

REPORT ON THE REFERRAL OF A LAW BACK TO PARLIAMENT BY THE HEAD OF STATE

adopted by the Commission at its 29th session (15-16 November 1996)
on the basis of a study prepared by
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with the assistance of the Secretariat

The proposal for a study on the practices adopted in the Council of Europe member states with regard to the referral of legislation back to parliament by the head of state was put forward by the Vice-President of the Republic of Moldova, Mr Dumitru Diacov. The idea was prompted by a decision of the Constitutional Court of the Republic of Moldova on the interpretation of Article 93 of the Constitution.

This article, entitled "The promulgation of laws", provides as follows:

1. The President of the Republic of Moldova promulgates the laws.
2. The President of the Republic of Moldova has the right, whenever he objects to a given law, to submit it within at most two weeks to parliament for re-examination. Should parliament maintain its previously adopted decision, the President must promulgate the law.

The purpose of this brief study is therefore to describe the practices adopted in a number of European countries under constitutional provisions relating to the referral of laws back to parliament by the head of state.

The study employs the comparative method and deals essentially with the relevant constitutional provisions and, to a lesser extent, the case-law of constitutional courts.

The study is in two parts: a general overview of the different situations to be found in European countries, and a more detailed account of the situations obtaining in the following countries: France, Germany, Belgium, Ireland, Greece, Italy, Poland, Bulgaria and Hungary.

I. Three different ways in which Constitutions deal with the question of the referral of laws back to parliament by the head of state

1. The Constitution does not provide for this possibility

This is the case in the majority of western European countries.

2. The Constitution does not lay down detailed rules as to the procedure for adopting legislation referred back to parliament by the President, but establishes a general principle

In **France**, Article 10 provides as follows: "The President of the Republic shall promulgate acts of parliament within a period of 15 days following their final adoption and transmission to the government. He may, before the expiration of this time limit, ask parliament to reconsider the act, or some of its articles. This reconsideration may not be refused."

In **Italy**, Article 74 provides as follows: "The President of the Republic, before promulgating a law, may request further discussion by means of a message to both Chambers in which the reasons for such action are set forth. If the Chambers vote the bill once more, the law must be promulgated."

In **Estonia**, Article 107 provides as follows: "Laws shall be proclaimed by the President of the Republic. The President of the Republic shall have the right to refuse to proclaim a law adopted by the Riigikogu, and to return the law to the Riigikogu for debate and decision, within 14 days of receiving it, together with reasons for its rejection. If the Riigikogu re-adopts a law which has been returned by the President of the Republic, without amendments, the President of the Republic shall proclaim the law or shall propose to the national court that it declare the law to be unconstitutional. If the national court declare the law to be in accordance with the Constitution, the President of the Republic shall proclaim the law."

In **Latvia**, Article 71 provides as follows: "Within seven days of the adoption of a law by the Saeima, the President of the State shall be entitled to ask, by means of explanatory letter addressed to the President of the Saeima, for the revision of that law. If the Saeima leave the law unaltered, the President of the State shall not have the right to raise any further objections".

There are similar provisions in other countries: in **Hungary** (Article 26); in the **Slovak Republic** (Article 87 No. 3); **Romania** (Article 77); and **Turkey** (Article 89).

In the absence of specific provisions, the majority required in these cases is the same as that required when laws are adopted under the ordinary procedure.

3. The Constitution lays down a specific adoption procedure

a. A two-thirds majority is required in the **Republic of Belarus**, where Article 100.20 of the Constitution provides as follows: "The President of the Republic of Belarus shall: (...) 20) sign laws and be entitled no later than 10 days following receipt of a law to return it with his objections to the Supreme Soviet for further discussion and a vote. If by a majority of no less than two-thirds of the elected deputies the Supreme Soviet upholds the decision it adopted earlier, the President shall be required to sign the law within three days' time (...)"

Article 94 of the Constitution of **Ukraine** says in paragraph 2: "Within 15 days of the receipt of a law, the President of Ukraine signs it (...) and officially promulgates it, or returns it to the Verkhovna Rada of Ukraine (...) for repeat consideration"; and in paragraph 4: "If a law (...) is again adopted by the Verkhovna Rada of Ukraine by no less than two-thirds of its constitutional composition, the President of Ukraine is obliged to sign it and to officially promulgate it within 10 days".^[1]

There is a similar constitutional provision (Article 18.3) in **Poland** (see below).

b. An absolute majority is required in Bulgaria, Greece, Lithuania, Portugal and the Czech Republic.

Article 42 of the **Greek Constitution** provides as follows:

"1. The President of the Republic shall promulgate and publish the laws voted by parliament within one month. The President of the Republic may

(...) send back a bill voted by parliament stating the reasons for returning it. 2. A bill or legislative proposal which has been returned by the President of the Republic shall be presented to the plenary session; if it is voted again by an absolute majority of the deputies (...), the President is obliged to promulgate and publish it within 10 days of the second voting."

In **Lithuania**, Article 72 of the Constitution provides as follows: "The Seimas may reconsider and enact laws which have been referred back by the President of the Republic. After reconsideration by the Seimas, a law shall be deemed enacted if the amendments and supplements submitted by the President of the Republic were adopted, or if more than half of all the Seimas members vote in the affirmative, and if it is a constitutional law, if at least three-fifths of the Seimas members vote in the affirmative. The President of the Republic must, within three days, sign and forthwith officially promulgate laws re-enacted by the Seimas."

In **Portugal**, Article 139, "Promulgation and veto", seems to be the most comprehensive and detailed constitutional provision dealing with this question. It is therefore quoted in full: "1. Within 20 days of having received any decree of the Assembly of the Republic for the purpose of promulgation as a law, or of the date of publication of a ruling of the Constitutional Court to the effect that none of the provisions of the decree under consideration violate the Constitution, the President of the Republic shall either promulgate it or exercise his or her right of veto; exercise of the latter shall be by way of a substantiated message requesting re-examination of the text. 2. If the Assembly of the Republic confirms its vote by an absolute majority of its members entitled to vote, the President of the Republic shall promulgate the instrument within 8 days of its receipt. 3. A two-thirds majority of the members present, where that majority is larger than the absolute majority of the members entitled to vote, shall nevertheless be required in order to confirm decrees that take the form of an organic law as well as decrees concerning the following matters: a. external relations; b. borders between the public, the private and the co-operative and social sectors pertaining to ownership of the means of production; c. regulations on the elections for the European Parliament or on any other electoral acts provided for in the Constitution. 4. Within 40 days of having received any decree of the government for the purpose of promulgation or of the date of publication of a ruling of the Constitutional Court to the effect that none of the provisions of the decree under consideration violate the Constitution, the President of the Republic shall either promulgate it or exercise his or her right of veto; exercise of the latter shall be by way of written communication addressed to the government and containing the reasons for the veto. 5. The President of the Republic shall also exercise his or her right of veto in the conditions laid down in Article 278 and 279 ["Preventive scrutiny of constitutionality"]."

In the **Czech Republic**, Article 50 provides as follows: "1. The President of the Republic has the right to return an adopted law, except a constitutional law, giving reasons, within fifteen days of the day of its transmission to the Presidency. 2. The Chamber of Deputies shall vote on the rejected law once again. Draft amendments are inadmissible. If the Chamber of Deputies re-approves the returned law by an absolute majority of all deputies, the law is promulgated. Otherwise it is assumed that the law was not passed".

Article 101 of the Bulgarian Constitution also requires an absolute majority (see below).

c. In **Georgia**, according to Article 68 of the Constitution, a three-fifths majority is required: "1. A bill adopted by parliament is passed to the President of Georgia within five days. 2. The President either signs and issues the law within ten days or returns it to parliament with further amendments. (...). 4. If parliament votes against the President's amendments, the bill as passed from parliament to the President is voted on again. The original is considered passed if supported by three-fifths of the total number of deputies in the cases of laws and organic laws; by two-thirds of the total number of deputies in the case of constitutional amendments".

d. In **Azerbaijan**, Article 110 of the Constitution ("Signing of laws") provides as follows:

"I. The President of the Azerbaijan Republic signs laws within 56 days of their presentation. If the President of the Azerbaijan Republic has objections to a law he may return it to the Milli Majlis^[2] of the Azerbaijan Republic within the specified term without signing it, together with his comments. II. Should the President of the Azerbaijan Republic fail to sign constitutional laws they will not come into force. If the Milli Majlis of the Azerbaijan Republic accepts by a majority of 95 votes laws that had been accepted previously by a majority of 83 votes [laws concerning the election of the President, the election of parliament and the status of its deputies, and referendums], and by a majority of 83 votes laws that had been accepted previously by a majority of 63 votes, said laws come into force after the second vote".

II. Consideration of the situations obtaining in some European countries

1. France

As already mentioned above, Article 10 of the French Constitution provides that the head of state "may (...) ask parliament to reconsider the act, or some of its articles. This reconsideration may not be refused." Such a request therefore obliges the two Chambers to start the whole legislative process over again and to vote once again on the text in question, whether amended or not. No restrictions are placed on their freedom of action: they are not required to comply with any special time limit or any rule requiring an increased majority for their second deliberation. This is a form of suspensive veto which was already permitted in 1875 and 1946. The power conferred on the President by Article 10 has very seldom been used since 1875. It could play a not inconsiderable role in relations between parliament, the government and the presidency. Good use was made of it under the IVth Republic to give the deputies the opportunity to reconsider a regrettable piece of legislation on parliamentary immunities which they had adopted with undue haste. It was also used as a means of revising adopted texts containing errors of drafting. Under the Vth Republic, after not being used for a long time, it enabled President Mitterrand to extricate himself from an awkward situation in 1983; after the law relating to France's application to host the 1989 World Fair had been passed, it became apparent that neither the state nor the City of Paris was willing to bear the costs involved. Referral back to parliament was in fact a convenient way of ensuring that the plan was dropped.

The President can also make use of this right to enable parliament to make additions to a law in place of provisions criticised by the Constitutional Council. This possibility is explicitly provided for in Article 23 of the law of 7 November 1958. It was put into practice in 1958 in connection with a law on the future of New Caledonia.

These powers enjoyed by the head of state as regards the promulgation of laws and the review of their constitutionality are shared powers since the necessary decisions, except for the decision to refer a matter to the Constitutional Council, have to be countersigned.

2. Germany

The legislative process ends in Germany with the promulgation of the law by the Federal President, who is required to ensure the proper conduct of this procedure, as he did, for example, in connection with the law on alternative community service for conscientious objectors. Article 82 of the Germany Basic Law states that laws must be signed by the President before they are published. This article therefore gives the President a certain degree of control over them. In this area, the Federal President is not simply regarded as the "notary" of the state. He may express constitutional reservations with regard to a law. However, so far in the history of the Federal Republic, there have only been five cases in which the Federal President has refused to sign an adopted law.

3. Belgium

The problem of royal assent arose in Belgium in April 1990 when the King was called upon to approve the law on the partial depenalisation of abortion. The King's view was that it was not right that he should be the only person obliged to sign the document in question since he would be unable

to square this with his conscience. However, having no intention of impeding the normal functioning of the country's institutions, the King asked the government to find a solution which would make it possible to bring the law into force without his involvement. The Council of Ministers decided therefore to make use of Article 82 of the Constitution, according to which if the King is unable to rule (which seemed to be the case at the time), the government may, with the approval of parliament, suspend him from his duties. In such cases, the Constitution provides for the King's powers to be exercised by the Council of Ministers. The Council of Ministers therefore approved the law and the two Chambers of Parliament reinstated the King immediately afterwards.

4. Greece

As already mentioned, Article 42 of the Greek Constitution states that the President of the Republic promulgates and publishes the laws adopted by parliament and may refer back to it a bill adopted by it, stating the reasons for so doing. The President of the Republic therefore promulgates the laws adopted by parliament and the implementing regulations issued under (general or special) statutory authorisation. When asking parliament to reconsider a law adopted by it, he must give reasons for this request.

In signing and promulgating the laws adopted by parliament and the implementing regulations of laws and all other important acts of the state, the President of the Republic carries out a formal (or external) review of constitutionality. In appending his signature, he certifies the authenticity of the legislation enacted by the competent body and the lawfulness of the procedure followed.

5. Ireland

With very few exceptions, the role of the President in Ireland is purely formal. Paragraphs 9 and 11 of Article 13 of the Constitution state clearly that his duties are performed only on the advice of the government. As "Guardian of the Constitution", the head of state exercises six responsibilities independently of the government.^[3] But Irish Presidents have rarely deemed it necessary to make use of these powers and have never had to do so during what might reasonably be termed a crisis. Only one of these powers has been used, namely that provided for in Article 26 of the Constitution concerning applications to the Supreme Court for a decision on whether a law is in keeping with the Constitution ("Reference of bills to the Supreme Court"). Article 26 has been used eight times. Bills on the following subjects have been referred to the Supreme Court: offences against the state, electoral law, criminal law, emergency powers, adoption, school attendance, housing, and again electoral law. Only the last three bills were deemed unconstitutional.

6. Italy

The decision by which the President of the Republic refers a law back to parliament for reconsideration is clear evidence of a review function which he performs, as "guarantor or guardian of the Constitution", regarding the way in which the legislative function has been exercised. The Head of State therefore plays no part in legislative activity: there is no need for his intervention to improve legislation, which is already finalised after being discussed by both Chambers. Furthermore, the President of the Republic may perform his review function only at the stage when the legislation, being already in the proper form, needs only to become effective: it is at this point that he may intervene and provisionally suspend the promulgation of the law. The government transmits the adopted law to the President of the Republic, who has one month in which to promulgate it, unless the Chambers set a shorter time limit, with which the President is obliged to comply. The President may request further discussion by means of a message to both Chambers, which must be countersigned, setting forth the reasons for such action (Article 74 of the Constitution). This prerogative was used only 33 times between 1948 and 1991: parliament maintained the law in full in only two cases; it allowed legal or substantive amendments suggested by the President in 26 cases; and the bill was withdrawn in five cases.

The effects of this review function of the President of the Republic with regard to parliamentary activity remain fairly limited. In practice, it in no way restricts the freedom of action of the two Chambers as they may ratify in full the previously adopted law. In such cases, as stated in Article 74 of the Constitution, the law "must be promulgated".

In conclusion, it is fairly easy for the President to make use of the right to refer a law back to parliament, but the requirement to obtain a countersignature sometimes makes this right a weapon in the hands of the President of the Council, who heads the government.

7. Hungary

As regards the powers of the President of Hungary in the legislative process, it should be noted that he may not only take part in the meetings of parliament and its committees but also has the power to initiate referendums and legislation (without a ministerial countersignature, which is normally required for other presidential activities).

In addition, before promulgating a law already approved by parliament, the President may ask parliament to reconsider it. He is, however, obliged to promulgate the law if it is approved again without any amendments. Article 26 of the Hungarian Constitution provides as follows: "1. It shall be the responsibility of the President of the Republic to promulgate acts within fifteen days (...) of receipt thereof. The President of the Republic shall sign the acts received for promulgation. Acts of parliament shall be promulgated in the Official Gazette. 2. In cases where the President of the Republic disagrees with any Act of Parliament or any provision thereof, he may, within the period stated in para 1, return such act unsigned with his comments to parliament for its consideration. 3. Parliament shall reconsider such act and take another decision on its approval. The President of the Republic shall sign any act thus approved and sent to him by the Speaker of Parliament and shall promulgate it within five days."

Moreover, paragraph 4 states that where the President "finds any provision of an act to be contrary to the Constitution he shall (...) refer it to the Constitutional Court for its comments"; if unconstitutionality is established, the President refers the law back to parliament; if not, he is obliged to sign the law and promulgate it within five days. This power has been used by the President of Hungary, for example, in connection with compensation for expropriations carried out under the previous regime.

8. Poland

In exercising his powers, the Polish President is limited to a considerable degree by the political make-up of parliament. More specifically, where legislative activity is concerned, he does not have an absolute power of veto: his request for reconsideration of a law may be overridden by the Diet if it approves the law again by a two-thirds majority of the members present, provided they represent at least half of the elected members. Article 18.3 of the Constitution provides as follows: "The President may refuse to sign a law and return it, with his comments, to the Sejm for reconsideration (...). If the law is approved again by the Sejm, by a majority of two-thirds of the votes cast, the President shall sign the law within a period of seven days and order its promulgation in the Official Gazette of the Republic of Poland (...)."

9. Bulgaria

Article 101 of the Bulgarian Constitution provides as follows: "1. Within the term established by Article 88, para 3 [15 days], the President shall be free to return a bill together with his comments to the National Assembly for further debate, which may not be refused. 2. The new passage of such a bill shall require a majority of more than half of all members of the National Assembly. 3. Following a new passage of the bill by the National Assembly, the President shall promulgate it within seven days of its receipt." The Bulgarian President may therefore refer a law back to the Assembly for further debate. However, if parliament approves the law again by an absolute majority, the President is obliged to promulgate it.

The referral of laws back to parliament, the dissolution of parliament and the formation of the government are the only acts not requiring a ministerial countersignature.

[1] *This is the Constitution of Ukraine adopted on 28 June 1996 by the Verkhovna Rada. The Venice Commission adopted an opinion on the draft Constitution of Ukraine in May 1996. Regarding Article 94 (at the time Article 95), it thought it excessive to require a majority of two-thirds of the members of both Chambers in order to avoid a presidential veto, on the grounds that this could impede legislative activity.*

[2] *The Parliament of the Azerbaijan Republic, composed of 125 deputies.*

[3] *With one exception (the decision to refuse the dissolution of parliament), the President may only exercise his discretionary powers after consulting the Council of State, which consists of senior officials.*