Discretionary Powers of Head of State in Parliamentary Republics: Study on Indirectly Elected Presidents in Armenia, Estonia, Georgia, Hungary, Latvia

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ABSTRACT

The conventional understanding regarding heads of state in parliamentary republics is that indirectly elected presidents are merely ceremonial figures similar to monarchs in parliamentary monarchies. This work further contributes to the scholarly works that tried to challenge this traditional assumption. Studying indirectly elected presidents in Armenia, Estonia, Hungary, Georgia, and Latvia the work focuses on three presidential powers: legislative (veto and promulgation), pardon, and referendum powers. The study demonstrates the diversity of institutional arrangement choices even within the five countries that went through similar historical dynamics and questions overly generalized assumptions.

INTRODUCTION

Presidents and power distribution between government branches have been in focus of comparative academic debates over decades. For example, Elgie classifies a number of academic works on presidential studies into three non-sequential waves. Pioneered by Linz, the first wave of studies focuses on democratic consolidation and poses the central question, of whether it is parliamentarism or presidentialism that is more likely to lead to it.[1] The second wave criticizes previous scholarship due to exclusively focusing on the "pure" government models and shifts focus to the mixed systems, demonstrated in Matthew Shugart's study on semi-presidential models.[2] The third wave of works relies on more discrete and rigorous methodological choices such as veto players or principal-agent theories.[3] However, recent studies question whether the traditional government system classifications truly represent how each model functions. This work contributes to this debate further, exploring the discretionary powers of the head of state, the concept that is not conventionally associated with presidents in parliamentary republics, and questions the understanding that equates indirectly elected presidents with monarchs of parliamentary systems.

A parliamentary republic is defined as a system with indirectly elected presidents in this work. Acknowledging various methodologies regarding the definition, indirect election and lack of popular mandate are the common criteria that most of the works share to consider the government system the parliamentary one.[4] It is exactly due to lack of direct popular legitimacy, that the presidents are considered merely ceremonial figureheads in parliamentary

[1] "From Linz to Tsebelis: Three Waves of Presidential/Parliamentary Studies?: Democratization: Vol 12, No 1." Accessed June 17, 2024. https://www.tandfonline.com/doi/abs/10.1080/1351034042000317989. 5
[2] Ibid, 10.
[3] Ibid, 18.
[4] For example, See: Duverger, Maurice, A New Political System Model: Semi-Presidential Government. *European Journal of Political Research*, 1980, *8*(2), 165–187. https://doi.org/10.1111/j.1475-6765.1980.tb00569.x

systems.[5] Recently two studies have challenged this conventional understanding. Namely, from the comparative political studies perspective, Tavits opposes the view that the mode of elections determines the extent of presidential activism. Introducing the political opportunity framework, she argues that institutional strength and the partisan composition of other institutions, especially government and legislative bodies affect the level of presidential influence.[6] Similarly, Köker[7] studies political patterns that influence presidential activism and opposes the idea that exclusively indirect elections affect the use of presidential powers. Both studies focus on political variables and select only a few presidential powers to test their assumptions. Therefore, the legal framework that in the first place defines presidential powers remains understudied from the comparative constitutional studies perspective.

The main research question this study tries to examine is the discretionary powers of presidents in parliamentary republics. Generally, the concept of discretion is defined diversely, usually deployed by administrative law scholars. This study shares the understanding of H.L.A Hart and defines discretion as a form of decision-making that exists because of the inherent indeterminacy of legal systems. Hart differentiates discretion from merely an arbitrary choice, as well as determinate and mechanical application of rules, and considers it a middle road between the two.[8] The particular characteristic of discretionary decision-making is that there is no clear "right or wrong" option and the only normative assessment that can be made about the decision is its wisdom or soundness.[9] Additionally, no definable aim exists, the circumstances under which the decision will operate are unknown, and no clear rules determine the constituent

[5] For example, see: "Comparative Presidencies: The Inadequacy of the Presidential, Semi-presidential and Parliamentary Distinction - SIAROFF - 2003 - European Journal of Political Research - Wiley Online Library." Accessed June 17, 2024. https://ejpr.onlinelibrary.wiley.com/doi/10.1111/1475-6765.00084.
[6] Tavits, Margit. *Presidents with Prime Ministers: Do Direct Elections Matter?* Oxford University Press, 2008. https://doi.org/10.1093/acprof:oso/9780199553327.001.0001. 234
[7] Köker, Philipp. Presidential Activism and Veto Power in Central and Eastern Europe, Palgrave Macmillan Cham, 2017, https://doi.org/10.1007/978-3-319-51914-2
[8] Shaw, Geoffrey C. "H.L.A. Hart's Lost Essay: Discretion and the Legal Process School." Harvard Law Review, December 20, 2013. https://harvardlawreview.org/print/vol-127/h-l-a-harts-lost-essay-discretion-and-the-legal-process-school/. 700
[9] Hart, H. L. A. "Discretion." Harvard Law Review, December 20, 2013. https://harvardlawreview.org/print/vol-127/discretion/. 659

values the decision should consider or if there is a conflict of these constituent values how the compromise should be made.[10] With all the abovementioned characteristics, discretion can be differentiated from another concept, margin of appreciation, that provides a narrower scope for decision-making as it sets predetermined alternatives, and therefore, the decision-maker authority cannot rely on their personal assessment of "sound" choices such extensively. Consequently, the discretionary powers generate a space for presidential decision-making and give heads of state a tool to examine their considerations, or motivations and exercise their powers accordingly. Most importantly, the rationale for examining discretionary powers is the assumption that if legal rules allow such a space for presidential decision-making, this ability directly challenges the understanding of the figure of the president as merely a ceremonial one with a lack of influence on legal and political dynamics.

Regarding the studied country and power selection criteria, the study first identified republics with indirectly elected presidents. The list includes Germany, Italy, Estonia, Malta, Latvia, Greece, Albania, Hungary, India, Israel, and Armenia. Additionally, from October 2024, Georgia will elect the head of state indirectly for the first time in history. Certain similar dynamics can be observed within these jurisdictions that opted for an indirect model, namely, institutional choices motivated by particular historical and political development. Generally, if parliamentary monarchies emerged from a series of compromises and are the result of gradual disempowerment of the head of state through centuries, the emergence of contemporary parliamentary republics is associated with rupture from past experiences. Developments in Europe after the Second World War demonstrate this tendency. For example, this is true for Italy, Greece, and Germany which went through a constitution-building process after totalitarian regimes.

[10] Ibid

Similarly, after the dissolution of the Soviet Union Latvia, Estonia, Georgia, Armenia, and Hungary went through similar state and constitution-building processes. This study focuses on this group of countries due to shared historical dynamics and rupture from the totalitarian past. Additionally, it contributes to the research gap that exists regarding Armenia and Georgia, as there is a lack of academic work on those countries, unlike other Central or Eastern European republics with Soviet Past. It should be noted that constitutional choices made by those countries and their constitutional paths are diverse. For example, the 1992 Constitution of Estonia made a deliberate choice for the parliamentary system to avoid past experiences. Conversely, Armenia and Georgia transitioned into parliamentary models as a result of gradual constitutional amendments. In Georgia, the 1995 Constitution mandated a presidential system, which was changed into a dual and later into a parliamentary one as a result of the 2017-2018 amendments. In Armenia semi-presidential system was chosen, followed by waves of amendments in 2005 and later in 2015 that established a parliamentary system.[11] The 1989 Constitution of Hungary made a choice for a strong presidential figure, however, the interpretation of presidential powers by the Constitutional Court created a convention that weakened the head of state. The 2011 Constitution textually carved the weak powers.[12] The constitution of Latvia also opted out of the parliamentary model, however, as some scholars consider and as will be demonstrated below some *sui generis* powers can be identified in this case. Therefore, the study relies on the same historical developments and a trend of disempowering Head of State that happened gradually over constitutional amendments or deliberate choices right after the dissolution of the USSR.

Studying the texts of constitutions of the selected countries various powers have been identified (see Table 1). This study focuses on three: legislative (veto and promulgation), referendum,

[11] Markarov, A. (2016). Semi-presidentialism in Armenia. In: Elgie, R., Moestrup, S. (eds) Semi-Presidentialism in the Caucasus and Central Asia. Palgrave Macmillan, London. https://doi.org/10.1057/978-1-137-38781-3_3
[12] Vincze, A. (2021). Shaping Presidential Powers in Hungary: Convention, Tradition and Informal Constitutional Amendments. Review of Central and East European Law, 46(3-4), 307-320. https://doi.org/10.1163/15730352-bja10057

and pardon powers. The rationale of the power choice is their diverse nature and capacity to potentially influence various aspects of social-political life. While veto powers affect legislative and policy dynamics, referendum powers are connected with direct democracy and the pardon power with the criminal law field. Additionally, considering previous studies that only generally list presidential powers or only focus on legislative and parliamentary dissolution powers (Tavits, Köker), the study offers substantive study in powers that are not studied conventionally from the perspective of the head of state powers.

Table 1. Power Classification

	Estonia	**Georgia**	**Armenia**	**Hungary**	**Latvia**
Signing Laws/Veto Power	Article 107, Article 105	Article 46, Article 77	Article 129	Article 6.4, 6.5	Articles 69-75
Pardons Convicts/clemency	Article 78.19	Article 52.1.f	Article 135	Article 9.4	Article 45
Decree Power	Article 78.7	Article 71 .4	Article 139	Article 50	-
Initiates Amendments/bills	78.8/103.5 (initiates amendment of constitution)	-	-	Article 6.1 (proposes bills)	Article 47, 65
Referendum	-	Article 52.2 (calls)	Article 206 (Sets)	Article 8 (may initiate, sets date)	Article 48, Article 78
Decides Citizenship Issues	-	Article 52.1.e	Article 134	Article 9.4.	-
Representation in Foreign Relations	Article 78.1, article 78.2 (appoint/recall diplomatic agents)	Article 49.3 Article 52.1.a (representative powers, ambassadorial appointments, negotiation with international organizations,	Article 132	Article 9.3, Article 9.4	Article 41

		concluding treaties)			
Status of Commander in Chief /national emergencies/martial law powers	Article 65.15 Article 78.17 Article 128 (state of war), 129 (state of emergency), 130 (restrictions)	Article 71, 72, 73 (declares state of emergency/war, can restrict/suspend certain rights by decree)	Article 133	Article 48.3, Article 50 (50.3 restrictions)	Article 42, 43, 44
Appointments	Proposes chief justice of the supreme court (150), Article 78.11, 78.12, 78.13	Article 52: Appoints 3 constitutional court judges, one member of high council of justice. Appoints chief of defense, members of central election commission Nominates members of the board of the national bank, nominates members of regulatory bodies.	Article 166, Article 155.3	Article 9.3. Article 23.2, 26.2-3, 29.4, 41.2, 44.4	Article 41, 42
Powers vis-à-vis legislative body (convening session, calling elections, dissolution)	Article 66, 68 (convening), Article 78.3 (elections), dissolution in 4 cases: Article 89, Article 97, Article 105, Article 119	Article 44 (convening), Article 53.2.a Article 56.3 (dissolution, if vote of confidence failed) Article 58 (dissolution, vote of confidence on the initiative of the PM)	Article 93 (elections) (dissolution not by president but by "virtue of law": 149.3)	Article 3.3. (dissolution) Article 9 (elections)	Article 14, 48-50 (dismissal), Article 20 (convening)

Powers vis-à-vis government	Article 78.9 (designate the PM candidate), 78.10 (appoint and dismiss from the government office), Article 89 (formation of government), Article 90 (changes to membership)	Article 56.5 (appointment of the PM) Article 57.3 (vote of no confidence)	Article 149.1 (apppintment of the PM), Article 150 (ministers), article 158	16.3 (recommends PM) 16.7 (appoints ministers)	Article 56, Article 46
Applying to the Constitutional Court	Article 107 (veto process element)	Article 60.4.b,d,e,f,h	Article 169.1.4	Article 9.3.	-
Other status elements	-	"the guarantor of the country's unity and national independence"	"shall observe compliance with constitution. In exercising his powers, the President of the Republic shall be impartial and shall be guided exclusively by state and national interests"	"shall embody the unity of the nation and be the guardian of the democratic functioning of the state organisation."	
Participation in criminal procedure	Article 145, 173	-	-	-	-
Awards/Ranks	Article 78.20	Article 52.1.g	Article 136, 137, 133.2	Article 9.4	
Territorial element	-	Article 52.1.h (to suspend the activity of a representative body of a	-	Article 9.4 (shall decide on matters of territorial organisation	

		territorial unit, or to dissolve such a body, if its activities threaten the sovereignty or territorial integrity of the country, or the exercise of constitutional powers by state bodies)		falling within his or her functions and powers)	

1. LEGISLATIVE POWERS

1.1 Promulgation

A clear distinction between legislative proposals and adopted enforceable law is a pillar of the rule of law. The general public should know what the law is as the idea of obedience presupposes knowledge of that which is to be obeyed.[13] The head of state is entrusted with this function: by granting signature or assent, the bill becomes a final and legitimate law. This moment is called enactment or promulgation.[14] Analyzing texts of the constitutions, the president's function of promulgating laws is present in all the selected countries. Constitutions are also explicit about the time frames. For example, the President of Hungary shall within five days sign the act sent to him or her and order its promulgation.[15] In Latvia, the President shall proclaim laws passed by the *Saeima* not earlier than the tenth day and not later than the twenty-first day after the law has been adopted.[16]

Promulgation is not a mechanical, automatic action as the presidents hold the reactive right of veto to protect the *status quo*.[17] However, there might be a hypothetical situation when the president neither promulgates nor vetoes the act. A case when presidential inaction prevents the prospects of an act from becoming a final law is referred to as a pocket veto. This is a passive but relatively strong power as even by inaction, the president takes away the override opportunity from the legislative body and therefore, kills the legislation without chance of

[13] Bailey, Gilbert. "The Promulgation of Law." *The American Political Science Review* 35, no. 6 (1941): 1059–84. https://doi.org/10.2307/1950547. 2059

[14] Bulmer, Elliot. *Federalism: International IDEA Constitution-Building Primer 12*. Second edition. Stockholm: International IDEA, 2017. Available at: https://www.idea.int/sites/default/files/publications/presidential-veto-powers-primer.pdf 4

[15] Constitution of Hungary, Article 6.3, Available at: https://www.constituteproject.org/constitution/Hungary_2016

[16] Constitution of Latvia, Article 69, Available at: https://www.constituteproject.org/constitution/Latvia_2016

[17] Kobal, Aleš, Tadej Dubrovnik. *The Powers of the Head of State in the Legislative and Executive Branch in Former Socialist Systems*. Institute for Local Self-Government and Public Procurement Maribor, 2016. https://doi.org/10.4335/978-961-6842-68-6. 7

overturning it.[18] Presidents do not own the pocket veto prerogative in any of the selected countries. Unlike other countries, the constitutions of Georgia and Armenia explicitly regulate presidential inaction cases. According to the Constitution of Armenia, if the President does not fulfill the requirements stipulated by this Article, the Chairman of the National Assembly shall sign and publish the law within five days.[19] In Georgia, if the president does not promulgate a law or return it to parliament, then the Chairperson of Parliament shall sign and promulgate the law within 5 days after the expiration of the time frame.[20] Therefore, constitutions offer the same solution and delegate the signature function to the chairman of the legislative body in case of presidential inaction. Additionally, even before the presidential signature, the word "law" and not the "bill" is used. For example, as a part of the package of amendments to restrict presidential power, this was a deliberate change in the Constitution of Georgia. The rationale of the change was to explicitly underline the fact that the President does not play a crucial role in legislation, which is an exclusive prerogative of the legislative branch and the law is already final without signature of the head of state.[21]

Another theoretical debate concerns whether promulgation should be considered a presidential duty or a right. Logically, it is the separate question of whether the president's refusal to sign the law is a constitutional violation by itself, even though it does not have a preventive effect on acts to become final laws. Presidents might also refuse to sign the law after they used the veto prerogative and the legislative body overturned it. The answer is not explicit in constitutional provisions. However, analyzing the wording of selected constitutions, promulgation is mostly formulated as a duty. For example, the constitution of Armenia calls

[18] Shugart, Matthew Soberg, and John M. Carey. *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*. Cambridge: Cambridge University Press, 1992. https://doi.org/10.1017/CBO9781139173988., 135

[19] Constitution of Armenia, Article 129.3, Available at: https://www.constituteproject.org/constitution/Armenia_2015

[20] Constitution of Georgia, Article 46.6, Available at: https://www.constituteproject.org/constitution/Georgia_2018

[21] Matcharadze, Zurab, and Javakhishvili Paata. "Normative Regulation of the President's Veto in Georgian Legal Reality." *Journal of Law*, no. 1 (June 30, 2023): 178-165 (Eng). https://doi.org/10.60131/jlaw.1.2023.7068. 182

the function of signing and publishing a law a "requirement".[22] Constitutions of Estonia, Hungary, and Latvia underline that the president shall (and not "may") sign the laws. In Georgia, the case is not that straightforward as the ambiguity cannot be overcome by grammatical interpretation. According to some scholars, inaction, when the president neither returns the law with remarks nor promulgates it, is not a violation of constitutional provisions but should be interpreted as the constitutional decision of the head of state.[23] Refusal of signature might be a political position itself if, for example, the president disagrees with the content of the politically controversial law. There were some cases when the President refused to sign laws (such as the Law on Amnesty (2012), the Law on Broadcasting (2018), and the Law on Changes in Criminal Code of Georgia [24]), however, it was never considered a violation. Therefore, constitutional ambiguity is answered by practice that way in Georgia.

1.2 Legislative Veto

When the president disagrees with the content of the law, the head of state has a right to return the law to the legislative body for reconsideration and therefore, use a legislative veto competence. The right to legislative veto exists in all the selected countries, except Armenia. However, constitutions regulate when the veto right cannot be used. For example, in Estonia, a law that is passed by a referendum shall promptly be proclaimed by the President of the Republic.[25] In Latvia, if the law is determined to be urgent, the president does not have a right to request reconsideration.[26] In Georgia, the president cannot exercise the veto right on the constitutional law that restores territorial integrity or the constitutional law that amends the constitution and is adopted by the two-thirds majority of the parliament.[27] Additionally, it is an

[22] Constitution of Armenia, Article 129.3
[23] Matcharadze, Zurab, and Javakhishvili Paata, 183
[24] Ibid
[25] Constitution of Estonia, Article 105
[26] Constitution of Latvia, Article 75
[27] Constitution of Georgia, Article 46.5

interesting characteristic that the President of Georgia has the right to veto the Law on the State Budget, however, the remarks may be accepted by the Parliament only with the consent of the Government[28], as drafting the budget law is the exclusive governmental prerogative.

Generally, veto and the scope of this right are considered important variables to measure the extent of presidential powers (Shugart and Carey (1992), Metcalf, (2000). The weight of a presidential veto depends on the required parliamentary majority to readopt the law in a repeated vote.[29] Theoretically, different variations exist such as the simple (50% plus one member of the quorum), absolute (50% plus one member of the entire membership of the assembly), or qualified (more than 50%) majorities. In Hungary, Latvia, and Estonia, the re-adoption of the vetoed law requires a simple majority and consequently, the president's veto carries less weight.[30]

The Constitution of Georgia is an interesting example of the variance of the required parliamentary majority for different types of law. Unlike the other selected countries, the Constitution of Georgia is very explicit and regulates both cases when the Parliament either adopts the remarks of the President or rejects them. The adoption of the president's remarks by the parliament requires the same number of votes as for the initial adoption of the type of law in question.[31] Generally, the Constitution of Georgia differentiates three types of legislation: law, organic law, and constitutional law. Organic law regulates issues of high importance and those issues are directly enumerated by the constitution, for example, state symbols, local governance, or justice administration issues. A constitutional law shall be used to amend the constitution, determine the powers of autonomous regions, and revise the state territorial arrangement.[32] Various parliamentary majorities are required for the adoption of each type of

[28] Constitution of Georgia, Article 66.7
[29] Kobal, Aleš, Tadej Dubrovnik, 8
[30] Ibid
[31] Constitution of Georgia, Article 46.3
[32] Constitution of Georgia, Article 7.2, 7.3 and 77

legislation: adoption of law requires at least one-third of the total number of the members of parliament (50 votes), while organic law needs the majority of the total number of parliament members (76 votes) unless another procedure for the adoption of organic laws is determined by the Constitution. [33] For now, this special procedure exists for regulation of the ownership of agricultural land, which requires two-thirds (100 votes) of the total members of the parliament.[34] The president can only use the veto competence on the constitutional law that amends the constitution and is supported by at least three-fourths of the total number of parliament members (113 votes). Therefore, depending on whether it is a law, organic law, organic law regarding agricultural land regulation, or constitutional law, the adoption of the President's remarks by the Parliament might require 50, 76, 100, or 113 votes. The constitution also regulates another alternative, a situation when the parliament rejects the President's remarks. In this case, the initial version of the law shall be put to a vote. In a repeated vote, an organic law or a law needs the support of the majority of the total number of parliament members (the exception for agricultural land regulation still applies here, which needs a two-thirds majority), while the constitutional law needs at least three-fourths.[35] Therefore, if the adoption of a law needs at least one-third of the total members of the parliament for the first time, after a presidential veto the re-adoption requires a higher majority of the total members (75 votes), which gives the president's remarks more weight and chance of influence.

Another classification category of the veto power is whether the president has the right to veto the law partially or fully. Consequently, package or line-item vetoes can be differentiated. As the partial veto allows a president to target specific legislation elements and draft special packages accordingly, it can be a more flexible tool for presidential influence.[36] In all the selected countries presidents do not have a line-item veto right and can only use the package

[33] Constitution of Georgia, Article 45.2
[34] Constitution of Georgia, Article 19.4
[35] Constitution of Georgia, Article 46.4
[36] Shugart, Matthew Soberg, and John M. Carey, 134.

veto prerogative. It is another criterion whether the legislative body can accept presidential remarks partially or fully or in other words, whether the parliament can amend the law per the presidential remarks before the repeated vote or not. In Estonia, the returned law cannot be changed and the *Riigikogu* must either adopt it unchanged or reject the law.[37] In Georgia, the possibility of changing the initial law is also excluded, as the remarks submitted by the President shall be voted all together.[38] Therefore, even when the legislator agrees with part of the presidential remarks, this regulation limits the Parliament of Georgia to take presidential remarks into account, which is considered an obstacle to negotiating and producing better quality laws.[39] On the other hand, in Hungary, the National Assembly may amend the act. In such case, only the amended provisions can be subject to constitutionality review later.[40] In Latvia, before the repeated vote, the responsible parliamentary committees prepare proposals related to the presidential objections. The committee proposals and the presidential objections are considered together.[41]

Analyzing the veto powers, the Constitution of Latvia also stands out as it introduces the *sui generis* institute of suspensive veto, which is a very rare power in contemporary constitutional systems. In the beginning, linguistic confusion has to be avoided: in many constitutional traditions, the suspensive veto is synonymous with the general presidential veto power, and the terms are used interchangeably.[42] However, in Latvia, the constitution differentiates two types of veto. According to Article 71, the President, by means of a written and reasoned request to

[37] Kobal, Aleš, Tadej Dubrovnik, 8
[38] Javakhishvili, Paata. "President's Veto in Georgian Legal Reality." *Polish-Georgian Law Review*, No. 3/2017: 95-103, https://www.academia.edu/37075331/FACULTY_OF_L_AW_AND_ADMINISTRATION_UNIWERSITY_OF_WARMIA_AND_MAZURY_IN_OLSZTYN_FACULTY_OF_L_AW_POLISH_GEORGIAN_Law_Review. 99
[39] Ibid
[40] Constitution of Hungary, Article 6.9
[41] Āboliņa, Dr Inese. "Presidential Interaction with Parliament within Decision-Making Process in Latvia: Guntis Ulmanis and Dr. Vaira Vike-Freiberga." *5th International Multidisciplinary Scientific Conference on Social Sciences and Arts, Conference Proceedings*, January 1, 2018. https://www.academia.edu/40430373/Presidential_interaction_with_Parliament_within_decision_making_process_in_Latvia_Guntis_Ulmanis_and_Dr_Vaira_Vike_Freiberga. 62
[42] Đorđević, Miroslav. "The Presidents of the Baltic States: Comparative Overview." *Strani Pravni Zivot*, no. 4 (2021): 621–30. https://doi.org/10.5937/spz65-35047, 626

the Chairperson of the *Saeima*, may require that a law be reconsidered. This is a general presidential veto power that is common in the abovementioned selected countries. What is different is Article 72, which grants the president the right to suspend the proclamation of a law for two months. Unlike other selected countries, this is a strong presidential power as, during this period, the veto power is absolute and cannot be considered null.[43] The rationale for a suspensive veto is to cool down the momentary political passions and allow more time for public deliberation.[44] Therefore, if the purpose of the general presidential veto is to reconsider its legal or political grounds before promulgation, the suspensive veto aims for suspense for a certain longer period.[45] The president can suspend the law by their initiative or must do so by the request of one-third members of the *Saeima.* Additionally, by exercising this power, the Head of State represents a governance tie with the general public[46] as the referendum must be held on the suspended law if at least a tenth of voters demand that, and if the majority votes against it, the law is rejected. This is referred to as an "absolute citizens" veto.[47] The suspensive veto can be used after the use general presidential veto. However, the referendum cannot be called if the *Saeima* again votes on the law and not less than three-quarters of all members of the *Saeima* vote for the adoption of the law.[48] Additionally, the President does not have the right to suspensive veto and the law must be promulgated if it is determined to be urgent by the two-thirds majority of the Parliament.[49] In practice, the suspensive veto power has been used 86 times over the 25 years.[50] Another interesting characteristic regarding the use of suspensive veto power is the concept of network governance.

[43] Zinzi, Maddalena. "The Latvian Parliamentary Form of Government and the Significant Powers Vested in the President." *DPCE Online* 55, no. 4 (January 9, 2023). https://doi.org/10.57660/dpceonline.2022.1740, 2067
[44] Đorđević, Miroslav, 627
[45] Ibid
[46] Zinzi, Maddalena, 2067
[47] Kobal, Aleš, Tadej Dubrovnik, 9
[48] Constitution of Latvia, Article 72
[49] Kobal, Aleš, Tadej Dubrovnik, 9
[50] Āboliņa, Dr Inese. "Suspensive Veto Practice in Governance of Latvia (1993-2018)" *Summary of Doctoral Thesis*, January 1, 2019. https://www.academia.edu/40430482/SUSPENSIVE_VETO_PRACTICE_IN_GOVERNANCE_OF_LATVIA_1993_2018_35

Although the main decision-maker is the President, different interest groups, such as legal professionals, lobbies from various industries, media, or political parties,[51] may consult the Head of State and address with letters within 10 days after the adoption of the law by *Saeima*.[52] The requests are evaluated by President Chancellery.[53] The network governance tradition started during the term Guntis Ulmanis and it was established as a tradition during the first mandate of Vaira Vīķe-Freiberga (1999-2003).[54] Therefore, a suspensive veto gives the Latvian President exceptional influence in the legislative process and a chance to include other interest groups.

1.3 Constitutional veto

In Armenia, Hungary, and Estonia, the president can make a referral to the constitutional court before promulgation if the head of state considers the law or its provisions unconstitutional. Generally, presidents can use vetoes because of legal or political concerns. However, the distinct constitutional procedure, the institutional participation of the court, and specialized judicial review classify this type of veto as a constitutional one.

Unlike other selected countries, the Constitution of Armenia grants only the constitutional veto right to the president. According to the Constitution, The President of the Republic of Armenia shall sign and publish a law adopted by the National Assembly within 21 days or, within the same period, apply to the Constitutional Court with the question of determining the conformity of the law with the Constitution and if the Court considers law constitutional, the President

[51] Āboliņa, Dr Inese. "Presidential Interaction with Parliament within Decision-Making Process in Latvia: Guntis Ulmanis and Dr. Vaira Vike-Freiberga." *5th International Multidisciplinary Scientific Conference on Social Sciences and Arts, Conference Proceedings*, January 1, 2018. https://www.academia.edu/40430373/Presidential_interaction_with_Parliament_within_decision_making_process_in_Latvia_Guntis_Ulmanis_and_Dr_Vaira_Vike_Freiberga. 62
[52] Āboliņa, Dr Inese. "Suspensive Veto Practice in Governance of Latvia (1993-2018)", 37
[53] Āboliņa, Dr Inese. "Presidential Interaction with Parliament within Decision-Making Process in Latvia: Guntis Ulmanis and Dr. Vaira Vike-Freiberga." 62
[54] Zinzi, Maddalena, 2068

must sign it.[55] Therefore, the role of the President is purely formal. The president cannot return a law to the legislative body, raise political arguments against the adoption of the law[56], or regard any irregularity that does not amount to unconstitutionality.[57]

In Estonia, the president must first use legislative veto before exercising their constitutional veto right. The rationale of this approach is for the Parliament to realize its mistake and drop the unconstitutional initiative, so the reputation of the legislative body will be reserved, and unnecessary, politically motivated cases will be filtered out from the Constitutional Court.[58] The *Riigikogu* has two options to deal with the legislative veto: it can agree with the president's remarks and amend the law accordingly or ignore the proposals and attempt to pass the law without any amendments.[59] If the *Riigikogu* follows the remarks and changes the law, the president is required to proclaim it. However, If the law is passed unamended by *Riigikogu* again, the president is consequently granted two options: the President of the Republic shall proclaim the law or shall propose to the Supreme Court to declare the law unconstitutional (Estonia does not have a separate constitutional court and the Supreme Court is entrusted with the constitutional review).[60] Therefore, there is a space for presidential decision-making and in case of disagreement with the remarks from the legislative branch, the president can still affect the legislation by involving the court in the process. If the president decides to submit the law to the Supreme Court, the rejection has to be justified by non-compliance with the Constitution and although initially it is not required rejections to be based on the constitutionality concerns,

[55] Constitution of Armenia, Article 129
[56] European Commission for Democracy Through Law (Venice Commission), First Opinion on the Draft Amendments to the Constitution (chapters 1 to 7 and 10) of the Republic of Armenia, Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)037 20
[57] Hakobyan, Davit. "Role and Powers of the Non-Executive President in the Republic of Armenia: Unfinished Constitutional Transition from a Semi-Presidential System of Governance to the Armenian Parliamentary Democracy." https://doi.org/10.54503/2953-8165-2023.1(1)-115. 125
[58] Đorđević, Miroslav, 628
[59] Toomla, Rein. "The Presidency in the Republic of Estonia" In *Presidents above Parties?: Presidents in Central and Eastern Europe, Their Formal Competencies and Informal Power*, 167–90. Masarykova univerzita. https://www.ceeol.com/search/chapter-detail?id=838249. 175
[60] Constitution of Estonia, Article 107

it is reasonable to keep in mind from the beginning.[61] The decision of the Supreme Court is mandatory: once the court declares the law constitutional, the President of the Republic shall proclaim it.[62]

The practical use of constitutional veto power varies among presidents. For example, Lennart Meri, a relatively activist president, used the veto power 41 times during his 10 years in office and parliament accepted 29 of these vetoes. The president turned to the Supreme Court eight times and the court ruled in the president's favor seven times.[63] For example, the constitutional court declared the 1997 Language Amendment Act unconstitutional, noting that the right to vote should only be altered by a legislative body and not by the executive as a result of delegation.[64] President Rüütel proposed to the Supreme Court 4 times and the court considered the law unconstitutional two times, while President Ilves used this prerogative only one time.[65] The constitutional veto tensions are ongoing: for example, the current president of Estonia, Alar Karis appealed to the Supreme Court at the beginning of 2024 to declare unconstitutional the act that amends the land tax and tax administration acts, adopted by the *Riigikogu* on November 23 by a vote of confidence.[66] This is an interesting case as the Court has to examine whether it is constitutional to tie a law with a question of trust in the government.

Adopted but not yet promulgated statutes in Hungary are subject to preventive judicial review.[67] Both the president and the National Assembly have the right to submit acts to the

[61] Toomla, Rein 175
[62] Constitution of Estonia, Article 107
[63] Tavits, Margit., 63
[64] Maveety, Nancy, and Anke Grosskopf. "'Constrained' Constitutional Courts as Conduits for Democratic Consolidation." Law & Society Review 38, no. 3 (2004): 463–88. http://www.jstor.org/stable/1555141. 479

[65] Toomla, Rein, 175
[66] Linking bill to confidence vote draws harsh criticism at Supreme Court hearing 05.03.204, available at: https://news.err.ee/1609272789/linking-bill-to-confidence-vote-draws-harsh-criticism-at-supreme-court-hearing
[67] Sólyom, László, 'The Constitutional Court of Hungary', in Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford, 2020; online edn, Oxford Academic, 20 Aug. 2020), https://doi.org/10.1093/oso/9780198726418.003.0008, 407

constitutional court. According to the constitution, the National Assembly may, upon the motion submitted before the final vote by the initiator of the Act, by the Government, or by the Speaker of the National Assembly, send the adopted Act to the Constitutional Court for an examination of its conformity with the Fundamental Law.[68] The president can exercise this right only when the National Assembly has not submitted the act for examination.[69] Therefore, parliamentary referral to the constitutional court excludes the president's right to exercise the constitutional veto. However, if the court considers the law constitutional following the parliamentary request for a constitutional review, the President still has a right to exercise the legislative veto before promulgation.[70] If the National Assembly has not exercised its constitutional review referral prerogative, the president has a choice: they can either use the legislative or constitutional veto. The former constitution stipulated that the president should have submitted statutes to the Constitutional Court first if they considered it unconstitutional, but the current constitution creates a binary choice between both vetoes.[71] According to Article 6.5, if the President of the Republic disagrees with the Act or any of its provisions and has not exercised his or her right under Paragraph (4), prior to signing the Act he or she may return it once, along with his or her comments, to the National Assembly for reconsideration. Therefore, the negative formulation of the provision hints that the President can only use the legislative veto if they have not used the constitutional veto previously. The time frame for the constitutional veto is also an interesting point: the Constitutional Court has 30 days to make a decision. However, the previous constitution did not set a deadline, meaning that in case of reference to the Court introduction of the act might have been postponed for years which gave an important influential tool to the President.[72]

[68] Constitution of Hungary, Article 6.2
[69] Constitution of Hungary, Article 6.4
[70] Kobal, Aleš, Tadej Dubrovnik, 10
[71] Sólyom, László, 'The Constitutional Court of Hungary", 408
[72] Horváth Attila, Gyulai, Attila, Dobos Gábor, "Weak but not Powerless: the Position of the President in the Hungarian Political System" In *Presidents above Parties?: Presidents in Central and Eastern Europe, Their*

Consequently, there are several variations of the presidential discretion regarding the preventive constitutional review in Hungary. The first important question is which organ, the President or the National Assembly initiates the request. The initiative from the National Assembly takes away the constitutional veto initiative from the president (Article 6.4). However, the president still has the discretion to use the legislative veto if the law is considered constitutional after the parliamentary request for a review. The second alternative is when the National Assembly has not requested the constitutional review from the Constitutional Court. In such cases, the president has the discretion to decide between the use of legislative and constitutional veto. This choice is a binary and there is no explicit constitutional regulation in which veto variation should be used first. However, if the president decides to use the constitutional veto, they cannot exercise the legislative veto competence afterward (Article 6.5). On the other hand, the use of legislative veto does not exclude using the constitutional veto later.[73]

2. REFERENDUM

2.1 Discretionary Powers vis-à-vis Referendum – an overview

A referendum is a tool of direct democracy. The concept of direct democracy is differentiated from representative democracy and functions as a complementary dimension to it. If under the representative democracy voters choose which candidates and parties they want to elect and empower those representatives to make decisions on their behalf[74], direct democracy maintains the decision-making agency within citizens themselves. Generally, depending on one's

Formal Competencies and Informal Power, 77–119. Masarykova univerzita, Accessed June 17, 2024. https://www.ceeol.com/search/chapter-detail?id=838243. 84

[73] Kobal, Aleš, Tadej Dubrovnik, 10

[74] *Direct Democracy: The International IDEA Handbook*. Stockholm: International Institute for Democracy and Electoral Assistance (IDEA, 2008), Available at: https://www.idea.int/sites/default/files/publications/direct-democracy-the-international-idea-handbook_0.pdf 19

ideological approach to the meaning and purpose of democracy[75], there are various conceptual views regarding the benefits and challenges of the referendum. For example, the institute is criticized because of its binary nature as it reduces complex issues to the "yes or no" question and lack of deliberation opportunity among citizens[76], which is essential for the concept of deliberative democracy. Domination of the majority is another concern, as unlike representative democracy where minorities can potentially accumulate their votes by building coalitions, each vote has the same weight in the referendum.[77] Conversely, a common argument for referendum is that it is closest to the people's decision-making authority[78] and can help to re-engage voters with politics in the context of increasing voter apathy[79], as well as creating the sense of political ownership. However, in practice it is the institutional design that determines whether referendum can be a merely formalistic tool or have comprehensive influence, as referendum outcomes might be determined not only by the votes but other procedural factors.[80] In that regard, various aspects should be considered, such as who initiates or has the final authority to decide whether the referendum shall be held, or what issues should be put to the referendum.

Comparative studies demonstrate that the head of state is generally one of these decision-making authorities within referendum arrangement systems. Therefore, the key question this chapter tries to asses is the presidential discretionary referendum powers and their extent. In fact, referendum powers can be important tool for the president to potentially influence legal and political dynamics. For example, discretion to initiate referendum even without further approval might give a start to important public debate regarding the issue. Additionally,

[75] Lord, Christopher. "Referendums and Democratic Theory." In *The Palgrave Handbook of European Referendums*, edited by Julie Smith, 29–48. Cham: Springer International Publishing, 2021. https://doi.org/10.1007/978-3-030-55803-1_2. 32
[76] Ibid 36
[77] Ibid 41
[78] Ibid
[79] Ellis, Andrew. "The Use and Design of Referendums An International IDEA Working Paper," Available at: https://www.idea.int/sites/default/files/speeches/The-Use-and-Design-of-Referendums.pdf
[80] Lord, Christopher, 35

presidential participation in the later stages, such as authority to call the referendum can be mobilized to shift the decision-making center from the legislative body to the people. This can be important tool if the president disagrees with certain legislative policies as it will be demonstrated below. Conversely, a referendum can be used as a legitimizing tool of certain policy by winning the electorate's approval. Presidential authority can also work from the other way around: in case of disagreement with the referendum theme, the president can rely on their assessments and filter out certain issues, rejecting to call the referendum.

Generally, various types of referendums can be classified around the world. Each type inherently influences the scope of presidential discretion. For example, direct and indirect calls of the referendum can be classified. A referendum is called indirectly when authorities make a decision that requires a referendum according to the normative framework, while in the case of a direct call, they choose to call it because of political or other reasons.[81] With that criteria, mandatory and optional referendums are differentiated. The mandatory referendum must be held in certain predetermined circumstances or about certain important issues.[82] This type excludes any exercise of discretion. Conversely, the optional referendum is a matter of choice by political authorities. Logically, depending on the type of referendum, the extent of the calling authority's discretion varies, granting more space for decision-making in case of an optional referendum. Additionally, other than political authorities, referendums can also be held at the request of the electorate. This type can be divided into two categories: the ordinary optional referendum, which challenges a text already approved by a state body, and popular initiative, enabling the electorate to propose a text that has not been yet approved.[83] In several states there is another limited form of popular initiative, granting the electorate an opportunity to propose another body to call a referendum.[84] Those requests might have a binding nature for

[81] *Direct Democracy: The International IDEA Handbook*, 41
[82] Ellis, Andrew. "The Use and Design of Referendums An International IDEA Working Paper," Available at: https://www.idea.int/sites/default/files/speeches/The-Use-and-Design-of-Referendums.pdf
[83] Ibid, 8
[84] Ibid, 9

decision-making authorities, while in other cases the bottom-up dynamics might be restricted on the extent of the exercise of discretion.

2.2 Country Study

Presidential discretionary powers regarding the referendum vary in the selected countries. Two jurisdictions, Armenia and Estonia exclude any extent of presidential discretion. The Constitution of Estonia differentiates mandatory and non-mandatory referendums. According to Article 105, the Riigikogu has the right to submit a bill or other national issue to a referendum. Therefore, the president is not a decision-maker actor regarding the ordinary referendum and is not granted any discretion in the process. This authority is fully granted to the legislative body. Even more, as noted, the head of state is obliged to proclaim the law passed by a referendum and discretion regarding the topic is limited even after the referendum. The second type, a mandatory referendum is used to approve constitutional amendments and although president, *inter alia*, can initiate the amendment, the main decision is up the intermediate body – the legislative branch, which weakens any discretion.

In Armenia, the president is only entrusted with the final formal act to set the referendum but is not granted any discretion - according to Article 206 of the Constitution, the president shall (and therefore, is required to) set a referendum. Generally, the Constitution of Armenia establishes different types of referendum: for constitutional amendments both mandatory and optional referendums are used. The adoption of the new constitution and amendments to certain constitutional provisions listed in Article 202 requires a mandatory referendum. For the amendment of other provisions that are not listed by the constitution, the ordinary referendum is deployed, meaning that the National Assembly might decide to put a draft to referendum.[85] The mandatory referendum is also required on the question of accession to supranational

[85] Constitution of Armenia, Article 202

organizations and changes of territory.[86] Additionally, if the draft law proposed by citizens[87] is rejected by the National Assembly, it shall be put to referendum.[88] Therefore, the constitution regulates issues that are required to be put on the referendum or are decided by the National Assembly, while the final call of the referendum by the President only has a formal nature. The Constitution strictly regulates even the time period for the final presidential act: within a three-day period of the Constitutional Court adopting a decision finding that a draft law presented by popular initiative is in conformity with the Constitution, or within a three-day period of the National Assembly adopting a decision to conduct a referendum, the President of the Republic shall set a referendum. The referendum shall be conducted no earlier than 50 and no later than 65 days after setting the referendum.[89]

In Georgia, Hungary, and Latvia certain level of discretion is found. Presidents participate in various stages, namely in the initiative phase as in Hungary, and in the final decision-making phase as in Georgia (however, unlike Armenia this power is not merely a formal one in Georgia). In Latvia president owns substantive discretion regarding the *sui generis* type of referendum, the parliamentary dissolution referendum and the optional veto referendum has already been discussed in the first chapter. This chapter further analyzes each power arrangement below.

Power to Initiate the Referendum - Hungary

Like Estonia, the Constitution of Hungary also establishes mandatory and non-mandatory referendums. The final authority to call a referendum is also assigned to the legislative body. However, the normative arrangement of how the referendum is called differs. The referendum is mandatory and the National Assembly is obliged to call it if at least 200,000 voters propose

[86] Constitution of Armenia, Article 205
[87] Constitution of Armenia, Article 109.6
[88] Constitution of Armenia, Article 204
[89] Constitution of Armenia, Article 206

it. Conversely, a referendum at the initiative of the President of the Republic, the Government or one hundred thousand voters is not mandatory and falls under the discretion of National Assembly to decide whether the referendum will be held.[90] Therefore, the extent of presidential discretion only covers the initiation phase of the referendum, while the final decision is up to the National Assembly.

However, even the initiation discretion power can be mobilized as a potential tool for presidential influence. For example, as mentioned, the president of Hungary owns *sui generis* suspending veto powers. In that sense, the presidential referendum initiative is considered more complementary to the veto powers as theoretically the head of state can request the electorate to repeal an act that survived the second parliamentary approval.[91] Additionally, the opposition or other interest groups can lobby the referendum issue to the president, as they are not granted the initiating right by the constitution and the president can represent the interests of the general public in that case. As mentioned, even though the initiative can be rejected by the National Assembly, it can still be a tool to initiate a dialogue or political debate. However, the Fundamental Law allows for direct democracy in exceptional cases: for example, according to Article 8, no referendum may be held on the amendment of fundamental law or dissolution of the National Assembly. The president is also granted authority to set the date for a referendum.[92] For example, the latest referendum was scheduled on the same day as the general elections.[93]

[90] Constitution of Hungary, Article 8
[91] Fabio Ratto Trabucco, "The Evolution of Referendum Experience in Hungary," Jura: A Pecsi Tudomanyegyetem Allam-es Jogtudomanyi Karanak Tudomanyos Lapja 2017, 211
[92] Constitution of Hungary, Article 9.3.e
[93] "President Áder sets date for referendum on child protection law", 12.01.2022, https://abouthungary.hu/news-in-brief/president-ader-sets-date-for-referendum-on-child-protection-law

Final Say to the President – Georgia

The Constitution of Georgia refers to people as a source of state authority and recognizes their exercise of power through different forms of direct democracy, including referendum.[94] Participation in referendum is also protected as a fundamental right.[95] However, the theoretical possibility of the use of referendum and its practical implications are limited. In the independence history of Georgia, only two referendums have been held: one about the declaration of independence in 1991 and the second about modifying the number of elected representatives in the Parliament of Georgia in 2003. Unlike previous examples, the Constitution does not establish the mandatory referendum and does not list issues that require a referendum, while the issues on which a referendum shall not be held are listed explicitly, namely adoption or repealing a law, granting amnesty or pardon, ratifying or denouncing international treaties, deciding issues that envisage the restriction of fundamental constitutional human rights.[96] This can be explained by the fact that the founders of the Constitution were concerned about the frequent use of the referendum and promoted significant limitations on referendum issues.[97] For example, the rationale for the exclusion of referendum on fundamental human rights issues is the concern that majorities might restrict and dictate minority rights. The Constitution also upholds the principle that while exercising their authority, people shall be bound by rights and freedoms directly applicable by law.[98]

The President of Georgia has the final authority to call a referendum. The Parliament of Georgia, the Government of Georgia or no less than 200,000 voters have a right to request a referendum. However, it is up to the head of state to decide whether the referendum will be held and therefore, the constitution grants a wide scope of discretion. The president has 30 days

[94] Constitution of Georgia, Article 3
[95] Constitution of Georgia, Article 24
[96] Constitution of Georgia, Article 52.2
[97] Avtandil Demetrashvili, 'Referendum in Georgian legislation and practice' in the collection Dimitri Gegenava (ed), Giorgi Kverenchkhiladze 50 (Sulkhan-Saba Orbeliani University Publishing House 2022) 11.
[98] Constitution of Georgia, Article 4.2

to decide after such a request is received. The comprehensive nature of presidential discretion is demonstrated by certain aspects. First, it is the president that examines whether the request to hold a referendum is in compliance with constitutional requirements and as mentioned above, does not include issues that are prohibited by constitution. Due to broad wording of constitutional provision, president has a wide scope to make their own evaluation and decide accordingly (for example, restriction of human rights is not self-explanatory but requires normative assessment). Additionally, all referendums in Georgia have a binding nature: a decision made by referendum has a legal effect and is final.[99] Therefore, the legislative and executive branches have to harmonize legislation and other acts with referendum results.[100] This normative nature gives president a potential tool to indirectly influence content of legislation on the key issues, as the essence of referendum is defined as nationwide poll on „particularly important national issues".[101]

However, this authority is not unlimited. The particular detail of the Georgian model is that only the questions of principle can be put to the referendum.[102] This level of generality of referendum issues leaves certain decision-making scope to legislative branch to adopt more specific regulations, as long as the Parliament upholds the principle adopted through referendum. Additionally, important check on the Presidential discretion is countersignature: procedurally, referendum is called by President's decree and the countersignature by the Prime Minister for rejection or calling a referendum is required.[103] Therefore, both decisions of the President to reject or accept the referendum request, although made individually by exercising discretion, requires ex-ante interference and acceptance by the Government.

[99] Organic Law of Georgia on Referendum, Article 28
[100] Ibid
[101] Organic Law of Georgia on Referendum, Article 1
[102] Venice commission, Referendums in Europe, 13
[103] Organic Law of Georgia on Referendum, Article 9, Constitution of Georgia, Article 53

The final authority also enables the president to moderate or filter the issues the referendum will be held on. For example, the most recent referendum issue requested by the initiative group in 2016 concerned the definition of family that was rejected by the President.[104] President's justification for the refusal to call a referendum also demonstrated another key challenge. After the Russian invasion in 2008, twenty percent of Georgian territory is occupied by Russian forces. Consequently, the government of Georgia has no effective control over the territory. According to Georgian legislation, referendum shall be held throughout the entire territory of Georgia[105] and there is no exceptional provision that would apply before the restoration of territorial integrity. As it is impossible to hold referendum in occupied territories, the president rejected the proposal. In his decree on the refusal of a request to hold a referendum, the president argued that calling a referendum would provide additional legal arguments to the occupying Russia and weaken the policy of de-occupation.[106] Some scholars think that this is literal understanding of the law and provisions should be interpreted in a way that does not prohibit holding a referendum under the conditions of occupation to uphold the principle of popular sovereignty.[107]

Referendum as a Zero-sum Game – Latvia

In the comparative European context Latvian dissolution referendum is a *sui generis* case. Article 48 of the Latvian Constitution gives president the discretionary right to propose dissolution of the *Seaima*. However, the specific characteristic of the Latvian model is the

[104] Formulation of the referendum question: "Do you agree that civil marriage should be defined as a union between a man and a woman for the purpose of creating a family?"
[105] Organic Law of Georgia on Referendum, Article 1
[106] Goradze, George. "Permissibility of Holding a Referendum under the Conditions of Occupation of the Territories of Georgia." Journal of Constitutional Law 1, no. 2023 (September 1, 2023): 109–25. https://doaj.org/article/c063d3fe10d64ee19e7bfcdbe1580210 111

[107]Ibid, 125

requirement of the referendum – according to the Constitution, following the proposal, a national referendum shall be held[108]. Therefore, presidential discretion only covers the initial proposal part of the parliamentary dissolution, while the final decision is made by people through referendum. The regulation originates from the 1922 Constitution, reflecting the juridical tradition of the country that views legislative body as a foundation of government system, while referendum is seen as a preventive tool or the remedy to deviations from the proper parliamentarism.[109] The head of state has a central function to enforce this mechanism. Influenced by the Weimar Constitution, the president is assigned a role of foreground player to mitigate inter-branch deadlock as both formal and substantial judicial ownership of anticipated legislative dissolution is up to the head of state.[110] While normative aspect remains in the scope of presidential discretion, the political ownership is granted to the electorate as it is the people who decides to put an end to the legislature.[111] This mechanism distinguishes Latvia from more common dissolution models where the final decision is made by president or political parties. Those provisions are explained by specific understanding of the democratic nature of the process and are based on the idea that the parliament is people's agent that should be dismissed by electorate itself and in case of disputes between president and legislative body, the people should have a right to make final decision as they possess the sovereign authority.[112]

Procedurally, the dissolution of *Saeima* consists of different stages. In the first phase, the president has the right to propose dissolution. This right is unlimited and theoretically, the president does not even have to justify reasons for the proposal as the reveal of reasons is not required by legislation.[113] The procedure is initiated by the presidential order. If all the other presidential orders need to be jointly signed by the Prime Minister or the appropriate minister,

[108] Constitution of Latvia, Article 48
[109] Trabucco, Fabio Ratto, 771
[110] Ibid 772
[111] Ibid 772
[112] Bulmer, Elliot. "Dissolution of Parliament," 23
[113] Kārkliņa, Annija. "Dissolution of Parliament in Latvia: Legal Regulation and Practice." *Jurisprudencija: Mokslo Darbu Žurnalas* 20, no. 3 (2013): 1213–29. https://doi.org/10.13165/jur-13-20-3-18. 1218

who assumes the full political responsibility for such orders, the order about dissolution of *Saeima* is an exception that does not require countersignature.[114] For the next stage, on the basis of presidential order, the Central Election Commission has a duty to prepare a referendum.[115] The outcome of the referendum is a zero-sum game: depending on the referendum results, either the *Saeima* is dissolved or the president is removed from office. If more than half of the voters cast votes in favor of dissolution, the *Saeima* shall be considered dissolved, new elections called, and such elections held no later than two months after the date of the dissolution of the *Saeima*.[116] Unlike other referendums, the dissolution referendum does not mandate any specific quorum. The logic of this approach is that dissolution is proposed in the context of inter-branch conflict between the president and *Saeima*. The requirement of a quorum threshold would not resolve this conflict and the effective functioning of those institutions would become impossible if the quorum was not reached.[117] If the electorate supports the dissolution, the Constitution ensures legislative continuity – the mandate of the members of the *Saeima* is in effect until the newly elected *Saeima* is convened.[118] During this time president is granted comprehensive discretion – not only the former *Saeima* may only hold sittings upon the request of the president, but the agenda of such sittings is also determined by the head of state.[119] The rationale of this regulation is to prevent *Saeima* which people already decided to dissolve and therefore, lacks the full legitimacy from making variety of irrational decisions, including removing the president as a political revenge.[120] This is logical as the *Staversme* does not regulate the impeachment procedure and Article 51 grants two-thirds of the *Saeima* members the unlimited right to remove president from the office without any specific normative basis.

[114] Constitution of Latvia, Article 53
[115] Kārkliņa, Annija, 1217
[116] Constitution of Latvia, Article 48
[117] Kārkliņa, Annija 1218
[118] Constitution of Latvia, Article 49
[119] Constitution of Latvia, Article 49
[120] Kārkliņa, Annija, 1219

The *Staversme* also regulates the case when the electorate votes against the dissolution: if in the referendum more than half of the votes are cast against the dissolution of the *Saeima*, then the President shall be deemed to be removed from office, and the *Saeima* shall elect a new President to serve for the remaining term of office of the President so removed.[121] Therefore, the provision holds the president responsible for the expression of initiative to dismiss the popularly elected body if the voters themselves do not agree with the proposal.[122] The alternative outcome of dismissing either the president or the *Saeima* can also work as a check on the frequent discretionary exercise of this power, as the president will more likely propose the dissolution if the political context gives enough evidence that the people will vote to do so.

The provision has been a contested one in Latvian contemporary politics as it includes some potential risks and ambiguities. President Valdis Zatlers submitted several proposals to the *Saeima,* suggesting amendment of the *Starvesme* to grant the head of state the discretion to dissolve *Saeima* without referendum and risking the office, as it is conventional for some other countries, however, the proposals have never been accepted.[123] Another important detail about the Latvian approach is the fact that the president can propose dissolution at any time during the term. Therefore, if the presidential term is about to expire the abovementioned constitutional requirement about the removal of the president if people vote against the dissolution becomes ineffective. This might lead to presidential activism at the end of their term as the preventive effect of potential loss of office does not apply in such cases. With that regard, President Zatlers also submitted a legislative initiative to specify the time framework by explicitly mentioning that the head of state is not granted this right if less than three months remain before the expiry of their term of office, however, no amendments were introduced.[124] Additionally, the term regulation of newly elected president also contains some ambiguity. As

[121] Constitution of Latvia, Article 50
[122] Kārkliņa, Annija, 1220
[123] Ibid
[124] Trabucco, Fabio Ratto, 719

mentioned, a new president is elected for the remaining term of office of the removed president. Generally, the Latvian constitution bars the same person from holding the office as president for more than eight years.[125] In the theoretical situation where the person is elected for the remaining period of one year and then decides to run for regular election for another four years, the total five years spent in the office would prevent them from running for the next elections as the second term would exceed the eight years term of the office. This restricts their right to be elected in office for eight years in a row.[126] In other constitutions, for example, a new president is generally appointed for the full term in extraordinary elections and not for the remaining period.[127]

In practice, the dissolution referendum was used only once by President Zatlers. On May 28, 2011, the president proposed a referendum. The decision followed *Saeima'*s rejection of a request by the Office for the Prevention and Combating of Corruption for permission to search the private property of politician Ainārs Šlesers.[128] There was a broader political context behind president's proposal: Zatler justified the decision by the lack of measures taken by *Saeima* to prevent oligarchs "from appropriating the country and spreading corruption".[129] In his speech, the president warned against "privatization of policy," and the growing influence of "oligarchs" and called for a fight against corruption.[130] Parliamentary refusal to lift the immunity of "oligarch" lawmakers was seen as hampering the investigation and protecting the politician's interests. Additionally, the political clash happened while the country was overcoming the worst economic recession in the EU.[131] The referendum was held on July 23, 2011, with nearly

[125] Constitution of Latvia, Article 38
[126] Kārkliņa, Annija, 1222
[127] Ibid
[128]Dudzińska, Kinga. "Implications of the Referendum on the Dissolution of the Latvian Parliament," No. 64 (281), June 16, 2011, Available at: https://www.files.ethz.ch/isn/130744/Bulletin%20PISM%20No%2064%20(281),%20June%2016,%202011.pdf
[129] OSW Centre for Eastern Studies. "Latvia's Inhabitants Dissolve the Parliament," July 27, 2011. https://www.osw.waw.pl/en/publikacje/analyses/2011-07-27/latvias-inhabitants-dissolve-parliament.
[130] Dudzińska, Kinga, 528
[131] Ibid

45% participation rate and 94% voting for the dissolution of *Saeima*. Therefore, the electorate agreed with the president.

It is interesting how the timing and political consequences played out. President Zatlers initiated the referendum at the end of his term as the next presidential elections was scheduled for June 2, 2011. This is captivating as it was Zalter himself who was suggesting the exclusion of this right at the end of the presidential term. Consequently, the presidential discretion was exercised without the risk of removal if the electorate voted against it as the Zalter's mandate was already expiring. However, this case demonstrated the best that even if the legal risk of the removal was avoided, Zatler's move still caused crucial political consequences: Zatler was a candidate in the upcoming elections and as it was the *Saeima* that he proposed to dissolve that would elect the new president, Zatler could not receive the required amount of votes. Instead, *Saeima* elected Andris Bērziņš on the second stage of voting. This example demonstrates that even if the legal check provided by Article 50 does not apply to the exercise of presidential discretion at the end of the term, president's decision might still be a politically costly one as the head of state risks re-election opportunity when their candidature is proposed for the upcoming presidential elections.

3. PARDON POWER

3.1 Comparative Overview of the Pardon Power

The pardon power is one of the oldest prerogatives of the Head of State. Comparative studies demonstrate that in the majority of countries, this power is almost exclusively vested in the Head of State. Certainly, there are some exceptions, for example, some constitutions attribute the power to collective bodies instead of the individual sovereign or the legislative branch itself.[132] However, what is particular with the pardon power is the tendency of historical continuity: no matter the variance of the presidential role as a chief executive in presidential, mixed, or parliamentary models, there seems to be a tradition to grant the power to presidents in all the models.[133]

The nature and rationale of the power have evolved historically. Originating from the English Crown where the clemency was an embodiment of the monarch's "divine will", the power was considered an act of mercy and symbolically demonstrated that it was the Crown that gave the right to life and death to their subjects.[134] However, in the contemporary usage and after gradual limitations, the power is not merely an "act of grace" but become a more legal-rational and rule-bound concept, similar to other mechanisms procedurally defined in criminal law such as parole or probation.[135] Pardon is no longer considered a private merciful act of the sovereign but a tool to serve public welfare and interests.[136] Additionally, the power can be mobilized to

[132] Sebba, Leslie. "The Pardoning Power: A World Survey." *The Journal of Criminal Law and Criminology (1973-)* 68, no. 1 (1977): 83–121. https://doi.org/10.2307/1142480. 112
[133] Ibid, 113
[134] Dascălu, Claudia Ilona. "Elements of Comparative Law on the Individual Pardon, Between Constitutional Constraint and Discretionary Prerogative of the Head of State" *Law Review*, no. 02 (2012): 37–43. https://www.ceeol.com/search/article-detail?id=1028908 37
[135] Pascoe, Daniel, and Andrew Novak. *Executive Clemency: Comparative and Empirical Perspectives*. Routledge, 2020.https://books.google.at/books/about/Executive_Clemency.html?id=jybxDwAAQBAJ&source=kp_book_description&redir_esc=y
[136] Jorgensen, James, Federal Executive Clemency Power: The President's Prerogative to Escape Accountability, 27 U. Rich. L. Rev. 345 (1993). Available at: http://scholarship.richmond.edu/lawreview/vol27/iss2/10 356

overcome legal irregularities or give the last chance to convicts, considering certain extra-legal factors. With that regard, some scholars refer to the pardon power as "legally sanctioned alegality"[137] as discretion attributed to the Head of State sets aside the final judgment of court.

There is a lack of coherence regarding the terms: constitutional texts refer to various words, such as "pardon", "clemency", "commutation", "amnesty", "mercy". [138] Although understanding of each term varies in different jurisdictions, some general assessments can be made. Generally, amnesty is differentiated from the pardon power as it is the competence of the legislative body and has a more general nature as it addresses not the individual case but a series of cases on the particular offense. Regarding the variations of the use of clemency and pardon, clemency is generally broader term as it includes different alternatives to alter the conviction, for example, commutation of punishment and the pardon itself as variation of clemency.[139] As the studied constitutions refer to both clemency and pardon, the chapter addresses presidential discretion in both cases.

3.2 Scope of the Presidential Discretion

The pardon power is generally considered the sole right of the Head of State. However, as mentioned, after gradual regulation of the use of power various bodies participate in the decision-making.[140] The origin of those bodies varies across jurisdictions: they can be deployed under an executive or legislative arm, or be independent and have a quasi-judicial character.[141] The nature of their decisions is also diverse as it might have a binding or only advisory nature for the President. Additionally, in some jurisdictions, counter-signature is used and if separate bodies generally provide *ex ante* involvement, counter-signature provides the *ex post* check on

[137] Campagna, Giordana, The Miracle of Mercy, *Oxford Journal of Legal Studies*, Volume 41, Issue 4, Winter 2021, Pages 1096–1118, https://doi.org/10.1093/ojls/gqab017 1108
[138] Sebba, Leslie 116
[139] Ibid
[140] Ibid 114
[141] Ibid

the President. Therefore, examining the scope of the Presidential discretion it is essential to observe the involvement of those "secondary bodies" and their influence vis-à-vis presidential decision-making.[142]

In Hungary, the scope of the presidential power only covers individual pardon cases, while the second type of pardon, referred to as a general pardon[143] is a constitutional prerogative of the legislative body.[144] The president exercises full discretion to make the final decision regarding individual pardons. This means that the President is not required to give any justification for the decision or comply with any deadline.[145] The decision is made by the President exclusively, however, the Constitution requires countersignature by a respective Minister[146] (the Minister of Justice). As both presidential decisions to grant or refuse the pardon need to be countersigned and therefore, agreed by the Minister, the presidential discretion is checked by the Government. Countersignature also brings a political element to the pardoning process: by countersigning the decision the Minister takes over political responsibility and might avoid doing so in politically sensitive cases that has happened in the Hungarian context.[147]

The Constitution is not explicit regarding the detailed exercise of the pardon power. Further regulation is outlined in various legislation, such as the Criminal Procedural Code, and other thematic legislative or ministerial acts. This legislative framework specifies that the pardon procedure can be initiated by the convicted, their representative, or *ex officio* and transmitted to the President by the Minister of Justice.[148] However, the extent of presidential discretion to make the final decision is not affected by those various stages. For example, although it is up

[142] Ibid
[143] Constitution of Hungary, Article 9.4.g. Unlike individual pardons, the general pardon, known as a public pardon or amnesty, applies to certain group of accused or convicted and might carry symbolic character or be connected with political events. See: Nagy, Anita, "Pardon System in Hungary and European Human Rights Jurisprudence" October 18, 2016. 182.
[144] Constitution of Hungary, Article 1.2.j
[145] Helsinki Committee of Hungary, Advisory Opinion on László Magyar v. Hungary**,** 4
[146] Constitution of Hungary, Article 9.5
[147] Helsinki Committee of Hungary, Advisory Opinion, 5
[148] Act no. CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Confinement for Infractions, Section 45

to the Minister to gather the required documents from the court and transmit the application to the President, the Minister is required to do so even in case of a disagreement with the application. Therefore, the opinion of the Minister does not bind presidential discretion in this initial stage.[149]

Hungarian legislation also introduces a very particular concept of the Mandatory Pardon which is not found in the constitution and contrary to its wording, does not have obligatory character to limit the presidential discretion. The Mandatory Pardon was introduced as a remedy after the European Court of Human Rights (ECtHR) considered the Hungarian model of life imprisonment without the right to parole a violation of the European Convention on Human Rights.[150] In response, the Government of Hungary created the Mandatory Pardon procedure as an alternative to the parole mechanism and established the special Pardon Committee to examine whether the aim of punishment is achieved without further deprivation of the convict's liberty. The idea of Mandatory Pardon requires *ex officio* review of the conviction by the Committee after the convict has served 40 years in prison and has a specifically criminological nature. However, the Committee only has an advisory role and the new provisions do not oblige the President to take into account the Committee's findings on whether the continued imprisonment is legitimate on penological grounds.[151] Consequently, despite the recent changes, the presidential discretion is not bound and there is no explicit guidance regarding the factors the President has to consider while making the final decision.[152]

The President of Latvia is entrusted with the right to grant clemency by the Constitution. However, unlike the Constitution of Hungary, the *Satversme* explicitly refers to the regulation

[149] Nagy, Anita, 184
[150] László Magyar v. Hungary
[151] T.P. and A.T. v. Hungary**,** Paragraph 49
[152] The ECtHR found the Mandatory Pardon mechanism incompatible with the Convention in T.P. and A.T. v. Hungary. The Mandatory Pardon has not yet been modified. See: Hungary fails to comply with ECtHR judgments on life sentence, Hungarian Helsinki Committee, 01.08.2023
https://helsinki.hu/en/hungary-fails-to-comply-with-ecthr-judgments-on-life-sentence/

of the extent of the right and following procedures by a specific law[153], namely the Clemency Law. The Clemency Law defines the concept of clemency and lists types accordingly. The President has a wide scope of discretion to make various choices such as releasing a convicted person from serving a punishment completely or partially, reducing punishment, or setting aside the criminal record.[154] Additionally, the President has discretion not only to decide clemency requests but to initiate the procedure on their own.[155] The Law also refers to the Clemency Service of the Chancery of the President as a preparatory body that provides necessary documents and information for the President. However, the final decision is made exclusively by the Head of State. This prerogative is checked by the countersignature requirement similar to Hungary: according to *Satversme*, all Presidential orders shall be jointly signed by the Prime Minister or the appropriate Minister who bears the political responsibility.[156]

The scope of presidential discretion is also wide in Georgia. The pardon prerogative is one of the rare presidential powers that remained unaltered even though Georgia changed its government system from the presidential to the semi-presidential and later to the parliamentary one. The specific characteristic of the Georgian model is that, unlike the previous cases, the Constitution of Georgia does not require countersignature for presidential acts to pardon convicts.[157] Consequently, the idea of exercising the pardon power exclusively and independently by the Head of State is strongly present there, as interference from the other branches is not required. This exclusivity grants President a substantive tool for potential political influence. For example, the fourth President of Georgia supported liberalization of

[153] Constitution of Latvia, Article 45
[154] Law on Clemency, Sections 1-2
[155] Law on Clemency, Section 4
[156] Constitution of Latvia, Article 53
[157] Constitution of Georgia, Article 53.2.g

drug policy and consequently, 62% of the pardons were granted to convicts of drug crimes.[158] The fifth President used this prerogative to pardon the opposition politicians, explicitly stating that she was aiming to resolve the ongoing political crisis that way.[159] Therefore, the pardon power can be mobilized to signal the President's views regarding criminal law policy or participate in the ongoing political dynamics.

There have been some tensions regarding the use of this power. For example, in 1999 the second President, Eduard Shevardnadze pardoned the former Mayor of the capital of the Adjarian Autonomous Republic, however, the Autonomous Republic authorities did not comply with the pardon and kept the Mayor in custody, charging him with different criminal offenses later.[160] The non-compliance with the Presidential pardon can be explained by the tense relationship that existed between the central and regional authorities at that time.[161] The pardon decision was challenged in the court due to procedural defects (the president did not obtain the opinion of the Pardons Board) and while the High Court of Adjarian Autonomous Republic considered the pardon null and void, this judgment was quashed by the Supreme Court of Georgia as the pardon power was deemed absolute and independent constitutional right of the President that could have been exercised without the Board[162].[163] Therefore, the non-compliance with the pardon order was considered illegal by the Court. Recently, the question of whether the use of pardon power is discretion or also a constitutional duty of the Head of State becomes relevant during the term of the fifth President of Georgia. In 2019, after certain pardon decisions caused harsh public criticism, the President declared a moratorium on

[158] Avaliani, Tamar, Presidential Pardon Power as a Mechanism to Maintain Constitutional Order, Journal of Constitutional Law, Vol.1 (2022), Available at: https://constcourt.ge/en/journal/journal_editions/journal-2022-1 141
[159] Ibid, 142
[160] Asanidze v. Georgia, Paragraphs 23-32
[161] Orakhelashvili, Alexander. "Assanidzev. Georgia." *American Journal of International Law* 99, no. 1 (2005): 222–29. https://doi.org/10.2307/3246100. 222
[162] Asanidze v. Georgia, Paragraphs 23-32
[163] The case made to the ECtHR (Asanidze v. Georgia). The Court could not asses legality of the detention after Presidential pardon due to inadmissibility as the complaint period has passed. However, the ECtHR still found a violation and held that the Mayor has been detained arbitrarily as the Adjarian authorities did not comply with the decision of the Supreme Court that ordered the immediate release.

pardoning and announced that the suspension would last until the adoption of the new rules on Pardoning.[164] The refusal to exercise the pardon power was considered breach of constitutional principles and arbitrary interpretation of the essence of presidential discretion by some scholars.[165]

Like the Georgian model, the President of Estonia enjoys a wide scope of discretion. Clemency is considered a sole right as the Constitution does not refer to the requirement of the countersignature. Therefore, the President can exercise the discretion without the interference from the Government. The only limitation indicated in the Constitution is that the President can release or grant commutation to convicts only at their request.[166] The nature of presidential clemency power has been interpreted by the Constitutional Review Chamber in its precedential decision (see below). The Court defined clemency as the "one-time exceptional individual act of mercy of state power" that does not question the legality and justification of a judicial decision.[167] The judgment also framed the understanding of the concept of presidential discretion and citing the administrative law theorist, noted that "even within the internal limits of free discretion an official is bound by law: it has to strive for the objectives of the norm and determine the means of enforcement thereof, being guided only by a general interest".[168] Therefore, according to the Court's understanding, discretion is not an unlimited or arbitrary use of power but has internal limits and is also bound by objectives of legal norms and public interests.

Unlike previous cases, Armenia is the only country where the President does not have discretionary power when granting pardons.[169] However, the Constitution is not explicit: it only

[164] President declares Moratorium on Pardoning, 19.09.2019, Available at: https://1tv.ge/lang/en/news/president-declares-moratorium-on-pardoning/
[165] Avaliani, Tamar 142
[166] Constitution of Estonia, Article 78.19
[167] Constitutional Judgment of the Constitutional Review Chamber of the Supreme Court, 3-4-1-3-98, 14 April, 1998, Available at: https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-3-98
[168] Ibid
[169] Hakobyan, Davit 121

mentions that in the cases and manner stipulated by law, the President of the Republic shall resolve the issue of granting pardon to convicted persons.[170] It is the Law on Pardon that sets out detailed procedures and underlines that the president can grant a pardon only based on the recommendations submitted by the Prime Minister.[171] The Prime Minister even formulates and sends the draft of the Presidential decree on granting or denying pardon, which should be signed by the President or returned with amendments in case of disagreement.[172] Consequently, the President only formally makes the final decision and the discretion is excluded *ex ante* by mandatory referral from the Prime Minister.

Therefore, presidential discretion and the effect of secondary bodies vary across selected jurisdictions. In Hungary, the Minister with the involvement of the court is responsible for preparing the case, however, their decisions are not binding for the President and the constitution provides only the *ex post* check with countersignature. In Latvia, the secondary body is created under the office of the President itself and does not have binding character. Similar to Hungary, the Constitution of Latvia also requires countersignature. Neither the counter-signature is required in Georgia and Estonia nor the secondary bodies have the binding character, while in Armenia, the President can only make the decision with the recommendation of the Prime Minister.

3.3 Competence to Regulate the Pardon Power

Presidential discretion and its extent are influenced by procedural regulations. With that regard, the question of which branch should be attributed the competence to set the detailed framework for the use of pardon power becomes relevant. Generally, two models can be differentiated:

[170] Constitution of Armenia, Article 135
[171] The official website of the President of the Republic of Armenia, Available at: https://www.president.am/en/questions/
[172] Ibid

regulation through laws adopted by legislative branch or self-regulation by the presidential acts itself. This aspect is important to examine the scope of discretion more precisely as for example, the statutory regulation by legislative body might possibly alter the extent of discretion that is granted by the constitution without explicit limits.

The analysis of Constitutional texts of the studied countries demonstrates relevance of this issue as constitutions grant the general right to president, while the detailed procedural regulations are adopted by the secondary sources. However, the approach regarding the type of secondary rules differs. Namely, in Hungary, Latvia, and Armenia it is the parliamentary acts that set the framework and in Latvia and Armenia constitutions directly state that the power shall be regulated by laws. In Georgia, the Constitution does not imply regulation through law, and the main legislative source, the Criminal Code of Georgia shifts the issue to presidential regulation.[173] Therefore, the self-regulation model is deployed in Georgia and the power is regulated by the Presidential Edict. The new Edict, adopted in 2019 by the fifth President, establishes the preparatory body, sets out detailed procedural rules, and lists types of offenses that can be pardoned. However, it is an important detail that the President can decide not to follow the rules outlined in the Edict at any phase of the proceedings.[174]

In Estonia, this issue has been addressed by the Court itself. In 1998 the President petitioned the Supreme Court to declare the Clemency Procedure Act unconstitutional. The President argued that the *Riigikogu* did not have a competence to adopt the Act as the Constitution recognized the authority of the legislative branch only regarding the issues that were not vested in the President. As the clemency power was granted to the President and the Constitution did not refer to its regulation by law, the President argued that the head of state had a right of self-

[173] Criminal Code of Georgia, Article 78
[174] https://matsne.gov.ge/ka/document/view/4712933?publication=0 Article 5.2

regulation regarding clemency proceeds and therefore, interference from the *Riigikogu* violated the principle of separation of powers.[175]

Subsequently, the Court assessed the central issues: firstly, whether the *Riigikogu* could generally regulate clemency and later, whether specifically, the establishment of an advisory body violated the constitutional logic of this presidential power. The Majority decision reasoned that although the Constitution did not *expressis verbis* provide for the passing of the Clemency Procedure Act, legislators still had a right to regulate clemency procedure. This understanding was justified due to the fact that the procedural law regarding the administration of justice was the sole competence of *Riigikogu*. Additionally, the Court noted that the pardon decision also had an administrative nature and according to Estonian legal practice, administrative proceedings had to be regulated by law. The majority opinion did not share the President's argument that the right of self-regulation was breached: the Court noted that this right covered only the internal institutional rules and while the President could regulate internal procedures, the Head of State was still restricted by laws in other spheres. Therefore, *Riigikogu'*s general competence to regulate clemency was considered constitutional. The Court's approach was different regarding the second issue, namely about the advisory body. The majority opinion underlined that a consultative body to assist the President and its establishment by the legislative act was not in itself unconstitutional. However, the problematic part was the competence of the Clemency Committee to decide on the admissibility of the clemency requests. As the Committee decisions had a preliminary binding nature and restricted presidential discretion by filtering out certain requests that were considered inadmissible by the Committee, the Court found a constitutional violation. The Court noted that the Committee could not prevent requests from reaching to the President and the President had to decide on

[175]Constitutional Judgment of the Constitutional Review Chamber of the Supreme Court

all appeals, including the ones that did not meet the formal requirements. Therefore, the Act was considered unconstitutional.

However, this understanding was not unanimous. The concurring opinion went further and argued that the *Riigikogu* did not have the competence to prescribe the existence of the Clemency Committee at all and organize the exercise of the will of the President that way.[176] The opinion reasoned that the establishment of the advisory body was the exclusive authority of the President under the right of self-regulation and the competence of the President included the freedom to regulate the formation of their will. The main argument the opinion relied on was the fact that the Constitution did not explicitly refer to the exercise of the pardon power "pursuant to law" and accordingly, the legislative branch did not have a regulatory competence. Thus, the decision to establish or not to establish a clemency committee, was for the President of the Republic to make, similar to the detailed regulation of the composition of the committee, its procedural rules and importantly, it was up to the Head of State to decide whether the Committee's decisions would have a binding effect on the President.

CONCLUSION

The key finding of this study is the considerable diversity that exists within the power arrangement system in each country (Table 2). Observing the nature of discretionary powers itself, the legislative powers seem to be granting a high extent of discretion, which is strongly connected with the idea of separation of powers and understanding the figure of the president

[176] Concurring opinion, Justice Jüri Põld, https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-3-98

as an important check on political branches. Similarly, the pardon or clemency power is also associated with the substantive level of discretion and exclusivity of the decision-making, which is considered a result of the historical continuity of the traditional powers of the head of state. Conversely, the referendum power generally relies on the participation of the other branches. Additionally, within some powers, several tendencies can be identified that check the presidential discretion, such as ex-post or ex-ante participation of the subsidiary bodies or the following requirement of the countersignature.

Focusing on the studied countries, the Constitution of Armenia grants no substantive discretionary powers to the president within the studied framework. After the transition to the parliamentary system in 2015, diminishing the presidential powers[177] seems to be a deliberate institutional choice. In Georgia, a similar trend of gradual constitutional amendments can be identified that opted out for a parliamentary model, however, unlike Armenia the president owns certain discretionary powers, such as legislative veto power, final discretion to call a referendum, and sole right to grant pardons. Similarly, in Hungary, although the 2011 Constitution was considered to crave out weak presidential powers, the President is granted discretion regarding both legislative and constitutional veto powers, as well as discretion to initiate referendum and sole right to grant pardons. The power arrangement system in Estonia was the initial choice unlike previous countries that went through various amendments or adopted new constitutions, also granted the president discretion within legislative and constitutional veto powers, and the sole right to grant clemency, while excluding presidential participation in the referendum. Latvia seems to be the most exceptional case, as the constitution contains various *sui generis* powers, such as suspensive veto power and the dissolution referendum with a high extent of presidential discretion. Therefore, arrangements

[177] Bisarya, Sumit. *Transitions to Parliamentary Systems: Lessons Learned from Practice. Discussion Paper 5/2023*. International Institute for Democracy and Electoral Assistance (International IDEA), 2023. https://doi.org/10.31752/idea.2023.89. 17

are diverse even within this small group of countries with similar historical dynamics. That might signal that instead of generalizations of the government systems and producing certain conventional understandings, close study of particular powers and systems is essential.

Table 2. Findings

	Estonia	Georgia	Armenia	Hungary	Latvia
Veto Power	Both legislative and constitutional veto power	Legislative veto	Only a referral to the Constitutional Court	Both legislative and constitutional veto power	Legislative veto, *sui generis* suspensive veto
Referendum	No participation	Final discretion, but countersignature is required from the Prime Minister	Shall call a referendum without discretion	Discretion to initiate. Final decision made by National Assembly	Initiating dissolution referendum, referendum connected with suspensive veto power
Pardon/Clemency Power	Sole right to grant clemency	Sole right to pardon, self-regulation of the procedure by presidential decree	No discretion. Makes decision on the recommendation of the Prime Minister	Sole right to grant personal pardon	Sole right to grant clemency

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