AMERICAN UNIVERSITY OF ARMENIA

DEPARTMENT OF POLITICAL SCIENCE AND INTERNATIONAL AFFAIRS

The Constitution Building Process in Armenia and the Concept of Separation of Powers

A MASTER ESSAY SUBMITTED TO

THE FACULTY OF GRADUATE PROGRAM OF

POLITICAL SCIENCE AND INTERNATIONAL AFFAIRS

FOR PARTIAL FULFILLEMENT OF THE DEGREE OF MASTERS OF ARTS

By

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YEREVAN, ARMENIA

SPRING 2014

SIGNATURE PAGE

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May 2014

Acknowledgements

First of all I would like to express my deepest gratitude to my supervisor Dr. Yevgenya (Jenny) Paturyan, for her support, understanding, advice, comments etc.

My special thanks to my lovely mother for her support and love. And finally, my special thanks go to my friends Naira Kocharyan and Mariam Hayruni.

Contents

Abstract

The aim of this Master's essay is to show the importance of the doctrine of separation of powers and discuss its application in Armenia's constitution. Throughout the essay the constitution Building process in Armenia is described, (where the discussion is also devoted to the constitutional amendments) by particularly emphasizing the concept of separations of power, which is one of the main factors in democracy and the cornerstone of modern government. The essay tries to find out to what extent the current Constitution of Armenia corresponds to the requirements of the Constitution of a democratic state in terms of separation of powers.

Throughout the essay it is argued that though formally the concept of the separation of powers exist in constitutional level, there are some problems with its practical implementation.

1. Introduction

Throughout the essay the constitution Building process in Armenia is described, (where the discussion is also devoted to the constitutional amendments) by particularly emphasizing the concept of separations of power, which is one of the main factors in democracy and the cornerstone of modern government. This is so because democracy in any country can develop in case of separation of powers between the different branches of government and where there is an effective system of checks and balances, which ensures accountability of these branches within the government.

Modern democratic political systems imply exercise of governmental power by separate institutions which are separate arms of government and include executive, legislative and judicial powers. Since Armenia is defined as a unitary, multiparty, democratic nation-state, the issue of separation of powers[1] in our country, which is an essential component of democratic state, is of the highest importance. It is essential to observe the interactions of these three branches and thus identify the extent and types of checks and balances among them. And the notion of checks and balances is emphasized because the concept of separation of powers deliberately prescribes the existence of check and balances as a mean of mutual control in a way that it ensures that no branch becomes powerful enough to overwhelm the other two, "…in this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State."[2]

The aim of this Master's essay is to show the importance of the doctrine of separation of powers and discuss its application in Armenia's constitution. Throughout the essay it is argued that though formally the concept of the separation of powers exist in constitutional level, there are some problems with its practical implementation.

The sections of this Master's essay are designed in a way that in chronological way discuss the constitution building process in Armenia, its evolution over time, as well as achievements and drawbacks, if any, reached during this process. So in section 1 the purpose and importance of the topic is discussed, research questions and hypotheses are presented as well as research methodology is introduced.

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[1] The Constitution of the Republic of Armenia, Chapter 1, Article 1: "The Republic of Armenia is a sovereign, democratic, social State governed by the rule of law."Article 5: "State power shall be exercised in conformity with the Constitution and the laws, based on the separation and balance of the legislative, executive and judicial powers."
[2] Vile, M.J.C. *Constitutionalism and the Separation of Powers*, A Project Of Liberty Fund, Inc. Indianapolis, 1967, 14

Section 2 is devoted to literature review in order to first of all reveal the importance of the topic of separation of powers and its implication in constitution of any country, secondly introduce academic literature and thinking on this subject and most importantly to discuss past research on the issue of separation of powers in Armenia. Literature review begins with the conceptualization of the notion of separation of powers. It discuses both the origin and the modern expression of the concept. And it is equally important to ensure that in this essay the concept of separation of powers is by no means understood as the division of state power into three branches which fully operate independently from each other. Quite the opposite, in order for this concept to function there is a need of mutual control, so-called principle of checks and balances, of the branches of power in order to prevent the authorities from abusing the power or responsibilities they are prescribed.

Section 3 comprises main body of discussion of the essay. It discuses period of time comprising the years of 1995-2005, when the process of constitutional amendments[3] was taking place, by particularly focusing on the results of 2005 amendments of the Constitution of the Republic of Armenia. This section also gives short overview of 1990-1995 Constitution building process in Armenia, presents the final report[4] of Venice Commission[5], interpret various expert interviews and compares key points that changed due to the amendments. And finally it makes an attempt to shed some light on the recent developments regarding Constitutional amendments

[3] The Constitution of the Republic of Armenia was adopted in 1995. The constitutional amendments were adopted on 27 November, 2005, by a referendum

[4] European Commission for Democracy through Law (Venice Commission), *Final Opinion on Constitutional Reform in the Republic of Armenia, adopted by the Venice Commission at its 64th Plenary Session (Venice, 21-22 October 2005)*, on the basis of comments by Mr Aivars Endzins (Member, Latvia), Mr Kaarlo Tuori (Member, Finland), Mr Vlad Constantinesco (Expert, France), 2005

[5] The Venice Commission of the Council of Europe is the European Commission for Democracy through Law (better known as the Venice Commission) was established in May 1990

(2014 Draft Concept Paper) and is devoted to the discussion of the draft of the Concept Paper[6] on RA Constitutional Amendments. By analyzing opinions of experts, political scientists and political parties the third section of the Master's Essay tries to find out the need, if any, of constitutional amendments.

1.1 Research Questions and Hypothesis

In order to focus this Master's essay and determine the path it will pass, research questions and consequent hypothesis are formulated. The general Research Questions and hypothesis are as follows:

RQ 1: To what extent the current Constitution of Armenia correspond to the requirements of the Constitution of a democratic state in terms of separation of powers?

RQ 2: What was the need for the amendments of the Constitution of the Republic of Armenia in 2005?

RQ 4: What is the need for the upcoming amendments of the Constitution of the Republic of Armenia?

The hypothesis for these general research questions are as follows:

H1: The Current Constitution of the Republic of Armenia leaves room for criticism in terms of separation of Powers.

It is important to mention that general questions, i.e., RQ2 and RQ3 are divided into four and three minor research questions respectively and are revealed within the scope of Section 3.

[6] Concept Paper is elaborated by Specialized Commission for Constitutional Amendments adjunct to the President of the Republic of Armenia, for details see http://moj.am/storage/uploads/A1.pdf (accessed on April 3, 2014)

So that Section 3.2 which discuses 2005 amendments of the Constitution of the Republic of Armenia tries to answer to the following questions:

- What were the problems with 1995 Constitution in general and in terms of Separation of Powers in particular?
- What players (Government, Council of Europe, Opposition) wanted to change in Constitution?
- What changed?
- What did not change?

And the final part of Section 3 (3.3) which is devoted to the discussion of the draft of the Concept Paper on Constitutional Amendments of the Republic of Armenia seeks to answer to the remaining questions which are as follows:

- What are the problems with the Constitution?
- What players (government, opposition) want to change?
- What is needed for the change to happen?

1.2 Research Methodology

The research methodology for this Master's essay is qualitative research design. This research is done with the help of document analysis, where a number of documents are analyzed and discussed. These documents are as follows:

- CDL-AD(2005)016 Second Interim Opinion on Constitutional Reform in the Republic of Armenia adopted by the Venice Commission at its 63th Plenary Session (Venice, 10-11 June 2005);
- CDL-AD(2005)025-e Final Opinion on Constitutional Reform in the Republic of Armenia adopted by the Venice Commission at its 64th Plenary Session (Venice, 21-22 October 2005);
- The Constitution of the Republic of Armenia (1995, as before the amendments);
- The Constitution of the Republic of Armenia (2005, with Amendments);
- Draft of Concept paper on RA Constitutional Amendments

In addition to that, various resolutions of Parliamentary Assembly of the Council of Europe are analyzed as well.

Discussion also is taking place with the help of secondary data, thanks to analysis of various interviews available in World Wide Web, conducted by various media centers and journalists.

2. Literature Review

2.1 The concept of separation of powers: Origin and modern expression of the concept

The existing literature on separation of powers doctrine is voluminous and a variety of theoretical explanations and empirical studies exist to understand this concept. The doctrine has ancient origins, and is associated with Plato and Aristotle in Greece and in republican Rome, by growing out from the development of western political thought.

Ancient Greek political thought outlined the concept of separation of powers with a mixed regime, when Aristotle in his *Politics* indicated three agencies of government which are the General Assembly, the Public Officials and Judiciary.[7] However as it is noted in Peter Simpson's *Philosophical Commentary on the Politics of Aristotle* book unlike modern time separation of powers, Aristotle divides the powers each within itself rater than from each other, so that while modern separation of powers concentrates all legislative functions in one body, executive functions in another one and judicial ones in third body, Aristotle separates the powers in condition of mixed regime among different parts of the city, "… so some parts of the deliberative and Judiciary he would give to the populace, and the other parts and offices he would give to the notables, hence Aristotle's balance is between parts of the city, not, as in the modern case between parts or powers of the regime."[8]

If we are to define the concept in really broadly (conventional) way as suggested in Montesquieu's *Spirit of the Laws*[9]*, 1966 [1748];* the doctrine of separation of powers states that power is separated into three branches constituting Legislative, Executive and Judiciary, where the first makes laws, second administers them and the last, Judiciary- interprets those laws. Furthermore, these three functions of government need to be separated and appointed to different bodies in order to restrain the attempt to violate *Political Liberty* by any of these branches, where Montesquieu defines *Liberty* as a right to do everything whatever the laws permit.[10] However, it is commonly accepted among a number of scholars that this Montesquian model is not identical

[7] As cited in Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, Duke University School of Law, 1970.
[8] Simpson, Peter *Philosophical Commentary on the Politics of Aristotle*, University of North Carolina Press, 1997, 341
[9] Spirit of the Laws, 1966 [1748]; as cited in Alvey, John Ralph, *The Separation of Powers in Australia: Issues for the states*, Queensland: Work and Industry Futures Research Center, 2005, 17
[10] MacFarlane, Alan, *Montesquieu and the Making of the Modern World,* 2000, 37

to the modern expression of the separation of power, rather than he is very often considered as the author of the idea of this concept. As it is stated in Carolan's book, "Montesquian model…has not been wholly reproduced in the institutional architecture of any modern state"[11], and as author goes on "…there must accordingly be serious doubts about its contemporary relevance."[12] Nevertheless many scholars[13] found its modern expression in a way that it evolved to embrace the idea of division of state power between the branches, and that "…each branch should engage in some form of security over the others, to ensure that its allocated power were not being exceeded or misused."[14]

While the concept of separation of powers possesses various interpretations, it will be interesting to continue the discussion regarding its origin with the Montesquieu and another most often cited author: Lock from England. The view of these authors on the discussed doctrine apparently had an impact on modern authors[15] in their efforts to make contribution to the modern time understanding and implementation of the term of separation of powers.

The conception of separate three arms of government (after Montesquieu) reemerged with the development of English Parliament, and this time in Lock's book titled *Two Treaties of Government (1689)*[16] where he named these three branches of government legislative federative and executive by stressing that the same person shouldn't have the power to both make law and execute them. What about Judicial part, in Lock's conception of the term of separation of powers

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[11] Carolan, Eoin, *The New Separation of Powers,* Oxford University Press, 2009, 18
[12] Ibid.
[13] Morris, Caroline and Malone, Ryan, *Regulations Review in the New Zealand Parliament,* Macquarie Law Journal, Vol4, 2004; Robert A. Goldwin et al, *Separation of Powers--does it Still Work?*, American Enterprise Institute for Public Policy Research, Washington, D.C, 1986
[14] Ibid., 7
[15] Ibid., see also Sharma, Urmila and S.K., *The Principles And The Theory Of Political Science*, Atlantic Publishers & Dist, 2000; Sindi, Guðjónsson, *The Seperation of Powers, the Non-Delegation and the right to Work in Icelandic Constitutional Law*, Akureyri: Haskolinn A Akureyri, 2007; and Calabresi, Steven G., Berghausen, Mark E. and Albertson, Skylar, *The Rise and Fall of the Separation of Powers*, Northwestern University Law Review : Vol. 106, No. 2 , 2012
[16] Ibid.

the Judicial functions are within the Legislative one, [17] (meanwhile, in contrast to that, in Montesquieu's writings the power is separated into Legislative, Executive and Judicial branches by stressing the importance of the independence of the Judiciary[18]). As Alvey[19] paraphrases Lock "…the importance of the separation of powers is essential to check on the abuse of executive power and the goal of limited and accountable government", so that he was contradicting the very notion of concentrating of power in the hands of any one individual or group of individuals. However, as Sam J. Ervin fairly notices for Lock the three arms of government namely executive, legislative and federative are by no means co-equal[20]. By continuing to interpret Lock's vision of the concept Ervin indicates that Lock's three branches of government are not designed to operate independently, so that according to him whereas Legislative branch is supreme, the Executive and Federative are left within the control of the monarch, indicating dual type of government.

If to discuss the modern relevance of the concept it may be stated that it is true that all the three powers first and foremost need to be separate in order to avoid the concentration of power in the hand of one (tyranny).[21] At the same time they are required to conduct a reciprocal control and cooperation to reach the equilibrium of the powers.[22] To put in other words, it is more about equilibrium of the powers, rather than the separation.

[17] Marcel Bode, *Political philosophy of John Locke*, GRIN Verlag, 2008, 9
[18] Ibid., 23
[19] Ibid.
[20] Ibid., 108
[21] Carolan, Eoin, *The Problems with the Theory of the Separation of Powers*, University College Dublin (UCD) School of Law, 2009, 17
[22] Dr. Camelia Tomescu, Dr. Mihaela Codrina Levai, *The Principle of Equilibrium and Separation of Powers under the Romanian Constitution,* The USV Annals of Economics and Public Administration Volume 12, Issue 1(15), 2012

With regard to existing researches[23] on the discussed topic it is important to note that the central concept for the modern Constitutionalism is exactly the concept of separation of powers as a compulsory principal for liberal democracy, which is also the very political principle that ensures constitutional governance. Thus, the cornerstone of the notion of constitutionalism is the acknowledged role of the government in the life of the society, via separating the power of this government, bringing it under control and put limits to the concentration of power in the hands of one. And exactly from this perspective the term separation of powers constitute a great deal of significance in modern times.

Very important point here is that the proliferation of literature on the concept of separation of powers somehow obscures it, hence no one and common explanation or definition exists. Moreover, very often while conducting a research on a particular issue there is a need to narrow down the concept of separation of powers to make the point clearer for the reader. It is equally important to ensure that in this essay the concept of separation of powers is by no means understood as the division of state power into three branches which fully operate independently from each other. Quite the opposite, in order for this concept to function there is a need of mutual control, so-called principle of checks and balances, of the branches of power in order to prevent the authorities from abusing the power or responsibilities they are prescribed.

2.2 The Concept and the Regime issue in Armenian case

A number of materials exist on the issue of separation and balance of powers in Armenia. Hence this part of discussion is also devoted to the review of past researches and reports

[23] Ibid., see also Georghios M Pikis, *Constitutionalism - Human Rights -Separation of Powers: The Cyprus Precedent Book Description*, Hotei Publishing, 2006

concerning this issue under the Armenian Constitution. Additionally, since Armenia is considered to be a country with semi-presidential constitution, discussions on semi-presidentialism, (which basic characteristics is its dual executive structure) and its sub-types[24] are also introduced in this set of materials. This is important to include given the fact that the issue concerning the form of government (presidential/parliamentary) along with other questions such as method of adoption of the Constitution was a subject of debate during constitution making process in Armenia[25].

Many scholars emphasize the popularity of semi-presidential type of regime during a period of time when a number of post communist countries embraced exactly this type of regime while making their transition to democracy[26]. The semi-presidentialism in Armenia began in 1995 with the adoption of the Constitution. This form of government is to say a mix of basic institutional arrangements of two predominant types of regime, i.e. presidential and parliamentary. As Choudhry and Stacey it put "A compelling explanation for the turn to semi-presidentialism in young democracies lies in a reaction against the risks posed by "pure" forms of both presidentialism and parliamentarism."[27] As the authors further state in case of Presidential government there is a risk of the concentration of power by a leader which may consequently threaten the democratic process, and as Linz in his *The Perils of Presidentalism* states, "…on the other hand presidential constitutions also reflect profound suspicion of the

[24] President-parliamentary, primer-presidential. Up until constitutional Amendments in 2005 Armenia was president-parliamentary, for details see Robert Elgie's *Semi-presidentialism: An Increasingly Common Constitutional Choice,* Institute of Political Science, Academia Sinica, 2008

[25] Khachatryan, Henrik M., *The First Constitution of the Republic of Armenia*, United Nations High Commissioner for Refugees, Yerevan, 1998, 15

[26] See Roper, Steven D., *Are All Semipresidential Regimes the Same? A Comparison of Premier-Presidential Regimes,* JSTOR, 2002, 253-272; Markarov, Alexander, *Regime Formation and Development in Armenia*, Slavic Research Center (SRC), 2007; Elgie, Robert; Moestrup, Sophia and Wu, Yu-Shan, *Semi-Presidentialism and Democracy*, Palgrave Macmillan, 2011

[27] Choudhry, Sujit and Stacey, Richard, *Semi-Presidentialism as a Form of Government:Lessons for Tunisia*, The Center for Constitutional Transitions at NYU Law, No. 2, June 2013, 3

personalization of power…"[28] Whereas in parliamentary systems, as the authors (Choudhry and Stacey) go on "… it is feared that governments are more beholden to the political parties in the legislature than to the electorate, because of the lack of direct election of the prime minister and the need for a government to enjoy the confidence of the legislature."[29] It is suggested that Semi-presidentialism outweigh this concerns firstly by keeping a legislature with real control over the government and secondly, in this type of regime a president is beholden to electorate and acts as a check on political parties.

Shugart in his *Semi-Presidential Systems: Dual Executive and Mixed Authority Patterns* book by adapting from Maurice Duverger's original conception of semi-presidentialism brings three main features of this type of regime which are as follows:

"Popularly elected President;

The president with considerable constitutional authority;

The existence of a prime minister and cabinet which is subject to the confidence

of the assembly majority."[30]

Maurice Duverger in his *A new political System Model: Semi Presidential Government* put it this way; "A political regime is considered as semi-presidential if the constitution which established it, combines three elements: (1) the president of the republic is elected by universal suffrage, (2) he possesses quite considerable powers; (3) he has opposite him, however, a prime minister and ministers who possess executive and governmental power and can stay in office only if the parliament does not show its opposition to them."[31] Besides the semi-presidential regime need to be based on certain variables such as "... the constitutional rules, the make-up of

[28] Linz, Juan, *The Perils of Presidentialism*, 1(1) Journal of Democracy, 1990
[29] Ibid.
[30] Matthew, Søberg Shugart, *Semi-Presidential Systems: Dual Executive And Mixed Authority Patterns*, Palgrave Macmillan Ltd, San Diego, 2005, 324
[31] Duverger, Maurice, *A new political System Model: Semi Presidential Government,* Amsterdam, 1980, 166

the parliamentary majority, the position of the president in relation to this majority, and national and contingent factors."[32] Meanwhile, Giovanni Sartori, in his *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, indicates dual authority structure as a component of semi-presidentialism, i.e, when president shares power with prime minister.[33]

As Vardan Poghosyan, Hrayr Tovmasyan and Vahagn Grigoryan discuss in their draft on amendments to the Armenian Constitution, the adoption of semi-presidential regime in Armenia was conditioned by several factors. Firstly, in 1991 the institution or the post of directly elected President was already established and the ruling administration headed by the president was in favor to preserve this position and further on strengthen it.[34] The only concern of the ruling majority was to decide which regime is the most preferable for the strong position of the President. Hence their decision was in favor of semi-presidential regime, as in time of crises this form of government gives an opportunity to always solve the problem in favor of President and may result in dissolution of the Parliament. The adoption of the semi-presidential type of government in Armenia in 1995 was a subject of criticism especially by political opposition which assessed it as "an authoritarian regime and an attempt for the legalization of individual power".[35] The opposition was particularly in favor of parliamentarian system of government, however it constituted minority in Parliament, thus it could not have decisive impact in this regard.

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[32] Ibid.
[33] Sartori, Giovanni, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, 2nd ed., London, Macmillan, 1997
[34] Poghosyan, Vardan; Tovmasyan, Hrayr; Grigoryan, Vahagn, *Amendments to the constitution of the Republic of Armenia : draft*, NGO Democracy, Yerevan, 2005
[35]Mkrtchian, Nerses and Sadoyin, Bagrat, Armenia's Constitution and the Separation of Powers among the Executive, Legislative, and Judicial Branches of Government: the New System of Separation of Powers, Armenian Center For National and International Studies,16, accessed on April 30, 2014 http://www.nato.int/acad/fellow/96-98/hovannis.pdf

Gagik Harutyunian, in his book indicates another principle characteristic of semipresidential type of regime by stressing to the fact that "... in the event of a major dispute between the government and the parliament it is not only the parliament that may withdraw confidence in the cabinet, but also the President may dissolve the Parliament."[36] Furthermore, in this type of regime it is indicated that contradictions may occur between the President and the government when they represent different political party, and the aspects of executive power of the President and the Premier are not so clear in this case. However this situation never takes place when the President enjoys majority in the Parliament, "...since political responsibility is shared."[37]

In this context it is also important to mention that Armenia by embracing semi-presidential form of government before amendments was capturing its parliament-president variation, whereas after amended constitution the sub-type is defined as Premier-President.[38] In general semi-presidential regimes vary depending on the position of the President vis-à-vis Executive branch of government. Or in other words, these types of regime are measured on the basis of constitutional power of the president. One example that defines these two sub types is that in case of Parliament- President the Premier is responsible to both the President and the Parliament, -meanwhile in case of Premier-President sub-type of government the Prime Minister is only responsible to the Parliament. This means that from 1995-2005 Armenia had even stronger presidential power than after the amendments, which will be discussed in the upcoming sections.

[36] Harutyunian, Gagik, *Constitutional Culture: The Lessons of History and the Challenges of Time*, 2009, 160
[37] Ibid., 161
[38] Ibid., 12

3. Constitution-Building Process in Armenia 1990-2005

3.1 Constitution-Building Process in Armenia 1990-1995: Short Overview

The issue of new constitution was on the agenda since the declaration of independence of Armenia[39]. In 1990, the Armenian Supreme Council (voting: 183 to 2) adopted the Declaration of Independence (August 23, 1990) which was the bases for a new Constitution. On November 5, 1990 according to the decision of the Supreme Council, Constitutional Commission[40] was formed to elaborate and draft the text of new Constitution[41]. Though the constitution drafting process came into being it was much setback conditioned by political, economic and social crises.

Nevertheless in June 1993 the Commission submitted a constitution draft to Parliament. The draft which is also known as presidential draft was published in newspapers in July. It immediately attracted a great deal of criticism, particularly concerning the disproportionate power of the President, failure to make references on the issue of 1915 Genocide and many other issues.[42] The opposition criticized it on the ground that it was laid on by ruling power. Thus, six opposition parties[43] that are known as the Council for National Accord started to elaborate their own text. As a result there were two main drafts (first one elaborated by Commission, and the second one by opposition) the basic distinction between which was the concentration of power.[44] Whereas in the Commission's draft power was concentrated in Executive branch, in case of opposition's draft more power was possessed by Parliament.

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[39] Defeis, Elizabeth F., *Elections and Democracy: Armenia, a Case Study,* 20 Loy. L.A. Int'l & Comp. L. Rev. 455, 1998

[40] A Constitutional Commission, headed by Levon Ter-Petrosyan-the Chairman of the Supreme Council of the Republic of Armenia, was comprised of 20 members and was established in November. Commission included members of the parliament, legal experts, official figures etc.

[41]Khachatryan, Henrikh M, *The First Constitution of the Republic of Armenia*, United Nations High Commissioner for Refugees, Yerevan, 1998

[42] Gönenç, Levent ed., Prospects for Constitutionalism in Post-Communist Countries, Kluwer Law International, Hague, 2002

[43] The Agrarian Democratic Party, the Armenian Democratic Party, the Armenian Republican Party, the Armenian Revolutionary Federation, the National Democratic Union, the Union for Constitutional Rights.

[44] Ibid., 461

The President, Levon Ter-Petrosyan and proponents of constitutional draft of Commission argued that there is a need for strong presidential power and that this power "…was either necessary or no greater than those in other countries." [45] Meanwhile opponents of this draft argued that constitution gives too much power to president over the three branches of government and advocated a parliamentary republic.

Another draft of new Constitution was prepared and submitted to the Supreme Council by the Head of the Department for Constitutional Research at the Institute of Philosophy and Law of Armenia's National Academy of Science Henrik Khachatryan. Many provisions of the draft, as it is mentioned in letter's book *The First Constitution of the Republic of Armenia*, were assessed as valuable in opinion of many experts and were taken into Commissions consideration.[46]

Nevertheless, after years of disputes over competing drafts of the constitution between President Levon Ter-Petrossyan and opposition the new Constitution of Armenia created a strong presidency which gave the president considerable power over the legislative and judicial branches of government. This took place on July 5, when along with first parliamentary elections in Armenia since its independence, the voters also cast ballots in the nationwide Armenian referendum on a new constitution. As Commission on Security and Cooperation in Europe or Helsinki Commission report indicates, the turnout (referendum) was 55.6 per cent, among which 68 per cent voted for the constitution, which means that only 37.8 per cent of eligible voters voted for the constitution.[47]

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[45] Commission on Security and Cooperation in Europe, *Armenia's Parliamentary Election and Constitutional Referendum July 5 1995Yerevan Armenia,* A Report Prepared by the Staff of the Commission on Security and Cooperation in Europe, Yerevan 1995

[46] Ibid., 16

[47] Ibid., 3

According to the Constitution of the Republic of Armenia, as before its amendments, the prerogatives of the President which were included in Section 3 of the Constitution named "The President of Republic" comprised variety of features, such as for example the President was appointing the Prime Minister; members of the cabinet (or government) were also appointed by the President on the advice of the Prime Minister; the President had right to dismiss both the Prime Minister and members of the cabinet. Additionally as it was prescribed by Article 55 (4) the Government was the subject of no confidence to the National Assembly, and as the article states "The President of the Republic... In the event the National Assembly expresses no confidence in the Government, within a twenty-day period accepts the resignation of the Government appoints a Prime Minister and forms a Government."[48]

By the Constitution the President was also authorized to dissolve National Assembly after consultation with the Prime Minister and the President (or Chairman) of National Assembly and designate Special elections.[49] Exactly this right of the President (regarding the right to dissolve national assembly) was one of the most disputed provisions of the Constitution, because the document was not specifying those cases upon which the President could dissolve the Parliament. Anyways, by jumping ahead, it is important to note that constitutional amendments of 2005 solved this problem which will be discussed in the next section (3.2) of this Master's Essay.

The Constitution (as before the amendments) was containing provisions that was granting the president considerable power over the judicial branches of government as well. So that the President was appointing the Chief Prosecutor at the proposal of the Prime Minister; he/she had

[48] Constitution of the Republic of Armenia (1995)
[49] Ibid., Chapter 3, Article 55 (3)

right to remove the Chief Prosecutor[50]; the President was appointing the president of the Constitutional Court and its members[51], more precisely four out of nine members, the remaining five member were appointed by the National Assembly[52]. According to the Article 55 (10) the President of Republic could terminate the power of those members who were appointed by him/her. The article stated that "... On the basis of the finding of the Constitutional Court, he (the President) can terminate the powers of a member of the Constitutional Court appointed by him or approve his arrest and his being subject to administrative or criminal liability by judicial procedure."[53] The President might also in accordance with Article 55 (11) appoint the presidents and judges of the Court of Appeals; terminate the powers of judges; appoint the Deputy Chief Prosecutors and prosecutors heading structural subdivisions of the prosecutor's office, dismiss prosecutors who were appointed by him etc.[54] The President of the Republic also had right to head the Justice Council and was the guarantor of the independence of judicial bodies; he/she was appointing fourteen members of the Council for five years term.[55]

The other prerogatives of the President, according to the 1995 Constitution, were comprising determination of guidelines in terms of both domestic and foreign policy, additionally the President was prescribed to be the guarantor of independence, territorial integrity and security of the Republic of Armenia, he was pursuing the upholding of the Constitution, ensuring and providing regular functioning and activity of legislative, executive and judicial

[50] Ibid., Chapter 3, Article 55 (9)
[51] Ibid., Chapter 3, Article 55 (10)
[52] Ibid., Chapter 6, Article 99 states "The Constitutional Court is composed of nine members, of whom the National Assembly appoints five and the President of the Republic appoints four. The President of the Republic appoints the president of the Constitutional Court from among the members of the Constitutional Court."
[53] Ibid., Chapter 3, Article 55 (10)
[54] Ibid., Chapter 3, Article 55 (11)
[55] Ibid., Chapter 6, Article 94 states " The guarantor of the independence of judicial bodies is the President of the Republic. He heads the Justice Council. The Justice Minister and the Chief Prosecutor are the vice presidents of the Council. Also included in the Council are fourteen members appointed for five-year terms by the President of the Republic and of whom two are legal scholars, nine are judges, and three are prosecutors.

authorities, etc. In other words as Henrik Khachatryan puts it by summing up the prerogatives of the President, "... The President is a political figure who coordinates and consolidates operations of all the branches of State Power."[56]

The content of only the third chapter (The President of the Republic) of the Constitution shows that, indeed, this document granted strong leverages to the President who had almost sole right to appoint and dismiss various officials. In this context it is important to note that according to the Article 57 the President could be removed from office in case he/she committed serious crime or for state treason. In such cases the National Assembly by majority of votes should decide to apply to Constitutional Court, then based on findings of the Court the Parliament should decide to remove the President from the Office by at least 2/3 of votes.[57]

The further analysis of above mentioned and other articles included in the Constitution will be presented in the next section (3.2) which will go further in its attempt to answer the question: What were the problems with 1995 Constitution before the amendments? Additionally, it will try to reveal and present the need of constitutional amendments, and of course the general question to pose will be the following: to what extent the Constitution of the republic of Armenia (before and after amendments) provides for the principle of separation of powers.

3.2 Constitution-Building Process in Armenia 1995-2005: 2005 Amendments

The Constitution of the Republic of Armenia was adopted on 5 July, 1995, by a nationwide referendum. Then the constitutional amendments took place, again adopted by nationwide referendum on November 27, 2005. As it is stated in the Constitution of the Republic

[56] Ibid., 113
[57] Ibid., Chapter 3, Article 57

of Armenia, article 5 "The state power shall be exercised in conformity with the Constitution and the laws based on the principle of the separation and balance of the legislative, executive and judicial powers."[58] So the Constitution does embrace the concept of separation of powers, yet as of before the amendments in 2005, it was creating a system of government with strong and centralized presidential power with great deal of influence on the operation of the legislative, executive, and judicial branches.[59]

As it was already mentioned above in this section many researches concerning the discussion and assessment of the provisions of the RA Constitution, indicate that 1995 document was creating a system of government with strong power and influence of the President over the operation of executive, legislative and judiciary branches[60]. And more importantly, though the Constitution (the one before the amendments) states that the President is to provide the normal activity of executive, legislative and judicial authorities, analysis of the latter shows that the President is granted with overwhelming power over the Parliament, Prime minister and Judicial branch rather than ensures and controls separation and balance of powers. And the examples of this argument have already been presented in 3.1 section of this essay.

Furthermore, many officials, experts in the field of constitutional law, political scientists and researchers point out to the various limitations of 1995 document. For example as Justice Minister Hrayr Tovmasyan states in the interview with Armenpress conducted in 2012, "... A while ago after the adoption of the Constitution in 1995 or at the moment of adoption it was obvious that it would need a great deal of amendments... However in 2005 with the amendments

[58] Constitution of the Republic of Armenia (With Amendments, 2005)
[59] Harutyunyan, Gagik, *Constitutional Culture: The Lessons of History and the challenges of Time*, Revised English edition, Yerevan, 2005, 2009, 159-161; Defeis, Elizabeth F., *Elections and Democracy: Armenia, a Case Study*, Loyola of Los Angeles International and Comparative Law Review, Los Angeles, 1998, 463-465; Ishiyama, John T. and Kennedy, Rayan, *Superpresidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan,* EUROPE-ASI A STUDIE S, Vol. 53, No. 8, 2001 , 117 7–1191, University y of Glasgow, 2001
[60] Ibid.

of the Constitution it became possible to solve the problems... especially with regard to mechanisms of checks and balances of the arms of government."[61] He also mentioned the fact of overcentralized power in the hands of the president (while speaking about the Constitution before the amendments) and argued that in such conditions, "good or bad functioning of the mechanisms of power was conditioned by the person who holds the post of the President."[62]

The amendments were envisaged to create more balanced separation of legislative, executive and judicial powers. The adoption of this improved Constitution was considered to be an important step in terms of democratic reform in Armenia and it is likewise to mention that both Venice Commission[63] of the Council of Europe[64] and the Organization for Security and Co-operation in Europe (OSCE)[65] positively assessed the amendments.

The issue of constitutional amendments was vivid since 1998, when during presidential election campaign, the candidates including Robert Kocharyan (Prime Minister at that time) promised constitutional change.[66] The main point common for many candidates was the idea to limit the broad powers of the President. Kocharyan particularly promised to bring to the balance the relations of the President and the National Assembly (the Parliament) which previously was predominantly in favor of the President.[67] After the elections, President Kocharyan by a decree (on May 19, 1998) appointed a commission on constitutional amendments. It was scheduled to draft amended constitution by December in 1998, after that set on discussion in National

[61] ARMENPRESS Armenian News Agency, accessed on May 7, 2014, http://armenpress.am/arm/news/686747/
[62] Ibid.
[63] The role of the Venice Commission as it is stated in official website of the Council of Europe is "... to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law." , For democracy through law -The Venice Commission of the Council of Europe, accessed on May 5, 2014 http://www.venice.coe.int/WebForms/pages/?p=01_Presentation
[64] Ibid.
[65] OSCE, Office for Democratic Institutions and Human Rights, *Republic of Armenia: Constitutional Referendum 27 November 2005,* OSCE/ODIHR Needs Assessment Mission Report 24-25 October, 2005, Warsaw, 2005
[66] Ibid.
[67] Ibid., 182

Assembly (in the beginning of 1999) and put to a referendum (on May of the same year, 1999) after parliamentary elections. However the Commission had not ever come to a common conclusion concerning the draft and after the parliamentary elections new staff was appointed to elaborate on draft amendments.[68] This was a period of time when Armenian authorities began to collaborate with the Venice Commission of the Council of Europe on Constitutional reforms, and so-called Working Group on the Revision of the Constitution established between the two.[69]

It is essential to note that by becoming a member of the Council of Europe (January 25, 2001) Armenia assumed a set of commitments, comprising variety of fields such as freedom of expression and information; elections, referenda; judicial reform; demonstration, meetings and free movement of persons; human rights defender institution in Armenia; national and ethnic minority rights; alternative service; freedom of expression and information etc.[70] Along with the mentioned fields constitutional amendments were particularly considered to be an important step towards democratization of the country.

The Council of Europe did not specifically impose the requirements upon Armenia with regard to constitutional amendments, rather revision of the Constitution was crucial to honor the fulfillment of the commitments. Besides, Armenia at that point was officially conducting constitutional reforms and was in close collaboration with the Venice Commission in that matter.

The Parliamentary Assembly of the Council of Europe (PACE) in its resolution (Resolution No. 1304, September 26, 2002) on the honoring of obligations and commitments by Armenia, called Armenian authorities to elaborate and adopt a draft text of amended constitution

[68] Ibid.
[69] Ibid.
[70] The report undertaken by Yerevan press Club under the Monitoring of Democratic Reforms in Armenia project , Sections of report developed by members of Partnership for Open Society Initiative; Open Society Institute Human Rights and Governance Grants Program, Open Society Institute Assistance Foundation-Armenia, 2006

and to submit it in 2003.[71] It also called to closely collaborate with the Venice Commission and follow its recommendations. Here, one of the recommendations of the Assembly resolution, for example, was to enhance supervision role of the National Assembly.[72] However, as a matter of fact, the Venice Commission was unaware of the actual process of constitutional reforms as the Armenian authorities stopped to collaborate with the Venice Commission, and in fact failed to follow the latter's recommendation. The amendments failed as referendum of 25 May 2003 did not gain sufficient quorum. In that regard The Parliamentary Assembly of the Council of Europe in its 1458 Resolution 2005 on constitutional reform process in Armenia recalled the failure of the referendum and stated that "...the authorities at the time had not committed themselves to a campaign in support of the reform as parliamentary elections were held in parallel."[73] Assembly also fixed the subsequent deadline for holding of a new referendum on amended Constitution that needed to take place no later than in June 2005.

Another resolution of the assembly (10601) this time more precisely states that constitutional amendments are precondition for the fulfillment of Armenia's commitments undertaken upon the accession to the Council of Europe.[74] The resolution furthermore discusses

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[71] Council of Europe: Parliamentary Assembly, Resolution 1304, Honoring of obligations and commitments by Armenia, 2002, accessed on May 9, 2014 http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/ERES1304.htm ,
Point 19 of the resolution, particularly states, " Concerning the revision of the constitution which is currently in progress, the Assembly takes note of the authorities' determination to adopt the draft text of the new constitution by next spring and to submit it to the nation for approval by referendum. It asks the authorities to continue their co-operation with the Venice Commission and to heed the recommendations made. It nevertheless invites the authorities to examine the possibility in the draft constitution of increasing the parliamentary supervision role of the National Assembly."

[72] Ibid.

[73] Council of Europe: Parliamentary Assembly, Resolution 1458, *Constitutional reform Process in Armenia*, 2005, accessed on May 9, 2014 http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1458.htm,
Point of the resolution states, " It recalls (the Assembly) that in 2001 the Armenian authorities and the European Commission for Democracy through Law (Venice Commission) had arrived at a mutually acceptable draft constitution in line with European standards. This draft, however, underwent significant changes during its examination and adoption by parliament and the text submitted to referendum in May 2003 represented an important step backwards. The Assembly therefore insists that such a scenario must not be repeated with the new draft."

[74] Council of Europe: Parliamentary Assembly, Resolution 10601, *Constitutional Reform Process in Armenia*, 21 June 2005, accessed on May 9 2014, http://www.refworld.org/docid/43a96c884.html

main weak points that are required to carry out in the amended Constitution which include the following spheres: human rights; separation of powers; independence of the judiciary; and local self-government. The document adds that for the constitutional referendum to succeed first of all there is a need of a broad consensus and secondly, political will in this matter. Interestingly, the Assembly states that the first (consensus) is a completely missing component, while the second one (political will) has to be questioned as well. This is so because the ruling coalition which comprises three different parties considerably vary in their political behavior and ideologies, besides the opposition parties appeal to their supporters to reject the amendments in referendum if the conditions concerning amendments in the fields of separation and balance of powers, local self-government and independent judiciary are not fulfilled. Another concern is lack of proper awareness concerning constitutional change among the population, who in such conditions are assessed to be unprepared for thorough decision.[75]

It is important to note that the Parliamentary Assembly makes its resolution upon the Venice Commission report (CDL (2000) 88, Basic provisions for the Concept of Reforming the Constitution of the Republic of Armenia)[76] which identified above mentioned areas (human rights, separation of powers, independent judiciary and local self-government) of the highest importance to change in the Constitution of the Republic of Armenia. With regard to separation of powers, the resolution states that the Commission defines its implementation as inconsistent as a result of shortage of practically separated, mutually checking and balancing branches of government. It also expresses its concerns regarding the fact that the place of the president in state power is not stated clearly. The same is true with regard to his/her power and responsibilities particularly in the realm of executive branch of governmental power. The other

[75] Ibid.
[76] Ibid.

issue is the role and place of the Prime Minister in the system of executive governmental power. While revealing resolution's concerns regarding Article 56[77] (which grantes the President the power to issue orders and decrees), it states that this, "…entitles him (the President) to priority norm-setting. This is incompatible with the principle of supremacy of the law, whereby sub-legislative normative acts should not only conform to law but also be rooted in law. "[78] Resolution also lists all the prerogatives of the president by assessing those as impressive. It states that even though considering separately those are acceptable and are usual in democratic countries, especially in presidential systems, the problem is generated by the combination of all those prerogatives (discussed in section 3.1) as they are creating disproportion. Furthermore, neither legislative nor judiciary branches of government do not constitute counterbalancing power to the President.

The resolution assesses the Constitution highly problematic in terms of judiciary power as well, by stressing the fact that there are not sufficient guaranties of its independent functioning. The concerns of PACE regarding local self-government, along with other issues, are particularly related to the appointment of the Mayor of Yerevan City, who is both appointed and removed by the President. The main problem here is that the position of the Mayor, in such conditions, comes from state governance. In this matter the resolution justifies its concerns by emphsizing that "...more than one third of the entire population of the country and more than 60% of the economic potential is concentrated in the capital city. If the Mayor was elected directly, this would create a new, mighty centre of power which could potentially destabilize a small country such as Armenia." [79] The document also makes recommendation to follow the

[77] Ibid. Chapter 3, Article 56
[78] Ibid.
[79] Ibid.

solution which is practiced in many democracies, that is to have city council that must be elected directly and hence to elect the Mayor.

So after the failure of referendum scheduled on May 25, 2003, a new round of constitutional reforms drafting process was set. As a result three drafts were introduced, prepared by ruling coalition (August 8, 2004), National Democratic Alliance (August 16, 2004), and by the United Labor Party (September 17, 2004). [80] In October the Venice Commission presented an interim opinion with regard to these three draft amendments of the Constitution of the Republic of Armenia.[81] As the National Assembly chose the one proposed by ruling coalition to elaborate on and set for the referendum, it requested the Venice Commission to make expert assessment on that draft.

The report which presents analysis of the constitutional amendments adopted in the first reading[82] make its interim opinion stressing the fact that the constitution need more significant reform in the fields of separation of powers. It particularly called for more balanced power between the state branches. This expert assessment states that in present condition when the president's power is not balanced by the legislative power (which is important to grant with necessary power), along with presidential immunity, hinders democratic life of the country.

In accordance with the report another fields that need more reforms are judiciary and local self-government. In that respect the repot also announced its regrets that among the three drafts of constitutional amendments Armenian Parliament (the National Assembly) has chosen a draft (and submit to assessment of the Venice Commission as a bases for amended Constitution)

[80] Ibid., 4
[81] CDL-AD(2005)016, European Commission for Democracy through Law (Venice Commission), *Second Interim Opinion on Constitutional Reforms in the Republic of Armenia,* Adopted by the Venice Commission at its 63rd Plenary Session (Venice, 10-11 June 2005) On the basis of comments by Mr Aivars Endzins (Member, Latvia) Mr Karlo Tuori (Member, Finland)
[82] Ibid., 2

which contains minor changes and almost did not take into account the comments made by the Venice Commission in previous reports. So the criticism concerning the power of the President to dismiss the National Assembly; to appoint and dismiss Prime Minister and the cabinet; as well as chair and convene the sittings of the Government, have not been taken into consideration. The conclusion of the Commission in that respect was that the new draft of constitutional amendments does not give guarantees " ...either for an effective independence of the Government vis-à-vis the President, or for a strong National Assembly..."[83] and many of its provisions are contradicting European standards.

However, considerable changes have been made in the fields of Human rights (protection of human rights and freedoms) and media (pluralism and independence of media), that are welcomed by the Commission. Commission also welcomed some changed provisions regarding judiciary, according to which the President no longer had the right to chair the Council of Justice and National Assembly did not appoint two non-judge members of the Council of Justice. Instead, many aspects of judiciary power contained minor changes in the draft and were assessed as limited, as the President still had a right to appoint and dismiss Prosecutor General and the Chairmen of Council of Justice, as well as judges. The Commission found it necessary to make changes which would guarantee the independence of the Judiciary from the Executive branch. With respect to local self- government the main criticism, as it has already been mentioned, was related to appointment of the Mayor of Yerevan by the President.

So to sum up, the Commission indicated three main aspects that are required to reform and bring to European standards. Those were first of all the separation and balance of powers between the state organs; secondly, the independent judiciary; and finally, the issue of appointment of the Mayor of Yerevan.

[83] Ibid., 4

As it was agreed between the Armenian authorities and the Commission, on June 17 the formers submitted the revised version of constitutional amendments draft to the Working Group of the Commission and got recommendations for further improvement (during the meeting held in Strasburg on 23 and 24 June, 2005). After revision of the draft Armenian authorities again submitted it to the Working Group, which prepared an assessment on that draft and send back to Armenian Authorities. It is important to mention that amended constitution was mainly assessed positively by the Commission. The document passed second (on 1 September, 2005) and third (on 28 September, 2005) readings in the National Assembly. Then, finally, by Presidential decree it was scheduled that the referendum on amended constitution would take place on November 27, 2005, which officially had high turnout.

If we are to analyze the amended constitution in terms of its advancement concerning separation and balance of powers the best way is to compare it with the previous version, by discussing the interactions between the branches. This is because the amendments were envisaged to create more balanced separation of powers, and many amended provisions indeed support this idea. However to what extent it served its purpose is second part of the subject of discussion to conduct.

So, for example if according to 1995 Constitution it was the President who was appointing and dismissing the Prime Minister, with the amended Constitution the Prime Minister can now only be dismissed by the National Assembly with the vote of no confidence as it is prescribed by Article 84 of the Constitution of the Republic of Armenia.[84] The new Constitution gives right to the President to appoint the Prime Minister, but that person must enjoy confidence of the majority or (if it is not possible) the highest number of the Deputies in the National Assembly. The Article states that the President of the Republic shall "...appoint as Prime

[84] Ibid., Chapter 4, Article 84

Minister the person who enjoys the confidence of the majority of deputies, and in case this is not possible, shall appoint the person who enjoys the confidence of the highest number of deputies."[85] However, as the Venice Commission (in its final opinion on constitutional reform in Armenia) fairly notices, the part of the sentence which states "...in case this is not possible shall appoint the person who enjoys the confidence of the highest number..."[86] is rather unclear, and the Commission called for the exact procedure.[87]

The amended Constitution also failed to clearly define the mechanisms of the formation of the Government. According to Article 55 (4), the President shall appoint and dismiss the members of the government by following the Prime Minister's proposal. However it is unclear to what extent the President is bound to follow the Prime' Ministers proposal.

Amended Constitution elaborates on the role of the Government, which, to note, was too general in previous version. So if 1995 Constitution was merely stating that the Government of the Republic of Armenia exercises executive authority, with amended Constitution it is clear that the Government develops and implements domestic policy, while it implements foreign policy jointly with the President.[88] Article 86 of the amended Constitution states that the sessions of the Government are convinced and chaired by the Prime Minister, however the President of the Republic may convince and chair sessions on the matters of foreign policy, security and defiance,[89] (where the President of the Republic has strong influence).To note that according to Article 86 of the Constitution before the amendments the sessions of the Government were called by the President and by the Prime Minister but only in case of the President's instructions.[90]

[85] Ibid., Chapter 3, Article 55 (4)
[86] Ibid.
[87] Ibid., 4
[88] Ibid., Chapter 5, Article 85
[89] Ibid., Chapter 5, Article 86
[90] Ibid., Chapter 5, Article 86 (The article of the Constitution before the Amendments)

Another important achievement of the Constitution is Article 74.1, which precisely define those cases upon which the President of Republic may dissolve the National Assembly, which were not there in previous version of the Constitution adopted in 1995. The Constitution before the amendments was only stating that the President can dismiss, (after consulting with the president of the National Assembly and the Prime Minister) the National Assembly and designate special elections. Now this action may be achieved only in the cases prescribed by Article 74.1 of the Constitution.[91]

The content of the Article 75[92] of the amended Constitution also left room for criticism. The essence of the article is that the legislative initiative in the Parliament (National Assembly) belongs to the members of the Parliament and the Government. Peculiarity of this auricle is that the Government may demand that the draft legislation proposed by it be voted with amendments and corrections acceptable to it. Regarding this article the Venice Commission back in its 2004 report express an opinion that "…in this way, the Government can decide the way in which the Parliament should exercise its legislative power…"[93] and made suggestion to remove this from the text.

The next set of amendments that was requested by the Venice Commission to conduct was about judicial reforms. 1995 Constitution prescribed that according to the Constitution and

[91]Ibid., Chapter 4, Article 74.1, the Article states: "The President of the Republic shall dissolve the National Assembly when the National Assembly fails to approve the Government programme for two consecutive times within two months.
The President of the Republic may dissolve the National Assembly upon the recommendation of the Chairperson of the National Assembly or the Prime Minister, when: (a) in the course of three months of a regular session, the National Assembly does not render a decision on a draft law considered as urgent by the decision of the Government; (b) sittings of the National Assembly are not convened for more than three months in the course of a regular session; (c) in the course of a regular session the National Assembly does not render any decision on issues under its discussion for more than three months. "

[92]Ibid., Chapter 4, Article 75, the Article states: "The right to legislative initiative in the National Assembly shall belong to the Deputies and the Government.
The Government may determine the sequence of the debate for its proposed draft legislation and may demand that they be voted only with amendments acceptable to it…"

[93] Ibid., 11

the laws that were only the courts that execute justice in Armenia,[94] and by doing this, members of the Constitutional court and judges are independent and obedient only to the laws.[95] The 1995 Constitution then states that the guarantor of this independence is the President of the Republic of Armenia,[96] who at the same time is the head of the Justice Council. Additionally, as it was already mentioned in section 3.1 the President was appointing the president of the Constitutional Court and its members; the Deputy Chief Prosecutors; fourteen members of the Council for five years term etc. All these provisions doubted the independence of Judiciary.

So the Judicial reform was announced as a precondition by the Parliamentary Assembly of the Council of Europe for the fulfillment of commitments undertaken by the Republic of Armenia.[97] As a result of amendments many provisions were reformed. Namely, thanks to article 94 the guarantor of the independence of courts is no longer the President of the Republic, but the Constitution and the laws.[98]

The next reform towards the independence of the Judiciary was article 94.1, according to which the sittings of the Council of Justice are chaired by chairperson of the Court of Cassation (without the right to vote), rather than the President of the Republic.[99] Despite the reforms, the President still has power with respect to judiciary as he or she in accordance with article 55 (10)[100] appoints four member of the Constitutional Court; the President may "… on the basis of a conclusion of the Constitutional Court terminate the powers of any of his/her appointees in the Constitutional Court…"[101] So that in fact the President may appoint and terminate four member of the Constitutional court, two academic lawyers to the Council of Justice, judges of Courts of

[94] Ibid., Chapter 6, Article 91
[95] Ibid., Chapter 6, Article 97
[96] Ibid.
[97] Ibid.
[98] Ibid., Chapter 6, Article 94
[99] Ibid., Chapter 6, Article 94.1
[100] Ibid., Chapter 3, Article 55 (10)
[101] Ibid.

Appeals and the Court of Cassation. And as the report under *Monitoring of Democratic Reforms in Armenia project* fairly notices, despite of the amendments the Constitution still retain provisions according to which the President is the final decision maker, and "… there is no provision in the Constitution as to what the Justice Council can do if the President does not appoint a candidate nominated by the Council."[102] Among the achievement of the amended Constitution was the right of citizens to bring cases before the Constitutional Court as prescribed by article 101 (6) which states: " As prescribed by the Constitution and the law on the Constitutional Court, applications to the Constitutional Court may be filed by… (6) everyone, with regard to a specific case, where a final court act is available, all the judicial remedies are exhausted, and who challenges the constitutionality of a legal provision applied with respect to him or her upon such act; "[103]

It is important to note that judicial reforms are conducted on ongoing bases. The first phase is represented in the 1995 Constitution, which as it was already discussed had many drawbacks, and was required to reform. The second phase came with the constitutional amendments, the main aim of which with respect to judicial field was to reduce the dominant role of the President, and somehow ensure independence of the Judiciary. After that, Judicial Code was adopted (which was applying to all courts, excluding the Constitutional Court), by the National Assembly, again aimed at the reforms in this field.

The final set of amendments that was announced by the Council of Europe as a precondition to fulfill commitments before it by the Republic of Armenia was concerning the local self-government. Chapter 7 of the Constitution that is devoted to the local self-government assumed a number of amendments. This section need to be amended to become an independent

[102] Ibid., 24
[103] Ibid., Chapter 5, Article 101 (6)

institute that is by no means steamed from state governance. So in that respect the amended Constitution according to article 107 states that the community exercises local-self governance through the bodies of the local self-government which are elected for a four years term.[104] Article also states that the members of the community may directly participate in the governing process of the community affairs. An important achievement was article 105.1 which states: "The land within the administrative boundaries of the community shall be the property of the community..."[105] the exceptions are comparing the land that is considered to be necessary for the state needs.

At the same time article 109, which states that the head of community may be removed from the office by the Government, was criticized by the Venice Commission and it was suggested to remove this provision. Armenian authorities as a compromise to this suggestion add that the Government may remove the head of the community referring to the opinion of the Constitutional Court.[106]

Many researchers emphasize that because of this provision there is contradiction between the Article 109 on the one side and the articles 2 and 4 on the other of the Constitution of the Republic of Armenia. So, whereas article 2 of the Constitution states that the power that belongs to people is exercised through state and local-self government bodies, and article 4 states that the bodies of self-government, along with the President, and the National Assembly are elected through "…universal, equal, and direct suffrage, by secret ballot"[107] above mentioned article 109 contradicts these principles via granting the Government right to remove the head of the

[104] Ibid., Chapter 7, Article 107
[105] Ibid., Chapter 7, Article 105.1
[106] Ibid., Chapter 7, Article 109
[107] Ibid., Chapter 1, Article 4

community. Article 108 of the Constitution states Yerevan as a community and the Mayor of the city may be elected directly or indirectly.[108]

So the Constitutional Amendments were called upon to strengthen democratic foundations in Armenia. Besides, Armenia had certain commitments before the Council of Europe the fulfillment of which could be reached through the amendments in the Constitution. As it is revealed from the discussion conducted above, constitutional reforms resulted in a number of achievements, which were assessed positively by the Venice Commission. However, at the same time the Commission, many experts in the field of constitutional law, political scientists and researchers indicate drawbacks concerning this document.

3.3 New Round of the Constitutional Amendments: 2014

Nowadays a huge wave of discussion is devoted to the Draft of the Concept paper on RA Constitutional Amendments. On September 4, the President of the Republic of Armenia, Serzh Sargsyan signed a decree according to which Specialized Commission for Constitutional Amendments adjunct to the RA President was established. The chairman of the Commission, who is also the President of the Constitutional Court, is Gagik Harutyunyan. On April 11, the latter, in the meeting[109] with the President and members of the Commission announced that the draft concept paper[110] on constitutional amendments was ready and was put on the official

[108] Ibid., Chapter 7, Article 108

[109] President of the Republic of Armenia, *Draft of Concept Paper on RA Constitutional Amendments was Presented to RA President,* accesses on May 11, 2014, http://m.president.am/en/press-release/item/2014/04/10/President-Serzh-Sargsyan-meeting-Commission-on-Constitutional-reforms/

[110] Draft of the Concept paper on RA Constitutional Amendments, elaborated by Specialized Commission for Constitutional Amendments adjunct to the RA President, Yerevan, March 2014
Հայաստանի Հանրապետության Սահմանադրական Բարեփոխումներ, Հայեցակարգ /նախագիծ/, Մշակվել է Հայաստանի Հանրապետության Նախագահին առընթեր Սահմանադրական Բարեփոխումների Մասնագիտական Հանձնաժողովի կողմից, Երեւան, Մարտ 2014

website of the Ministry of Justice. [111] Gagik Harutyunyan also mentioned that given the fact that the document is preliminary one and it would need to pass the period of mandatory public discussions, the paper did not reveal the final points on all the issues.[112] It is important to note that, among other issues, the paper is proposing to become a parliamentary republic.

The content of this document immediately embraced a huge wave of criticism. Many started to question the necessity of the amendments at this point. As the Director of the Yerevan-based Regional Studies Center (RSC), Richard Giragosian states that the details of constitutional changed proposed in the Concept Paper are disappointing, by stating that this document does not have any points that will address ineffective National Assembly and lack of independence of the Judicial branch of the government.[113] With regard to the provisions on the problems of checks and balances of power, the researcher states that the document does not contain guidelines or mechanisms how the checks and balances of power are going to work.

The main finding from the analysis of this document was that it is helpful in sense that this 45 page paper reveals the drawbacks which currently exist in the Constitution of the Republic of Armenia. It is to say the members of the Commission, who are qualified professionals in their respective fields, make their expert assessment with regard to the current Constitution.

The paper, particularly states that amended Constitution, besides its various achievements brought about a number of "half solutions" which nowadays require systematic solutions. Along with other issues, the paper touches upon the part regarding separation and balance of powers,

[111] For details see http://www.justice.am/article/897, acceded on May 12, 2014
[112] Ibid.
[113] 168Hours:news and analysis, *Richard Giragosian: "President Sargsyan will ensure that the next Prime Minister is not the successor"*, Interview with the Director of the Yerevan-based Regional Studies Center (RSC): Richard Giragosian, accessed on May 12, 2014 http://en.168.am/2014/04/12/1311.html

which is assessed as a fundamental issue that require new approaches.[114] It states that there is a need of consistent realization of this constitutional principle, and strengthening the independent functioning of the branches of the Government.

Below are a few points that are specified in the Concept Paper as drawbacks of present Constitution:[115]

- In condition when the President enjoys majority support in the National Assembly, and the absence of counterbalancing power within the parliament creates a danger of power domination. It results in dominant and absolute power of the President which is balanced neither by the legislative nor by executive branches of power.
- There is a need to more precisely clarify the power of the president with respect to executive branch of the Government.
- There are still no proper guarantees (on constitutional level) for complete implementation of legislative and supervisory functions of the Parliament.
- There are no proper mechanisms (prescribed by the Constitution) that will solve the conflicts aroused from the interactions of the President and the National Assembly; the President and the Government; and the National Assembly and the Government.
- The system of the Executive power of state government is not clarified. There is a lack of clarity with regard to the functional role of the executive branch as well as its jurisdiction and responsibilities, which is also conditioned by the dual nature of this branch.
- Insufficient functioning of the constitutional system of checks and balances, etc.

[114] Ibid., 5
[115] Ibid., 21-23

Those are the problems of the Constitution discussed by the Commission (regarding separation and balance of powers) though the proposed solutions, as it has already been mentioned are heavily criticized. The paper in fact formulates the problems regarding the separation of powers and checks and balances, however as Giragosian states: " …there is not enough checks and balances on power under these changes: it is unacceptable that even with these changes, the president will still appoint governors of the regions; most ministers of the cabinet; senior military and police officials and almost all judges."[116] He also states that according to alternative plan, which also exist in the proposed paper, there is a possibility to become a parliamentary republic, where president becomes a symbolic head of state, who is elected by the parliament. Here he sees a danger and as he states: "…given the composition, the corruption and the incompetence of today's Armenian parliament, such a system would be worse."[117]

The main points of proposed changes include; conducting both Presidential elections and elections for the National Assembly at the same day; embrace parliamentary form of the government, where the president (non-partisan candidate) is the head of state elected by the National Assembly; the Prime minister assumes his/her power based on the outcomes of the parliamentary elections, he/she forms cabinet and is responsible only before the National Assembly; granting Constitutional Court with the right to decide jurisdictional problems between the government ageneses, etc.

Very common idea that is expressed by many political scientists, researchers and other professionals is that international practice shows that from the perspectives of separation of powers parliamentary system of the government is very acceptable form, but it is not the time for

[116] Ibid.
[117] Ibid.

Armenia to make this change. And as the Chairman of Armenia Helsinki Committee, Avetik Ishkhanyan, states the parliamentarian form of government gives the opportunity for the development but it cannot serve as a solution to the existing problems.[118] He also states that the provisions in the concept paper regarding separation of powers, checks and balances and independent judiciary are not expressed clearly and it is difficult to assess this document at this point, given the fact that this is only a preliminary version. According to him there is a need of clear mechanisms according to which the branches of government will be separated and will balance and check each other. Ishkhanyan also states that there is a need of political and popular consensus as well as proper campaign among the wider population on this issue, for the change to happen.

Many political figures in Armenia share a common opinion that it is not time for Armenia to make changes. Paruyr Hayrikyan, the president of Union for National Self-Determination (political party), states that constitutional amendments are taking place either in case of constitutional crises, when because of constitutional drawbacks state system faces crises and there is a need for amendments, or when there is a public demand. As Hayrikyan states there is neither public demand nor constitutional crisis in Armenia. His concerns regarding concept paper is that it split the democracy in 50 per cent: "Now, the people are taking part in the presidential and parliamentary elections, but the amendments proposed by them (Commission) spilt the democracy in 50%. The people's participation is moved out.... Parliament... decide whom to vote for president for seven years, whom to put the prime minister."[119] Other concern mentioned by

[118] Helsinki Committee of Armenia, *This is either an attempt to Make Reforms or, a covert rig to expand the Power,* an interview with the Chairman of Armenia Helsinki Committee and Human Rights defender Avetik Ishkhanyan, accessed on May 13, 2014 http://armhels.com/2014/04/17/sa-kam-ishxanutyan-cankutyunn-e-barepoxumner-anelu-kam-qogharkvats-oramankutyun-e-ishxanutyuny-erkaradzgelu/

[119] Առավոտ News from Armenia: "Isn't it Hooliganism?" Hayrikyan about Constitutional Amendments, accessed May 13, 2014 http://en.aravot.am/2014/04/11/164641/

Hayrikyan is the fact that the order of parliament formation is missing from the proposed document, and that there is a need of clear separation or distinction of powers.

In fact discussions on the proposed amendments will continue as the presented paper is only preliminary document. However at this point it is criticized and many drawbacks are identified in the proposed documents. It is likewise important to mention that the proposed amendments are under doubt, whether there is a need of Constitutional amendments at this point.

4. Conclusion

The amended constitution firstly, made an attempt to bring the relationships of the Government, the President and the National Assembly to more balanced condition, by the fact that the President no longer has exclusive power to dismiss the Prime Minister (that exclusive right is prescribed to the National Assembly), and no longer has exclusive right to call and conduct the Government sessions (except for the sessions regarding foreign policy, defense and national security). Very important step was to define those cases when the President may dissolve the National Assembly, because it was not clear in previous version of the Constitution. Or to put it other way the Amendments of the Constitution of the Republic of Armenia, among other things, were aimed at reducing the overwhelming power of the president.

Secondly, the amended Constitution made an attempt to ensure the independence of Judiciary. In that respect an important change that took place as a result of amended Constitution was President-Judiciary relations. At the same time and it is important to mention that the field of Judiciary in Armenia is in the process of ongoing reforms.

In Armenian Constitution the existing institutions of state power formally are recognized in accordance with the principle of separation of powers. The discussion conducted in the essay tried to show the relationship of the three branches of government (that are prescribed in Constitution) through the analysis of the amended Constitution of the republic of Armenia.

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Հայաստանի Հանրապետության Սահմանադրական Բարեփոխումներ, Հայեցակարգ /նախագիծ/, Մշակվել է Հայաստանի Հանրապետության Նախագահին առընթեր Սահմանադրական Բարեփոխումների Մասնագիտական Հանձնաժողովի կողմից, Երեւան, Մարտ 2014