly, adopted by the Venice Commission at its 110th Plenary Session (10-11 March 2017) 13

<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)005-e)> accessed 28 March 2018

least very significant representation in the legislature'.⁹⁸ The President even without being a member of the Parliament will have authority to appoint and dismiss ministers, selecting some of them from among parliamentarians.⁹⁹ The existence of such competence can result in President's control over the legislature.

President's affiliation with a particular political party undermines possibilities of his role to 'represent the Republic of Turkey and the unity of the Turkish nation' and 'ensure implementation of the Constitution and the regular and harmonious functioning of the organs of the State'.¹⁰⁰ Concerning this issue, the Venice Commission has expressed its worries as well. 'A symbolic, politically neutral presidency can hardly be reconciled with a politically engaged presidency (holding the whole of the executive power). The amended Constitution has failed to choose between these two opposed visions'.¹⁰¹

The President of Azerbaijan holds extraordinary constitutional mandate whereas he is a Chairman of the party, which has a majority in the Parliament. It suffices to mention following constitutional provisions to describe comprehensiveness of his role: executive power belongs to the President,¹⁰² President is head of state, represents a unity of the nation and provides continuity of the statehood, President is a guarantor of independence and territorial integrity, observance of international agreements and independence of judicial power, President is the Supreme Commander-in-Chief of Military Forces.¹⁰³ Since President

⁹⁸ *ibid.*

⁹⁹ CDL-REF (2017)005 Unofficial Translation of the Amendments to the Constitution of Turkey, provided by the Turkish authorities to the Venice Commission (2 February 2017) Article 106 § 4
<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)005-e)> accessed 22 March 2018

¹⁰⁰ The Constitution of Turkey (n 96) Article 104.

¹⁰¹ CDL-AD (2017)005 (n 97) 14.

¹⁰² The Constitution of the Republic of Azerbaijan (1995) Article 7

<<http://en.president.az/azerbaijan/constitution>> accessed 27 March 2018

¹⁰³ *ibid.* Article 8 and 9.

has a right of legislative initiative and strong veto power,¹⁰⁴ which is almost impossible to overrule we are observing a situation where executive takes control of the legislative agenda. Adoption of new laws or amendments to legislation were overwhelmingly initiated either by the President or the ruling party, chaired by the President.¹⁰⁵

The second issue that shall be discussed here is the terms Presidents can serve. Azerbaijan is the most “problematic” country regarding this question. In most states with an elected President, the Constitution imposes a limitation of one or two presidential terms, be it absolute or successive.¹⁰⁶ Azerbaijan is an “exception” since the constitutional imposition of presidential term limits was removed by 2009 referendum, which was initiated by President Aliyev.¹⁰⁷ Currently, Azerbaijan and Belarus are the only presidential republics in Europe that no longer limit the number of consecutive terms.¹⁰⁸ Unlike Belarus, Azerbaijan is a member of the Council of Europe¹⁰⁹, and in my opinion, removal of terms contradicts the obligations and commitments Azerbaijan took on voluntarily basis¹¹⁰ when it joined the organisation in 2001.

Extension of the presidential term from five to seven years is another controversial issue concerning term limitations. The Constitution of Azerbaijan was amended in 2016 again by the initiative of the same President, and the presidential term was extended. Most

¹⁰⁴ These issues will be discussed in details in the next subchapter.

¹⁰⁵ This qualification is based on minutes of all sessions of the Parliament since 2015 when last parliamentary elections were held. Minutes of Milli Majlis (n 81).

¹⁰⁶ Angelika Nussberger, “Setting Limits and Setting Limits Aside – The Constitutional Framework of Presidential Power in Post-Communist Countries” in Pergola AM (eds), *Liber Amicorum* (Istituto Poligrafico e Zecca Dello Stato 2008) 206, 210.

¹⁰⁷ Wojciech Sadurski, ‘Legal Opinion on Amendment in Azerbaijan, 2009, Removing Presidential Term Limits’ (2013) 2 <<http://www.hfhr.pl/wp-content/uploads/2013/08/Legal-Opinion-on-Azerbaijan2.pdf>> accessed 28 March 2018

¹⁰⁸ *ibid.* 7.

¹⁰⁹ Azerbaijan became the 43rd member State on 25 January 2001.

Azerbaijan // 47 States, One Europe <<https://www.coe.int/en/web/portal/azerbaijan>> accessed 28 March 2018

¹¹⁰ Opinion 222 Azerbaijan’s Application for Membership of the Council of Europe <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16816&lang=en>> accessed 29 March 2018

European countries provide five-year terms for each mandate besides limiting the President's term of office to two consecutive mandates.¹¹¹ Among the member states of Organization for Cooperation and Development (OECD), no countries with presidential systems currently adopt a seven-years' presidential mandate.¹¹² Even in the case of a strong presidential system like in the US, the presidential term is limited to four years.¹¹³

Concerning the extension, it is necessary to mention Article 101, para. 5 of the Constitution of Azerbaijan since it gives an opportunity to the President limitlessly extend the serving terms. This Article notes that 'in case the conduct of the presidential election is not held due to military operations under the state of war, the term of office of the President shall be extended until the end of military operations. The Constitutional Court shall adopt the decision on this matter'.¹¹⁴ The President possesses the competence to declare a state of war, requirement that stipulates the Constitutional Court should adopt the decision on this matter looks weak since President nominates judges of the Constitutional Court and he has a parliamentary majority for approval his nominees. The conflict between Azerbaijan and Armenia over Nagorno-Karabakh area and occupation of 7 Azerbaijani regions around this area by Armenia troops¹¹⁵ enhances the concern that abovementioned constitutional provision can be misused.

This issue of extension is problematic not just because of European practice is not applied in Azerbaijan, but it together with the removal of two-term limits extraordinarily strengthens the power of one person, which establishes an apparent and direct danger to the principle of separation of power. As Linz notes, in a presidential system 'the power of the

¹¹¹ CDL-AD (2016)029 (n 51) 12.

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ The Constitution of Azerbaijan (n 102) Article 101.

¹¹⁵ UN Security Council Resolutions on Nagorno-Karabakh (1993)

<<https://2001-2009.state.gov/p/eur/rls/or/13508.htm>> accessed 28 March 2018

President is at once so concentrated and so extensive that it seems unsafe not to check it by limiting the number of times anyone President can be elected'.¹¹⁶

In Turkey, it seems that the Constitution is clear concerning terms of the President to serve in the office. Presidential term of office shall be five years, and one person may be elected to this position two times at most.¹¹⁷ But "problematic" constitutional provision related to the presidential term was introduced to the Turkish Constitution in 2017. According to this provision, if the Parliament decides a new election during the second term of the President, latter may run for office one more time.¹¹⁸ Apparently, it gives a chance to the same person to be elected third time after being in the office already two times. Why is such provision decided to be included in the Constitution? What is the *rationale* behind such requirement? There are no justified and clear answers to these questions. The Venice Commission has assessed this provision as providing the opportunity to the President to 'stay in office for a potentially unlimited period of time, which is clearly unacceptable'.¹¹⁹

A case of Azerbaijan demonstrates that incumbent President is using various means to enhance his position and increase chances for re-election indefinitely. It proves once again that two-term limitation is a necessary check to be able to minimise abuse of power by the incumbent Presidents. Unfortunately, we are currently observing negative tendencies in Turkey as well. To conclude I'd like to refer to the position of the Venice Commission with regard to issues discussed in this subchapter: 'the constitutional limitations on successive terms are meant to limit the risk of negative consequences for democracy arising from the fact that the same person has the possibility of occupying the presidency for an excessive period of time'.¹²⁰

¹¹⁶ Juan J. Linz, 'The Perils of Presidentialism' (1990) 1(1) Journal of Democracy 51, 66.

¹¹⁷ The Constitution of Turkey (n 96) Article 101.

¹¹⁸ Unofficial Translation of Amendments (n 99) Article 116.

¹¹⁹ CDL-AD (2017)005 (n 97) 14.

¹²⁰ CDL-AD (2009)010 (n 63) 5.

Since its transformation from presidential to a parliamentary system the role of the Georgian President logically has been diminished in 2010.¹²¹ Amendments introduced to the Constitution on that year removed the President's role to 'lead and exercise the internal and foreign policy of the state'.¹²² Under current Constitution, President is the Head of state, the guarantor of national independence and unity of the country.¹²³ At the same time, he shall ensure the functioning of state bodies and represent Georgia in foreign relations.¹²⁴ The latter function can be considered somewhat symbolic than real presidential power.

Currently, the Georgian President is elected by popular vote, but a presidential election in 2018 is going to be the last one where he will be elected directly since new model for the election of President was introduced and will be applied from 2024 on.¹²⁵ New constitutional provisions provide an indirect election of the President by an Election Board, which shall consist, 300 voters, including all members of the Parliament and the supreme representative bodies of the autonomous republics of Abkhazia and Adjara.¹²⁶ Respective political parties will nominate other voters from the composition of the representative bodies of local self-government.¹²⁷

Each democratic state may apply different election systems to elect its President. Nevertheless, to determine whether an applied electoral system is appropriate one it is necessary to define the whole system of check and balances. Newly introduced system for

¹²¹ CDL-AD (2010)028 (n 95) 7.

¹²² *ibid.*

¹²³ The Constitution of Georgia (n 94) Article 69.

¹²⁴ *ibid.*

¹²⁵ CDL-AD ((2017)013 Opinion on the Draft Revised Constitution, adopted by the Venice Commission at its 111th Plenary Session (16-17 June 2017) 11
<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)013-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)013-e)> accessed 21 March 2018

¹²⁶ CDL-AD (2017)023 Opinion on the Draft Revised Constitution as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, adopted by the Venice Commission at its 112th Plenary Session (6-7 October 2017) 8
<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)023-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)023-e)> accessed 21 March 2018

¹²⁷ *ibid.*

elections of the President does not demonstrate any overt danger for a neutral role of President enshrined in the Constitution.¹²⁸ However, first version of amendments contained potential risks of undermining the already restricted position of the President as a ‘neutral arbitrator between the state institutions and weakening the system of checks and balances set up under the draft amendments’.¹²⁹ On the one hand, amendments did not guarantee a greater consensus in the Election Board by requiring qualified majority in the first round of presidential elections.¹³⁰ Furthermore, since half of the Election Board consists of the members of the Parliament and if the ‘5% threshold in combination with the prohibition of electoral blocks and the allocation of seats to the winning party is upheld for the parliamentary elections, the President will most likely be the candidate of the parliamentary majority’.¹³¹ The Georgian government accepted concerns of the Venice Commission and introduced another amendment that minimised risks mentioned above.¹³² Firstly, a qualified majority of two-thirds of votes of the total number of electors has been introduced as a requirement; secondly, an open ballot system has been introduced, which will guarantee more transparency during the elections.¹³³ Besides, current parliamentary majority publicly committed to considering to reduce 5% threshold and allowing electoral blocks at the next parliamentary elections in 2020 in order to guarantee the President's neutral role.¹³⁴ This step can be considered a positive one, but since the parliamentary majority could refuse to follow their promises or suspend actions, they committed to take then real risks do exist for the

¹²⁸ CDL-AD (2017)013 (n 125) 12.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² CDL-AD (2017)023 (n 126) 8.

¹³³ *ibid.* 9.

¹³⁴ *ibid.*

neutrality of the future Georgian President, who suppose to be elected by the Election Board in 2024.¹³⁵

Constitutional provisions concerning the number of the presidential terms and duration of the office are compatible with democratic principles described above. The same person may serve five years in the office only for two consecutive terms.¹³⁶

2.1.2 Legislative and non-legislative powers of Presidents

The Constitution of Azerbaijan provides the President with wide-ranging and comprehensive powers in both legislative and non-legislative spheres. Concerning the legislative powers, the President possesses decree powers,¹³⁷ decrees and orders become valid from the day of their publication if not specified otherwise.¹³⁸ Declaration of martial law¹³⁹ and state of emergency¹⁴⁰ shall be made by the President, which requires submitting decree in both cases for approval by the Parliament within 24 hours. The President is provided with veto power over legislation¹⁴¹ and right to introduce legislation¹⁴² and call for referenda.¹⁴³

The most problematic issue here is related to the declaration of the state of war and emergency. Despite the requirement that decree on both matters shall be submitted for approval to the Parliament in both cases such condition have formal nature. First, according to the new constitutional provision, which was introduced in 2016 referendum, the President may dissolve the Parliament, *inter alia*, when the latter ‘fails to fulfil its obligations specified in Article 94 and 95... of the present Constitution due to unavoidable reasons’.¹⁴⁴ One of the obligations of the Parliament is to approve President's decree on the state of war and

¹³⁵ *ibid.*

¹³⁶ The Constitution of Georgia (n 94) Article 70.

¹³⁷ The Constitution of Azerbaijan (n 102) Article 113.

¹³⁸ *ibid.*

¹³⁹ *ibid.* Article 111.

¹⁴⁰ *ibid.* Article 112.

¹⁴¹ *ibid.* Article 110.

¹⁴² *ibid.* Article 96.

¹⁴³ *ibid.* Article 109.

¹⁴⁴ *ibid.* Article 98-1.

emergency.¹⁴⁵ In this case, if Parliament would be divided and not be able to approve or reject proper orders, President may dissolve the Parliament. Thus, abovementioned provision may easily be referred as “the sword of Damocles” over the legislature. Secondly, as it was described in previous subchapters the President has an overwhelming parliamentary majority; therefore, approval of decrees does not seem impossible at all.

Similarly to Azerbaijan, in Turkey, the decision of the President to declare the state of emergency shall be submitted to the Parliament for approval as well.¹⁴⁶ The Turkish Constitution provides the competence to the Parliament to reduce or extend the period of the state of emergency or lift it at all when it deems necessary.¹⁴⁷ But risks derived from the Constitution concerning control of the President over the legislature that described in above chapters, including the existence of the parliamentary majority supporting the President increase the role of the Parliament dramatically in this question. Furthermore, the same constitutional provision allows President to sign decrees on the matters linked to the state of emergency without the ‘limitation outlined in the second sentence of the seventeenth paragraph of Article 104’.¹⁴⁸ It undermines the prevailing status of laws in front of presidential decrees in case of their conflict. But amended Constitution attempts to establish a balance between the legislature and executive as well. Thus, it contains that presidential orders issued during the state of emergency shall *ex officio* cease to affect if they are not debated and concluded by the Parliament within three months.¹⁴⁹

Elimination of different forms of the state of emergency by 2017 referendum illustrates another controversial issue in the Turkish Constitution. In the Venice Commission

¹⁴⁵ *ibid.* Article 95.

¹⁴⁶ Unofficial Translation of Amendments (n 99) Article 119.

¹⁴⁷ *ibid.*

¹⁴⁸ Article 104, paragraph 17 reads: “In case of a conflict between presidential decrees and the laws due to differences in provisions on the same matter, the provisions of law shall prevail”.

¹⁴⁹ Unofficial Translation of Amendments (n 99), Article 119.

Opinion, ‘the differentiation of different kinds of states of emergency is a common solution on many countries, and a positive one: different types of state of emergency need the utilisation of different means’.¹⁵⁰ Provisions defined different types of the state of emergency will lose their power next year. According to new provision the President declares the state of emergency ‘in the event of war, mobilization, uprising, strong and actual attempt against homeland and Republic, widespread acts of violence of internal and external origin threatening the indivisibility of the country and the nation, emergence of widespread acts of violence which are aimed at the destruction of the constitutional order or the fundamental rights and freedoms, severe destruction of public order due to acts of violence, and emergence of natural disaster, dangerous pandemic disease or severe economic crises’.¹⁵¹ Therefore, the President gains the exclusive power to declare the state of emergency under comprehensive circumstances.

Power to the declaration the state of emergency in Georgia belongs to President too, which requires the approval of the legislature.¹⁵² Majority of the total number of the parliamentarians is necessary for approval.¹⁵³ Such practice does not pose any problematic issues.

Unlike Azerbaijan, constitutions of Turkey¹⁵⁴ and Georgia¹⁵⁵ do not provide the President with a power of legislative initiative, which is one of the core differences between these countries concerning the legislative power of the executive. However, the Turkish President may issue decrees on subjects related to the executive power.¹⁵⁶ It is worth to

¹⁵⁰ CDL-AD (2017)005 (n 97) 18.

¹⁵¹ Unofficial Translation of Amendments (n 99) Article 119.

¹⁵² The Constitution of Georgia (n 94) Article 73.

¹⁵³ *ibid.* Article 62.

¹⁵⁴ CDL-AD (2017)005 (n 97) 19.

¹⁵⁵ The Constitution of Georgia (n 94) Article 67.

¹⁵⁶ Unofficial Translation of Amendments (n 99) Article 104.

mention that, legislation prevails presidential orders;¹⁵⁷ furthermore, the Constitution apparently indicates matters that should be regulated by the presidential decrees.¹⁵⁸ These provisions minimised the risk that the President will have control over legislature through his decree powers. This provision at the same time differs the Turkish President from powerful President of Azerbaijan.

The President of Azerbaijan has a long list of powers concerning non-legislative matters. He appoints the Prime Minister by consent of the Parliament; however, consent is not required when the President dismisses the Prime Minister.¹⁵⁹ From another hand, permission needed by the legislature does not have any severe impact on a procedure of appointment of Prime Minister since the President may appoint her/him without the consent of the Parliament if the latter refuses to approve candidate proposed by the President to this position three times.¹⁶⁰ Additionally, the President does not need any approval or initiation to appoint or dismiss any member of the government while it is her/his sole competence.¹⁶¹ The legislature has no power to initiate resignation of Prime Minister or any other individual member of the government. While the Parliament can express no confidence in the government appointed by the President, application of such procedure will result in the dissolution of the Parliament itself. We will discuss details of this issue in one of the next subchapters.

The following list of appointment competences describes the scale of presidential non-legislative powers: to nominate judges of the Constitutional Court, Supreme Court and the courts of Appeal; to appoint judges of other courts; to appoint and dismiss General prosecutor with consent of the Parliament; to nominate members of the Board of Directors of

¹⁵⁷ *ibid.* 14.

¹⁵⁸ *ibid.* Article 106, Article 108, Article 118.

¹⁵⁹ The Constitution of Azerbaijan (n 102) Article 109.

¹⁶⁰ *ibid.* Article 118.

¹⁶¹ *ibid.* Article 109.

the Central Bank and to appoint the Chairman of the Central Bank; to appoint and dismiss officers of higher rank of the Military Forces¹⁶².

In Turkey, a power to appoint a minister raises a disturbance due to two main reasons. Firstly, the President may appoint the ministers from among the members of the Parliament,¹⁶³ which increases the possibility for President to control the legislature. Secondly, the Constitution lacks requirement of parliamentary approval of ministers appointed by the President.¹⁶⁴ However, constitutional provisions indicated congressional investigation over minister's activities¹⁶⁵ and a possibility of impeaching ministers by the Parliament, therefore, it does not allow us to put Turkey in the same row with Azerbaijan, where the President may appoint and dismiss ministers and other officers without the consent of any other body.

2.2 Extraordinary presidential powers: the dissolution of the Parliament and power to call early elections

Dissolution of assemblies is among those presidential powers, which usually analysed during the preparation of various indices measuring general powers of the executive.¹⁶⁶ In all three countries investigated in this paper, constitutions provide power for Presidents to dissolve the assemblies. Most of the countries where the President has the right to terminate the assemblies are parliamentary systems (for example, Germany, Italy, Romania, Ireland, etc.).¹⁶⁷

¹⁶² *ibid.*

¹⁶³ Unofficial Translation of Amendments (n 99) Article 106.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ Jessica Fortin, 'Measuring Presidential Powers: Some Pitfalls of Aggregate Measurement' (2013) 34(1) *International Political Science Review* 91, 91.

¹⁶⁷ Jenny S. Martinez, 'Inherent Executive Power: A Comparative Perspective' (2006) 115(9) *The Yale Law Journal* 2480, 2496.

Since Georgia is a parliamentary republic the presidential power to dissolve the assembly seems essential to solving the political crisis in the country, which can occur between the Parliament and Government. In such case, a neutral judge is needed to help to resolve the crisis, which at the same time will secure the functioning of state bodies by establishing harmony between two branches.¹⁶⁸ Circumstances under which the President of Georgia shall dissolve the Parliament enhances abovementioned claim. The Georgian Parliament shall put a vote the confidence in the Government within seven days after the composition of the Government is proposed.¹⁶⁹ A majority of the full list of the parliamentarians is required to gain the confidence of Parliament.¹⁷⁰ When Parliament fails to give a vote of confidence in a composition of the Government, the President shall dissolve Parliament and call snap elections.¹⁷¹ Almost the same rules envisaged to nominate and to give a vote of confidence in Prime Minister.¹⁷²

In presidential republics the power to dissolve the Parliament is not widespread;¹⁷³ however, Azerbaijan and Turkey are among exceptions.¹⁷⁴

According to a new provision adopted through a constitutional referendum in 2016, the Parliament of Azerbaijan Republic shall be dissolved by the President of Azerbaijan, if, (1) the same convocation of Parliament makes a vote of no confidence in the Cabinet of Ministers twice within a year; (2) after the recommendation of the President, the Parliament

¹⁶⁸ CDL-AD (2016)029, (n 51) 14.

¹⁶⁹ The Constitution of Georgia (n 94) Article 80.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² *ibid.* Article 81.

¹⁷³ CDL-AD (2017)005 (n 97) 21.

¹⁷⁴ There are another presidential or semi-presidential countries where the head of state possess the power to dissolve the Parliament, for instance, Ecuador, France or Russia. In the Russian Federation (Articles 111 and 177 of the Constitution) the President may dissolve the Parliament in case of a no-confidence vote against the Government or in case the Parliament rejects the Prime Minister's nomination three times. The French President may dissolve the legislature only following consultations with the Prime Minister and both chambers of the Parliament.

fails to appoint suggested candidates for a number of positions (judges of the Constitutional and Supreme courts, the Managerial Board of the Central Bank) two times, or (3) legislature fails to perform duties in specific articles.¹⁷⁵ It is vital to pay attention reasonableness of circumstances under which the Parliament may be dissolved, to define whether relevant presidential power disturbs the balance between executive and legislature.

Analyses above indicated that Prime Minister and individual ministers of the Cabinet are solely responsible before the President.¹⁷⁶ Consent of the Parliament for an appointment of the Prime Minister is very weak requirement since the President can appoint his nominee to the position of Prime Minister even the legislature rejects the nomination.¹⁷⁷ The Parliament may suspend appointment three times,¹⁷⁸ but afterwards, it does not have any other mechanism to prevent selection whoever the President wishes to see as Prime Minister. Furthermore, a power of the Parliament to adopt a decision of no confidence to the Cabinet of Ministers is not mandatory for the President, who can undoubtedly ignore such decision.¹⁷⁹

Candidates for members of the two top courts of Azerbaijan proposed by the President need the approval of parliamentarians,¹⁸⁰ and it is a crucial check over a non-legislative power of the executive by the Parliament. But since the Constitution indicates the failure to approve candidates nominated by the President as one of the reasons for the dissolution of the Parliament, the effectiveness of abovementioned check was dramatically decreased. Thus, dissolution of the legislature under this ground, in fact, discourages the Parliament to vote against candidates nominated by the President.

Unclearness of the third ground for dissolution gives the executive a hidden control over the legislature. When Parliament fails to fulfil its duties under particular articles of the

¹⁷⁵ The Constitution of Azerbaijan (n 102) Article 98-1.

¹⁷⁶ *ibid.* Article 109.

¹⁷⁷ *ibid.* Article 118.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.* Article 95.

¹⁸⁰ *ibid.*

Constitution the President gains a power to dissolve the assembly. These articles include those, which define competences of the Parliament in spheres of lawmaking, appointments, international relations, etc.,¹⁸¹ legislative initiative¹⁸² and set time limits and other terms for the adoption of laws submitted by the President.¹⁸³ What would amount a failure? Will any single minor failure suffice for dissolution? Since the Constitution is silent on these matters, unclarity of the third ground is visible.

In the context of Azerbaijan where the same person has been in power since 2003 succeeding it from his father, the extraordinary power of dissolution of Parliament extraordinarily enhances an already mighty President.

The Venice Commission expresses its concern over this issue as well. It notes that dissolution, usually, should aim ‘to secure harmony between the executive and legislature. The dissolution, however, has not much practical meaning when the executive does not really answer to the legislature’.¹⁸⁴ Under such circumstances, it is challenging to predict the real aim of empowering the President to dissolve the Parliament. The political reason standing behind it could be to gain an ability to control the Parliament if President loses his/her majority in there.

In case of Azerbaijan and Turkey presidential power to dissolve the Parliaments is indeed extraordinary since on the one hand, Presidents of both countries possess authorities to keep control over the legislature, from another hand legislature lacks real powers over the executive. Therefore, possession of the ability to dissolve the Parliament, where the President already has a comprehensive list of powers misbalances relations between executive and legislature in favour of the executive. It gives an opportunity for the Presidents to silence the legislative branch frightening the latter by dissolution. Additionally, in Azerbaijan, it

¹⁸¹ *ibid.* Articles 94 and 95.

¹⁸² *ibid.* Article 96.

¹⁸³ *ibid.* Article 97.

¹⁸⁴ CDL-AD (2016)029 (n 51) 14.

minimises chances of opposition would raise dissenting opinion in the Parliament which already rare occasion.

In all political systems, the head of state symbolises and guarantees stability and continuity of State action and has a fixed term in office.¹⁸⁵ In Azerbaijan, in addition to dissolving the Parliament and hence provoking new parliamentary elections, the President also holds the exclusive and arbitrary right to call early presidential elections with no guarantees whatsoever as to how and when that right will be exercised.¹⁸⁶ In some countries (Italy, Greece, Germany, etc.) Presidents have the power to call early parliamentary elections (not presidential) and most of the countries providing such power to Presidents have a parliamentary system.¹⁸⁷

2.3 Control over presidential powers: do parliamentary mechanisms work?

It is necessary to analyse forms and scope of actions that Parliaments may apply to determine the effectiveness of curbing the presidential powers by the legislature. In another word, it is crucial to define limits that occurred inherently to reducing presidential powers by the assembly, a significant institution aiming to hold horizontal accountability. These may include limits of censure, limits in the budgetary process, limits of overruling a presidential veto, and limits of impeachment.¹⁸⁸

Constitutions of Azerbaijan, Georgia and Turkey contain various provisions defining mechanisms that are designated to keep control over executive power. I would like briefly to describe of each tool from a comparative point of view:

¹⁸⁵ *ibid.* 13.

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ Cranenburgh (n 10) 64.

A motion of censure. The Constitution of Azerbaijan is silent on the power of parliamentarians to table and pass a motion of censure against ministers.¹⁸⁹ *Milli Majlis* may decide a vote of confidence in the Cabinet of Ministers since it is the issue falling under the competence of the Parliament under the Constitution, which requires a majority of 63 votes.¹⁹⁰ Nor the Constitution, neither the relevant Constitutional Law does contain any provisions on procedure providing for a vote of no confidence.¹⁹¹ The chapter added to the Internal Rules of the Milli Majlis regulates the proceedings.¹⁹² As the Venice Commission fairly emphasised, ‘in the absence of a textual amendment of the Constitution by referendum any procedure providing for a vote of no confidence implemented by means of Constitutional Laws cannot be other than recommendatory in nature’.¹⁹³

Theoretically, each member of the Parliament has a right to send requests to the Prime Minister and other members of the Government, and the Cabinet is obliged to reply within one month,¹⁹⁴ but any negative respond or no response at all do not trigger any procedures for investigation.

Georgia does not have detailed provisions on censure in its constitution like in Azerbaijan; however, it is constitutionally possible to execute control over ministers besides the vote of confidence. According to the Georgian Constitution, ‘any member of the Parliament shall have the right to pose questions to and get answers from the bodies accountable to the Parliament, as well as to pose questions to and get answers from the

¹⁸⁹ The Constitution of Azerbaijan (n 102).

¹⁹⁰ *ibid.* Article 95.

¹⁹¹ CDL-INF (2001)026 Opinion on the Draft Constitutional Law of the Republic of Azerbaijan on “Safeguards for the Vote of Confidence to the Cabinet of Ministers by Milli Majlis”, adopted by the Venice Commission at its 49th Plenary Meeting (14-15 December 2001) 5-6

<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2001\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)026-e)> accessed 2 April 2018

¹⁹² *ibid.* 5.

¹⁹³ *ibid.*

¹⁹⁴ *ibid.* 3.

Government, its members, head of executive bodies of territorial units at any level, state institutions'.¹⁹⁵ The Constitution contains the same right for a parliamentary faction consisting at least ten members of the legislative body, as well as an obligation for the Government to answer questions.¹⁹⁶ The answer is a subject of parliamentary discussion.¹⁹⁷ The Parliament has the right to bring the Prime Minister's attention to the official responsibilities of a specific member of the Government; however, such action requires an absolute majority of members of the legislature.¹⁹⁸

The Turkish Constitution indicates various ways of obtaining information and supervision by the Grand National Assembly, which, at first sight, creates an image of the country having real mechanisms to control the executive. Unlike constitutions of Azerbaijan and Georgia, one of such tools defined in the Turkish Constitution is censure. Any political party group or at least twenty deputies have a right to table a motion of censure; however, such proposal is not automatically included to the agenda of the Parliament, an absolute majority of presented members is required.¹⁹⁹ A motion of no confidence with reasoning tabled by political party groups or deputies 'shall be put to the vote only after a full day has elapsed'.²⁰⁰ An absolute majority of the total number of members is required to pass the motion.²⁰¹

The main problem regarding censure is not whether constitutions determine it, but its application in practice. Since application of motion of censure or no confidence vote requires voting by a substantial part of the legislature politics implemented by ruling party plays a

¹⁹⁵ The Constitution of Georgia (n 94) Article 59.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ The Constitution of Turkey (n 96) Article 99.

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

crucial role in this question. Vast majorities of ruling parties in assemblies²⁰² and strict party discipline of the ruling parties almost exclude any attempts to censure ministers or other members of the executive. In case of Azerbaijan, even the achievement of required majority is not suffice to lead resignation of a particular member of the Cabinet or whole Cabinet.

Budgetary process. It is essential to indicate whether any constitutional restrictions for an amendment to the budget by Parliaments are defined. In all three countries exclusive right to propose the budget belongs to the government. In Azerbaijan, the Constitution does not provide any power for the Parliament to amend the proposed budget.²⁰³

According to the Georgian Constitution amendments to the budget may be made exclusively if the Government expresses its consent.²⁰⁴

The Turkish Parliament can amend the budget as well, but proposals are entailing an increase in expenditure or a decrease in revenue shall not be made.²⁰⁵ Such constitutional provisions insinuate agenda control by the government. In all analysed countries assemblies have a right to refuse approval of the state budget, but since it could result in the dissolution of assemblies such veto power is considered as a weak one.

Overruling presidential veto. In Azerbaijan, the President enjoys solid veto power over legislation passed by the Parliament, and at the same time, an exceptional majority may overrule the presidential veto. In case of objections made by the President, the law shall be returned to the legislature without signing.²⁰⁶ If the Parliament adopts by majority of 95 votes laws that have been passed previously by majority of 83 votes, and by majority of 83 votes the laws that have been adopted prior by majority of 63 votes, then veto by President is

²⁰² YAP, a ruling party of Azerbaijan has 71 seats out of 125, AKP, a ruling party of Turkey has 316 seats out of 550, and Georgian Dream, a ruling party of Georgia has 115 seats out of 150. Last parliamentary elections were held in 2015 in Azerbaijan and Turkey and in 2016 in Georgia. Duration of the term is 5 years in all three countries.

²⁰³ The Constitution of Azerbaijan (n 102).

²⁰⁴ The Constitution of Georgia (n 94) Article 93.

²⁰⁵ The Constitution of Turkey (n 96) Article 164.

²⁰⁶ The Constitution of Azerbaijan (n 102) Article 110.

overruled, otherwise laws shall be revised in accordance to the President's comments, approved and sent to signing again.²⁰⁷ This rule is not applicable to the Constitutional laws since they will not come into force if the President failed to sign them.²⁰⁸

Unlike Azerbaijan constitutions of Georgia and Turkey do not contain substantial presidential veto power since both countries currently have a parliamentary system. The President of Turkey shall send laws back to the Assembly if she or he does consider them unsuitable, but if the Parliament adopts the law sent for reconsideration without any amendment, the President shall promulgate the law, in any case.²⁰⁹

In Georgia, if the President returns the draft law to Parliament with comments, and if the latter rejects the President's remarks, the first version of the draft law shall be voted.²¹⁰ An ordinary draft law shall be deemed adopted if a majority of the presented deputies during the relevant session support it.²¹¹ Majority of the total number of deputies and at least three fourth of the total number of deputies are required to adopt a draft organic law and a constitutional draft law respectively.²¹²

Constitutional provisions mentioned above imply that a significant threshold is required to overrule presidential veto in Azerbaijan, one-party dominance in the Parliament and President's strong position in the ruling party make overruling almost impossible. Unlike Azerbaijan, the overruling of presidential veto is more straightforward in Georgia and Turkey. Although if the ruling party decided to pass some controversial legislative act the problem of misconducts potentially may occur.

Impeachment procedure. Parliaments of these three countries have the power to impeach a President who has violated the constitution or committed a crime. In case of

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ The Constitution of Turkey (n 96) Article 89.

²¹⁰ The Constitution of Georgia (n 94) Article 68.

²¹¹ *ibid.*

²¹² *ibid.*

Azerbaijan, while the President can dissolve the Parliament readily, the President's impeachment procedure is complicated and difficult to enforce. Impeachment can be launched exclusively in the case of a grave crime committed by the President.²¹³ Only the Constitutional Court can initiate the impeachment procedure in front of the Parliament.²¹⁴ For this purpose, the Constitutional Court needs the opinion of the Supreme Court.²¹⁵ Afterwards, 95 members of the Parliament should vote in favour of the impeachment, and besides, the Chairman of the Constitutional Court should sign the decision within one week so that the impeachment is valid.²¹⁶ Consequently, 76% of the votes of the directly elected members of the Parliament do not have any weight until confirmed by one judge, who is herself/himself appointed by the President. Additionally, the Parliament has two months to adopt the impeachment decision, and if not, criminal charges of grave crime against the President will be automatically dropped.²¹⁷

Parliament of Georgia may dismiss the President; if the latter violates the Constitution or committed crime,²¹⁸ however, the issue shall be referred to the Constitutional Court for decision with at least one-third of the total number of deputies.²¹⁹ If the Constitutional Court confirms that the President committed a crime or has violated the Constitution Parliament shall vote for removal of President from office, which requires at least two-thirds of the total number of deputies.²²⁰

In Turkey, the only case when the President can be impeached is when he or she committed a crime of high treason.²²¹ One-third of the total number of parliamentarians is

²¹³ The Constitution of Azerbaijan (n 102) Article 107.

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ The Constitution of Georgia (n 94) Article 75.

²¹⁹ *ibid.* Article 63.

²²⁰ *ibid.*

²²¹ The Constitution of Turkey (n 96) Article 105.

required to initiate the impeachment procedure, and by the decision of at least three fourth of the total number of members, President can be removed from the office.²²²

The complexity of the impeachment proceedings that we observe in Azerbaijan can be justified in any other presidential systems; however, the vast array of presidential powers, including the right to dissolve the Parliament, along with other constitutional imbalances represents a direct threat to the democratic legal system. Difficulties of impeachment procedure in Turkey can be considered improper as well taking into consideration that the primary constitutional office in this country will belong to the President from the next year. Despite the fact that, the initiation of the impeachment procedure does not require a vast majority in Georgia, referral to the Constitution Court and requirement of two third votes to remove the President from the office indicates that the impeachment procedure is prevented to be used as a tool against the President by the ruling party.

²²² *ibid.*

Chapter III. Practical application of constitutional mechanisms curbing presidential powers: lessons learnt

3.1 Introduction

It is unfortunate to emphasise that use of legal tools aiming to restrain presidential powers and thus prevent dangers, which were described in the first chapter does not always produce desired results. On the one hand, a certain number of leaders present themselves as democratic ones referring to constitutions, which contain provisions on separation of powers, the conduct of regular elections and other procedures aiming to prevent concentration of power in hand of one person. From another side, these political actors apply a considerable number of various measures to fight against those constitutional principles pursuing limitations with the further glorification of such steps. Consequently, personalist regimes were established through the breakdown of constitutional term limits, an extension of power over the legislature and other means to achieve just one goal: to allow the same person to stay in office indefinitely or as long as possible. Chehabi and Linz, or Geddes indicate that ‘personalist regimes usually end with the death or incapacity of their rulers’.²²³ Another point raised by various scholars is that ‘the longer executives are allowed to stay in office, the more repressive their regimes are’.²²⁴

3.2 Lessons from Azerbaijan, Georgia and Turkey

I argue that above statement is fully applicable to Azerbaijan, a member State of the Council of Europe since 2001. In October 2003, incumbent President Ilham Aliyev ‘succeeded his father following disputed elections that were deemed neither free nor fair by the OSCE’.²²⁵ After re-election for the second presidency in 2008, Aliyev immediately

²²³ Baturu (n 9) 5.

²²⁴ *ibid.* 40.

²²⁵ Magdalena Frichova Grono, ‘Azerbaijan: Country Report’ in Lisa Mootz (eds) *Nations in Transit 2010: Democratization from Central Europe to Eurasia* (Freedom House, Inc 2010) 83, 84.

initiated a referendum on amendments to the Constitution, and in March of 2009 two-term limit, the primary check to presidential power was removed from the Constitution.²²⁶ The latter change was beneficial, and he was elected as a President the third time in 2013.²²⁷ Afterwards, Aliyev again proposed new controversial amendments to the Constitution, which were adopted by the referendum in September 2016.²²⁸ The last modifications empowered him to call an early elections that has been done already and snap elections was appointed on 11 April 2018.²²⁹ In case of his re-election term for office will be seven years, but not five as before.

Baturo argues that 'during the tenure of a particular President a country can also make significant democratic progress, or regress; and compliance with, or subversion of, term limits almost always plays a significant role in this'.²³⁰ He highlights an example of Jerry Rawlings, a former President of Ghana referring to the reports of the Freedom House. When Rawlings assumed power, Freedom House defined Ghana as "partly free" and soon ranking was changed to "not free". Then, with the introduction of multiparty elections and term limits, the country was reclassified as "partly free". When Rawlings decided to follow tenure limits and step down as indicated by laws Ghana was classified as "free".²³¹ Likewise, the Venice Commission referred to the same database, which apparently illustrates that

²²⁶ 'Azeris End President's Term Limits' (BBC 19 March 2009) <http://news.bbc.co.uk/2/hi/7949327.stm> accessed 28 March 2018

²²⁷ Thomas Grove and Afet Mehdiyeva, 'Aliyev Wins the Third Term as President of Azerbaijan' (10 October 2013) <https://www.reuters.com/article/us-azerbaijan-election/aliyev-wins-third-term-as-president-of-azerbaijan-idUSBRE99812Z20131009> accessed 28 March 2018

²²⁸ 'Azerbaijan Holds Controversial Constitutional Referendum' (Radio Liberty 26 September 2016) <<https://www.rferl.org/a/azerbaijan-referendums-constitutional-changes-aliyev/28012681.html>> accessed 28 March 2018

²²⁹ 'Azerbaijan Schedules Snap Presidential Election in April' (Radio Liberty 5 February 2018) <<https://www.rferl.org/a/azerbaijan-snap-election-aliyev/29018696.html>> accessed 28 March 2018

²³⁰ Baturo (n 9) 5.

²³¹ *ibid.* 267.

Venezuela, Dominican Republic and Nicaragua ‘suffered a decline in democratic quality in the years following the elimination of presidential term limits’.²³²

In the recent Freedom House report, Azerbaijan was rated "not free" receiving 14 points only out of possible 100.²³³ Other prominent international non-governmental as well as governmental organisations expressed their concerns over the continuing deterioration of human rights situation and increased the level of the corruption.²³⁴

It will be unfair to equal Turkey to Azerbaijan in the context of building super presidency without any effective constitutional checks, although current situation in Turkey is an obvious matter of concern about human rights, especially after the *coup* attempt allegedly initiated by Fethullah Gulen, a Turkish preacher living in exile.²³⁵ Besides, a constitutional reform package that will replace Turkey's "parliamentary system of governance

²³² CDL-AD 2018(010) (n 6) 18.

²³³ Freedom in the World Report (n 93).

²³⁴ For more information see, Report of the United Nations Working Group on the Universal Periodic Review Azerbaijan (July 2013)

<<http://www.ohchr.org/EN/HRBodies/UPR/Pages/AZindex.aspx>> accessed 28 March 2018
‘Azerbaijan’s Chairmanship of the Council of Europe: What Follow Up on Respect for Human Rights?’ 2185 Resolution of the Parliamentary Assembly of the Council of Europe (2017)

<<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24196&lang=en>>
accessed 28 March 2018

‘The Functioning of Democratic Institutions in Azerbaijan’ 2184 Resolution of the Parliamentary Assembly of the Council of Europe

<<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24188&lang=EN>>
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<<https://www.amnesty.org/en/countries/europe-and-central-asia/azerbaijan/report-azerbaijan/>> accessed 28 March 2018

Transparency International Corruption Perception Index (2017)

<https://www.transparency.org/news/pressrelease/corruption_perceptions_index_2017_shows_high_corruption_burden_in_more_than> accessed 28 March 2018

²³⁵ Lorena Rios, ‘President Erdogan’s “New Turkey”’ (2017) 71(3) IBA Global Insight 37, 40.

with an executive presidency" in November 2019, which passed through a referendum last April by a tight margin,²³⁶ raises concerns.

Second chapter analysis illustrates that when the same person is a President on the one hand, and a chair of the political party that has a majority in Parliament, from another, the issue is deeply concerning. The constitutional amendments removed a requirement prohibiting president to hold a position in a political party. Another problem is related to the ambiguity of the presidential term in Turkey. President of Turkey may be re-elected once, however, following the 2017 amendments, in case new elections have been decided by the Parliament during the second term of office of the President, he or she can run for the presidency one more time.²³⁷ Relations between Presidents and Governments as well as parliamentary majorities were always tense.²³⁸ But abovementioned constitutional amendments and increased authority of the Turkish ruling party and its leader Erdogan strengthen concerns that legislature may fully control by the executive soon.

Since Georgia has a parliamentary system of governance, it was necessary to analyse the powers and the role of President of Georgia mostly in the context of relations between legislature and executive as well as Government and a President. The second chapter provides relevant analysis and discusses the central question to what extent is the scope of presidential powers in Georgia. The primary constitutional issue concerning the presidency in Georgia is related to the new provisions introduced by the incumbent ruling party on the election of the Georgian President. According to amendments, which will enter into force in 2024, a newly established Election Board will elect the President, and some concerns are foreseen due to its composition as well as the slow process to fully introduce proportional

²³⁶ 51% voted for and 49% voted against, according to Turkey's Supreme Election Council *ibid.* 37.

²³⁷ CDL-AD 2018(010) (n 6) 5.

²³⁸ Levent Gonenc, 'Presidential Elements in Government: Turkey' (2008) 4(3) *European Constitutional Law Review* 488, 508.

elections system.²³⁹ Although various difficulties and worries exist concerning consolidation of power by the ruling party, Georgia demonstrates the political will to collaborate with the Venice Commission and other international stakeholders to conduct dialogue over constitutional reforms and particularly their practical implementation in coming years.

As can be seen, Azerbaijan is not on a right path since almost all constitutional mechanisms for curbing powers either became ineffective or removed from the constitution. This path raises the question whether such personalised regime will “end by death or incapacity of its ruler”. In all circumstances, the future is not promising.

Despite to all negativities that currently are observed in Turkey, it shall be heeded that the country is as a member of NATO and is seeking full membership of the European Union. Divisive voting results on constitutional amendments, which were proposed by charismatic Turkish leader Erdogan demonstrated that Turkish society is polarised and the idea of power concentration in hand of one person does not have substantive support by the people. Therefore, any attempt to remove mechanisms aiming to curb presidential powers will receive strong resistance.

Both internal²⁴⁰ and external²⁴¹ factors prevent ruling party of Georgia to concentrate the power in its hands, although there are clear signs that latest constitutional amendments were designed to achieve this goal. After accepting already some recommendations of the Venice Commission on amendments current parliamentary majority in its official letter to the Commission publicly promising that they will further consider dealing with rest of concerns.

²³⁹ CDL-AD (2017)023 (n 126) 8.

²⁴⁰ Legacy of the 2003 Rose Revolution; the existence of opportunities for the opposition to be enhanced; relatively strong and active civil society, including expert community; independent or opposition media, including TV channels and radio stations; lack of energy resources

²⁴¹ Close political and economic affiliation with the Western countries and the EU separately; aggressive politics of neighboring Russia

Conclusion

To summarise, we shall mention a few preliminary findings on the topic. First, dangers derived from the perpetual rule are apparent. Unlimited power is particularly troubling in presidential systems, where one person may consolidate absolute authority in his or her hands and apply various techniques to override constitutional instruments aiming to control presidential powers. This absolutism may pose dangers such as tyranny, arbitrariness, inefficient governance, non-transparency, and unaccountability.

Second, there is universally accepted approach that checks constraining the powers of the executive branch of government shall be applied. Therefore, constitutions contain specific provisions dealing with this issue. Parliamentary control mechanisms over executive and term limits are among main constitutional instruments.

Third, unfortunately, in some cases, including Azerbaijan, incumbent presidents apply various measures either to overrule existing checks entirely or to diminish their possible efficiency. These measures imply any actions from the removal of term limits for Presidents to control legislature through a parliamentary majority.

I would like to propose following suggestions in order to prevent outcomes of the third conclusion:

The first proposal suggests designing and applying special public awareness programs, which explain that institutions and principles are more important than political leaders. A unified working group containing legal scholars, experts, human rights activists, and *intelligentsia* shall design such programs and address it to the broader public continuously.

Another suggestion is addressed to the international community, particularly, to international organisations and separate states financially and politically supporting these institutions. It proposes preparation and adoption of an international document that will have

the binding force to respect the rule of law, separation of powers and term limits. Opinions of the Venice Commission, which has advisory nature and works of prominent legal scholars, shall be taken into account during this process.

The third suggestion has more specific nature since it calls donor countries to consider political and economic leverages to put pressure on states with a distinct concentration of power in hand of one person or family where there is a lack of free, fair and democratic elections. Considerations may cover even individual sanctions against ideologists of power concentration or proponents of removal of term-limits. This suggestion may sound unrealistic due to geopolitical reasons, and state interests but as well as constitutional arguments that “democratic dictators” use. However, I believe continuing Syrian crisis, which directly impacted not just the Middle East, but the European Union countries is a convincing example, which proposes that measures against dictators shall be taken immediately. Otherwise, the danger with an immense scope will not be easy to prevent, as it is a case currently.

Last two proposals require further research with strong argumentation to be able to determine potential effectiveness. One of them proposes the application of one-term presidential tenure for seven years being in the office. An absolute ban on re-election already exist in some countries, and in my opinion, it shall be disseminated further. Another suggestion enshrines a two-term limitation for members of Parliaments, consequently for a Prime Minister. The initial argument behind this proposal is that unacceptable cases of the concentration of power by a particular political party may occur. Research shall address questions whether we shall consider the re-election as a human right? If so, what reasonable limitations shall we apply over this right? Are term limits or other mechanisms violate the right of citizens to vote and play an active role in political life of the country?

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