

PRESIDENTIAL PARDON POWER AS A MECHANISM TO MAINTAIN CONSTITUTIONAL ORDER

ABSTRACT

The present Article analyses the political nature of the pardon power, its historical origins, and the essence of the mechanism to maintain constitutional order. The pardon power is an important mechanism in the hands of the Head of State to do politics and influence it. It is based on exclusive power and the idea of alienation. The Article analyses the prerogative of the Head of State to influence criminal law policy and the function of influencing justice. The Article develops a discussion about the exclusive nature of the pardon power and the necessity to interpret it according to constitutional principles. The Article analyses gaps in the Georgian model of pardon power, and dubious norms, and develops recommendations to improve the pardon power in Georgia and regulate it more clearly.

I. INTRODUCTION

Almost all legal systems of the world know the pardon power, which has a function to influence criminal law policy and contribute to solving governmental crises.¹ The pardon power also has a function to correct justice and its deficiencies. The pardon power is first of all a humane and political act which equips the Head of State with a significant balancing function in the system of separation of powers. By exercising the pardon power, the Head of State participates in political processes. It is therefore not advisable to exercise the pardon power only within the context of humanity without considering its political and power aspects.²

The Article analyses the Georgian model of pardon power, its deficiencies and international practice, including its historical development. The aim of the Article is to contribute to the academic debate about understanding the political aspects of the pardon power and its exclusive legal nature. The Article includes recommendations

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¹ Andrew Novak, "Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States" (2016), University Michigan Journal of Law 49, 818.

² Tornike Gerliani, "The Political Nature of the Pardon Power and the Logics of Constitutional Order", Social Justice Center (Webpage of the Social Justice Center, 11 October 2019) <<https://socialjustice.org.ge/ka/products/shetsqalebis-politikuroba-da-konstitutsiuri-tsesrigis-logika/>> [last accessed on 8 August 2022].

towards regulating the pardon power more clearly to minimise the arbitrary use of the pardon power by the Head of State and the interpretation of the pardon power in violation of constitutional principles.

II. ORIGINS OF THE PARDON POWER AND ITS HISTORICAL DEVELOPMENT

The origins of the pardon power date back to Athens and Rome. In ancient Athens, the institute of pardon was based on direct democracy principles and was directly implemented by citizens. Before 403 B.C., the pardoning rule – *Adeia* – functioned in Athens. According to this rule, to pardon a person, it was necessary that 6 000 citizens voted for it. The pardoning process was implemented by secret ballot. The pardoning process in Athens was considered a complicated process because ordinary citizens could not gain the support of 6 000 citizens. That is why the pardon privilege was mainly available only to influential citizens. Influential citizens were athletes, orators and other powerful people. In the democratic republic of Athens, the pardon power was not implemented by the executive authority. As part of direct democracy, the pardon power was directly implemented by citizens based on the people's decision.³

In Rome, the pardon power was not considered an act of justice or mercy. In ancient Rome, the pardon power was used as an instrument of political subjugation of the masses of people and soldiers. The Romans used it as an instrument of intimidation and strengthening political power. The Romans punished people selectively. They punished perpetrator soldiers rather than the whole army. The Romans used the pardon power to maintain public order in the army and to spread fear.⁴

The pardon power, as a legally based power of the classical monarch, originated in Great Britain⁵ and first appeared in legal texts from the 8th century.⁶ *William Blackstone* considered that the British model of pardon power was based on Roman legal traditions,⁷ which manifested itself in the fact that the aim of the pardon power was to strengthen the loyalty of subjects to the monarch and receive unconditional support from the latter.⁸ The King of Wessex confirmed in his legislation that a person who would fight

³ Robert Nida, Rebecca L. Spiro, "The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power" (1999), *Oklahoma Law Review* 52(2), 202.

⁴ Tamar Avaliani, Giorgi Chitidze, "Georgian Model of Pardoning and International Experience" (Open Society Georgia Foundation, webpage, 25 May 2016) <<https://osgf.ge/publication/shewyalebis-uflebamosileba-qartuli-modeli-da-saertashoriso-gamocdileba/>> [last accessed on 8 August 2022].

⁵ William F. Duker, "The President's Power to Pardon: A Constitutional History" (1977), *William & Mary Law Review* 18, 476.

⁶ Richard M. Thompson II, "Coordinator, The President's Pardon Power and Legal Effects on Collateral Consequences" (2016), Congressional Research Service Paper 7-5700, 1.

⁷ See *supra* note 3, 203.

⁸ *ibid.*

within the mansion of the monarch would be responsible for all his property, and that the appropriateness of his life would be decided by the monarch.⁹ In 1535, the Parliament granted the monarch an exclusive power to pardon and excluded all other persons from exercising this power.¹⁰ The British Parliament granted *Henry VIII* an absolute pardoning power to use it in relation to high treason, murder and other crimes.¹¹

In Britain, the exercise of the pardon power by the monarch was limited by the act of impeachment. The monarch had no pardon power when the Parliament initiated an impeachment procedure against him. In the centuries that followed, confession of the committed crime and the prospect of correction were seen as prerequisites for pardoning. Monarchs defined that they would issue an act of mercy and take all possible measures in relation to those who obeyed legislation and respected it.¹² Until the 17th century, the pardon power of English monarchs was absolute, but from the end of the 17th century the absolute power of monarchs was limited due to an increase in parliamentary prerogatives and the reduction of the monarch's powers.¹³ The Parliament of England unsuccessfully tried to limit the monarch's pardon power, but it became possible only in 1701 when the Parliament adopted the Act of Settlement.¹⁴

In addition to being a purely humane act, the pardon power was also a decision expressing political authority which was used by the monarchs for economic, political and military purposes.¹⁵ In Britain, the monarch used the pardon power for positioning his political aims and power, which was as sacred to the monarch as the "rights of an English gentleman".¹⁶

In republics, the pardon power was an exclusive authority of heads of state, which, in addition to the humanity and the importance of forgiveness, had the meaning of different political importance and solving crises.¹⁷ According to the definition of the Constitutional Court of Poland, the pardon power is a prerogative of the president, who is not obliged to consult with anyone before exercising it.¹⁸

⁹ See supra note 5, 476.

¹⁰ *ibid*, 486.

¹¹ See supra note 4.

¹² See supra note 2.

¹³ See supra note 5, 486.

¹⁴ James P. Pfiffner, "The Scope of the President's Pardon Power" (2019), Statement of Author - Hearing on the Constitutional Role of the Pardon Power, 1.

¹⁵ See supra note 2.

¹⁶ See supra note 5, 487.

¹⁷ Brandon Sample, "The History of the Presidential Pardon, Brandon Sample Attorney at Law" (Page of Brandon Sample PLC, 30 December 2018) <<https://clemency.com/history-presidential-pardon/>> [last accessed on 8 August 2022].

¹⁸ Anne McMillan, "The Pardon: Politics or Mercy?" (International Bar Association, 8 August 2022) <<https://www.ibanet.org/article/465431E6-8846-4A89-BA0A-6A8B85E5ED1D>> [last accessed on 8 August 2022].

According to Article 2(2) of the US Constitution, the President enjoys the power to annul court decisions and pardon those who committed crimes against the United States, except in cases of being under the impeachment procedure.¹⁹ Under the US Constitution, the President cannot pardon an individual(s) if he/she is under an impeachment procedure. The US Constitution also stipulates that a person must have committed an act in violation of federal legislation. The US stipulation about an impeachment procedure has an influence of Britain. In Britain, the monarch had no pardon power if he/she was under an impeachment procedure initiated by the Parliament.²⁰ The Federalist Papers analyse the importance of granting the pardon power to the US President and its exclusive nature in the hands of the Head of State.

According to *Alexander Hamilton*, “humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel”.²¹ Famous US politician and public figure *Edmund Randolph* wanted to limit the pardon power to cases of high treason and had an argument that in the case of high treason by the President, the latter would pardon himself.²²

The founding fathers considered that the pardon power should be granted to the president, even if it was high treason or a riot.²³ The US Supreme Court considers that the pardon power is a full discretionary power that should not be subject to legislative changes.²⁴ *Roger Sherman*, one of the founders of the United States, considered that the president should exercise the pardon power only with the consent of the Senate. *Sherman*’s opinion was not shared by the political spectrum.²⁵ In a number of pardoning cases, the US Supreme Court considered that the pardon power was a discretionary power that should not be limited. The pardon power derives from the US Constitution, and it should not be modified by the Congress.²⁶ It is the pardon power, as a single instrument, that delimitates the executive branch and the legislative branch.²⁷

¹⁹ Article 2.2., Constitution of the United States <https://www.senate.gov/civics/constitution_item/constitution.htm> [last accessed on 8 August 2022].

²⁰ See supra note 3, 205.

²¹ Alexander Hamilton, “The Command of the Military and Naval Forces, and the Pardoning Power of the Executive” (Federalist Papers: Primary Documents in American History, 8 August 2022) <<https://guides.loc.gov/federalist-papers/text-71-80>> [last accessed on 8 August 2022].

²² See supra note 14, 3.

²³ See supra note 21.

²⁴ Michael A. Foster, “Presidential Pardons: Overview and Selected Legal Issues” (2020), Congressional Research Service R46179, 1.

²⁵ See supra note 14, 3.

²⁶ *Schick v. Reed*, 419 U.S. 256, 1974, para 3 <<https://supreme.justia.com/cases/federal/us/419/256/>> [last accessed on 8 August 2022].

²⁷ Ilona Maria Szilagyi, “Presidential versus Parliamentary System” (2009), *Journal of Law AARMS* Vol.

In the US, the pardon power is virtually unlimited. It is oriented on personal usage, without the control and oversight of other branches. The US Supreme Court makes reservations in respect of the pardon power only in two cases: the pardon power must be related to the commission of a federal criminal offence and the president must not be under an impeachment procedure.¹

The US Supreme Court saw the pardon power primarily as an act of implementing policy, “part of the constitutional scheme” and a tool for reaching “public welfare”.² The mentioned ruling was adopted by the US Supreme Court in 1927 in *Biddle v. Perovich*,³ where the court considered the pardon power an act of political expediency. The opinion should be shared about the fact that “the very political nature of the pardon power creates the real essence of the pardon power.”⁴

III. GOALS OF THE PARDON POWER ACCORDING TO THE US CONSTITUTION

According to the US Constitution, the presidential pardon power has several goals,⁵ among which the goal of solving and preventing crises dominates. With the aim of mitigating the political crisis and ensuring national consolidation, US President *Gerald Ford* pardoned President *Richard Nixon* on 8 September 1974. President *Gerald Ford* exercised the exclusive power of pardon and completely released *Richard Nixon* from criminal liability. President *Gerald Ford* explained that the American people should leave the Watergate scandal behind and unite around shared national values.⁶ According to *Gerald Ford*, if he had not exercised the presidential power of pardon, the state of the US would be hindered from development and constantly obsessed with the “Watergate case”. Therefore, President *Gerald Ford* saw the pardon of President *Nixon* as a way out of the situation and explained that the “long national nightmare” in the US was over.⁷ *Gerald Ford*’s decision was a purely political act that served to achieve national peace and harmony. The political nature of *Gerald Ford*’s decision is underlined by the fact that he pardoned *Richard Nixon* before the investigation had been launched and before *Richard Nixon* had been accused.⁸ The political aim was behind the exercise of

8, No 2, 309.

¹ See supra note 24.

² See supra note 18.

³ *Biddle v. Perovich*, 274 U.S. 480, 1927 <<https://supreme.justia.com/cases/federal/us/274/480/>> [last accessed on 8 August 2022].

⁴ See supra note 2.

⁵ See supra note 4, 10.

⁶ President Ford Pardon of Richard Nixon in 1974, (C-SPAN, 8 August 2022) <<https://www.c-span.org/video/?153623-1/president-gerald-fords-pardon-richard-nixon/>> [last accessed on 8 August 2022].

⁷ *ibid.*

⁸ *ibid.*

the pardon power by President *Andrew Johnson*. He pardoned the Confederate officials and carried out a mass pardoning of soldiers on 9 April 1865, after the end of the Civil War in the US.⁹ The exercise of the pardon power by President *Bill Clinton* had the same purpose, when he pardoned the donor of the Democratic Party *Mark Ritz*.¹⁰ In 2018, US President *Donald Trump* pardoned boxer *Jack Jonhson* after his death. He was the victim of a racially motivated conviction. He was arrested in 1913 with his white girlfriend because of crossing the US border.¹¹

The aim of restoring historical justice and achieving national harmony through the exercise of the pardon power is also revealed in the experience of other countries.¹² As the experience of different countries shows, the pardon power plays an important role in preventing legal procedures that may be contrary to the public interest and the aim of national reconciliation in traumatic situations.¹³ The aim of defusing tensions was behind the exercise of the pardon power by US President *Donald Trump*. In 2018, he pardoned more than 300 persons via Twitter, who participated in the demonstration against the government.¹⁴ The pardoning of 150 000 prisoners by the King of Thailand in 2016 served the same political aim. Those prisoners were convicted of insulting the royal family.¹⁵

One of the aims of the pardon power in the US is to correct judicial errors. The opinion should be shared that even the existence of a perfect justice system cannot eliminate the risk of errors being made, and in this case, the very presidential pardon power can correct the mistakes of the justice system to avoid an accusation of innocent persons.¹⁶ The presidential pardon power can be used to restore justice when the society in the path of its development considers concrete cases unjust.¹⁷

One of the most widespread and classic cases of the exercise of the presidential pardon power is to pardon a prisoner who confesses and repents of the crime committed and at the same time deserves to be at liberty due to certain circumstances (deterioration of health, age, etc). This kind of aim best reveals the humane and humanitarian nature of the pardon power.¹⁸

⁹ See supra note 5, 512.

¹⁰ See supra note 1, 821.

¹¹ John Eligon, Michael D. Shear, "Trump Pardons Jack Johnson, Heavyweight Boxing Champion" (New York Times, 8 August 2022) <<https://www.nytimes.com/2018/05/24/sports/jack-johnson-pardon-trump.html>> [last accessed on 14 March 2022].

¹² See supra note 18.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ See supra note 4, 10.

¹⁷ See supra note 18.

¹⁸ *ibid.*

The aim of the presidential pardon power may also be to influence criminal law policy. The president pursues this purpose if he/she disagrees with repressive criminal law policy and severe sentences. In this case, the president can replace a disproportionately severe punishment with a more lenient one, or completely release the person from criminal liability. Using this goal, the president can substantially influence the liberalisation of criminal law policy and make the legislation more humane.¹⁹ The opinion should be shared about the fact that “when criminal law policy and justice are strict, the president can exercise the pardon power to pursue a policy of humanity and justice”.²⁰ For example, in 1956, US President *John Kennedy* pardoned persons who were convicted based on the Drug Act.²¹ In respect of certain drug crimes, President *Barack Obama* issued a pardon law to replace the sentences of thousands of prisoners with more lenient sentences.²² Between 18 November 2013 and 3 November 2015, the President of Georgia pardoned prisoners convicted of drug crimes (986 out of 1559 prisoners, 62%)²³.

In the US, the pardon power is double-levelled and decentralised. The US president exercises the pardon power over federal crimes. On the state level, the pardon power is exercised by state governors or commissions of pardons.²⁴ In the US, the decentralisation of the pardon power is confirmed by the decision of the US Supreme Court in *Herrera v. Collins*.²⁵ According to the court ruling, the states of the US are not required to have a pardoning mechanism in place or they themselves have the right to establish the pardoning model they prefer.²⁶

In addition to the US experience, practices in different countries show a less controversial aim of pardoning, which is to unload public institutions and infrastructure.²⁷ For example, presidential pardon powers may be used to prevent overcrowding in penitentiary institutions.²⁸ In 2013, President of the Czech Republic *Václav Klaus* pardoned 6 000 prisoners (one third of the prisoners) on the occasion of the twentieth anniversary of the Czech Republic’s independence. Among the prisoners were high-ranking officials accused of corruption and fraud.²⁹ The aim of exercising the presidential pardon power was to reduce prison overcrowding.

¹⁹ See supra note 4, 11.

²⁰ See supra note 2.

²¹ See supra note 17.

²² *ibid.*

²³ See supra note 4, 17.

²⁴ See supra note 1, 823-829.

²⁵ *Herrera v. Collins*, 506 U.S. 390, 1993 <<https://supreme.justia.com/cases/federal/us/506/390/>> [last accessed on 8 August 2022].

²⁶ See supra note 1, 823-829.

²⁷ See supra note 18.

²⁸ *ibid.*

²⁹ *ibid.*

One of the aims of a pardon is to forgive the crime. However, despite the different aims of the pardon power, it is not an act of humanity only and should be seen from a broad political perspective. The pardon power plays an important role in the practical realisation of the principle of separation and balance of power and empowers the Head of State to solve and prevent political crises. Furthermore, by exercising the pardon power, the president influences criminal law policy, which allows the correction of judicial errors.

IV. PRESIDENTIAL PARDON POWER AND GOVERNANCE MODELS

The presidential pardon power and its political importance vary according to governance models. In countries with collegial governance, such as China and Germany, the presidential pardon power is in the hands of a collegial body, which excludes the risks of unilateral decisions.³⁰ The countries which have the Head of State and where the power is divided between the prime minister and the president, the exercise of the pardon power requires a countersignature mechanism.³¹ Article 94 of the Constitution of Romania envisages the pardon power that applies only to the cases of prisoners who have been sentenced to imprisonment, and is applied after a judgment of conviction has entered into force.³² In Romania, the president cannot use the pardon power at sole discretion. The power needs a countersignature of the prime minister.³³ The prime minister's countersignature on the presidential pardon power excludes the exclusivity of the pardon power because the countersigned act is considered a governmental act. The government's countersignature gives legal effect to the presidential pardon power. In the case of countersignature, the law deprives the Head of State of the possibility to use his/her arbitrary functions based on his/her constitutional status and to exercise the pardon power towards solving political crises. Unlike the Romanian model, Article 139 of the Constitution of Poland grants the president the pardon power without a countersignature mechanism. Article 139 of the Constitution of Poland provides the only exception and stipulates that the pardon power does not apply to persons who are sentenced by tribunals.³⁴ Article 17 of the Constitution of France contains little information on the French model of pardoning and only stipulates that the President of France has the pardon power.³⁵ The President of France does not delegate the pardon

³⁰ See *supra* note 4, 22.

³¹ See *supra* note 1, 8.

³² Article 94, Constitution of Romania <<http://www.cdep.ro/pls/dic/site.page?id=371>> [last accessed on 8 August 2022].

³³ *ibid.*

³⁴ Article 94, Constitution of the Republic of Poland <<https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>> [last accessed on 14 March 2022].

³⁵ Article 17, Constitution of France <https://www.constituteproject.org/constitution/France_2008.pdf?lang=en> [last accessed on 8 August 2022].

power to any authority.³⁶ The President of France has the power to commute, suspend or postpone a specific sentence, which constitutes the limited use of the pardoning mechanism.³⁷ The Czech model is an example of a unilateral exercise of the pardon power. According to Article 62 of the Czech Constitution, the president exercises the pardon power, commutes the punishment, instructs not to initiate criminal proceedings or to suspend them, or expunges a conviction.³⁸ An exclusive pardon power is also used by several states of the US.³⁹

V. UNDERSTANDING THE CONCEPT OF EXCLUSIVITY OF THE PARDON POWER

According to a widespread opinion, the pardon power is based on the concept of exclusivity exercised by the Head of State without interference from different authorities.⁴⁰ The exclusive nature of the pardon power derives from the constitutional model of the United States based on the practice of the Supreme Court and the principles of supremacy and inviolability. Judge of the US Supreme Court *Warren Berger* ruled in *Shick v. Reed* that the discretionary “power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress”.⁴¹ An analysis of the practice of the US Supreme Court reveals that it is not permissible to interfere in the presidential pardon power, which contradicts the constitutional idea of the pardon power.⁴²

The exclusive nature of the pardon power is often understood in a crude, formalistic manner and without regard to the principle of clarity. While in most countries the pardon power is in the hands of the Head of State, there are countries where the pardon power is exercised by different authorities. For example, in Turkey, Switzerland and Uruguay, the pardon power is mainly exercised by the legislative authority.⁴³ The principle of the rule of law requires that the pardon power and its nature should be interpreted based on the constitutional principles and with a proper understanding of their real aim.⁴⁴ The exclusivity of the presidential pardon power should be interpreted based on the

³⁶ See supra note 4, 22.

³⁷ *ibid.*

³⁸ *ibid.*, 23.

³⁹ *ibid.*

⁴⁰ See supra note 2.

⁴¹ *Schick v. Reed*, 419 U.S. 256, 1974, para 3 <<https://supreme.justia.com/cases/federal/us/419/256/>> [last accessed on 8 August 2022].

⁴² See supra note 14, 8.

⁴³ See supra note 4, 21.

⁴⁴ Georgian Young Lawyers' Association, “Georgian Young Lawyers' Association refers to the fact of pardoning Tengiz Gunava by the President” (webpage of the Georgian Young Lawyers' Association, 31 July 2013) <<https://gyla.ge/ge/post/saia-saqartvelos-prezidentis-mier-tengiz-gunavas-shetsyalebis-faqtsekhmaureba-31#sthash.PIFPTYBX.dpbs/>> [last accessed on 8 August 2022].

principle of certainty, which excludes the risk of exercising it arbitrarily. The importance of interpreting the pardon power particularly increases when the Constitution does not contain explicit restrictions on the use of the pardon power. For example, Article 52 of the Constitution of Georgia provides for the presidential pardon power, at a glance, without any limitations and stipulates that “the President pardons convicts”.⁴⁵ The exclusivity of the presidential pardon power should not be interpreted in such a way as to enable the President to exercise it ignoring the constitutional principles. The pardon power should be exercised in accordance with the constitutional principles, for the citizens to be able to foresee the decisions of state authorities. Citizens should be able to foresee what kind of a decision this or that state authority will take in concrete circumstances.⁴⁶ The exclusivity of the presidential pardon power should be interpreted in terms of the inadmissibility of interference by different branches of government, rather than in terms of arbitrariness and ignoring the constitutional principles. The logic behind the pardon power excludes its dubious use by referring to its exclusivity. The discretionary pardon power does not imply its arbitrary and irresponsible use,⁴⁷ which is contrary to the principle of the rule of law. The exclusivity of the pardon power should be interpreted in terms of its aims, which include influencing criminal law policy in order to humanise it, resolving political crises, and using the pardon power as a humane act for those prisoners who realise the crime committed and repent of it.

There is a debate in US academic circles about the exclusivity of the pardon power. According to Professor *Andrew Kent*, the pardon power should not be considered fully unlimited and the president should not use it ignoring constitutional principles.⁴⁸ The discussions that took place with the participation of Professor *Andrew Kent* concerned the issue of pardoning the family members and friends of the president, as well as the president’s criminal liability for exercising the pardon power.⁴⁹

The exclusivity of the pardon power is related to the question of whether the president may be held liable for the exercise of the pardon power, including through an impeachment mechanism. A pardon is a political act and should be assessed primarily from a political perspective. The legal basis for impeachment is a violation of the Constitution or the commission of a crime. The opinion should be shared about the fact that “an act that is political in content and does not violate legal principles and norms should not be

⁴⁵ Article 52, Constitution of Georgia <<https://matsne.gov.ge/ka/document/view/30346?publication=36/>> [last accessed on 8 August 2022].

⁴⁶ See *supra* note 4, 43.

⁴⁷ Georgian News Agency, “The right to ask for pardon: Disability or the sacrifice of non-having right” (webpage of Georgian News Agency, 19 September 2019 <<https://ghn.ge/news/232701-shetsqalebis-tkhovnis-ufleba-uunarobis-tu-uuflebobis-samskhverploze/>> [last accessed on 8 August 2022].

⁴⁸ Andrew Kent, “Examining the Constitutional Role of the Pardon Power: Hearing before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties” (2019), Statement, Fordham Law School, 10.

⁴⁹ *ibid.*

considered a legal basis for impeachment”.⁵⁰ If the president is not violating the law and is not committing a crime, his/her pardoning act has only a political significance, for which the president should not be held liable. The idea of a pardon as a political and humane decision stems from the fact that there is no judicial control over its exercise. The president may be held liable or impeached if he/she takes a bribe for pardoning or is involved in corruption. The president will be liable for violating the Constitution if he/she ignores constitutional principles and the principle of the rule of law and acts for personal gain. If the president violates constitutional principles and pardons a prisoner under the principle of *quid pro quo*, then he/she will obstruct justice.⁵¹ The opinion should not be shared about the fact that the president may not be impeached for the pardon power.⁵² On the contrary, the president may be impeached for exercising the pardon power if it contradicts the constitutional limits (principles) that are defined by the Constitution for exercising this power.⁵³

The second important issue is whether the president has the right to pardon himself/herself and whether it is necessary to regulate its prohibition directly by the Constitution and other legal acts. For example, the US Constitution does not regulate the issue of self-pardoning by the president. The US Supreme Court used a “textual argument” in *Schick v. Reed*⁵⁴ and explained that the presidential pardon power is an absolute power that should be interpreted based on the text of the constitution.⁵⁵ The scholars supporting the “textual argument” say that the framers of the US Constitution wanted to specify this prohibition directly in the text of the Constitution.⁵⁶ The supporters of the “textual arguments” considered that the president had the right to self-pardoning. In the case of the US, none of the presidents used the self-pardoning power. President *Donald Trump* wrote on Twitter that he had the power to pardon himself.⁵⁷

The US Supreme Court clarified in the case of *Ex Parte Garland* that the exclusive nature of the pardon power can only be limited by an impeachment procedure, which is explicitly stipulated in the US Constitution.⁵⁸ According to scholars *Robert Nida* and *Rebecca Shpiro*, the presidential pardon power is “absolute and the president can exercise it at any time”.⁵⁹

⁵⁰ *ibid*, supra note 2.

⁵¹ *ibid*, supra note 14, 6.

⁵² *ibid*.

⁵³ *ibid*.

⁵⁴ See supra note 3, 216

⁵⁵ *Schick v. Reed*, 419 U.S. 256, 1974, para 3 <<https://supreme.justia.com/cases/federal/us/419/256/>> [last accessed on 8 August 2022].

⁵⁶ See supra note 3, 216-217.

⁵⁷ See supra note 14, 7.

⁵⁸ *Ex parte Garland*, 71 U.S. 333, 1866 <<https://supreme.justia.com/cases/federal/us/71/333/>> [last accessed on 8 August 2022].

⁵⁹ See supra note 3, 222.

The opponents of the “textual arguments” consider that the president may use the self-pardoning power to avoid charges after leaving office.⁶⁰ The threat of avoiding criminal liability after the president leaves office is ensured by the prohibition of pardoning during the impeachment procedure. Another argument of opponents of presidential self-pardoning is the possible existence of a conflict of interests, which is supported by the argument that “no one can be the judge in his/her own case”.⁶¹ This principle is enshrined in the case of *Marbury v. Madison* reviewed by the US Supreme Court.⁶² According to the court, “the basics of the principle of the rule of law are that none can be above the law”.⁶³ Therefore, the self-pardoning power enables the president to place himself/herself above the law, which is manifested in the problem that the president commits a crime and then pardons himself/herself.⁶⁴

VI. GEORGIAN MODEL OF THE PARDON POWER AND ITS GAPS

Despite several amendments to the Constitution of Georgia and the establishment of different models of governance (presidential, semi-presidential and parliamentary), the constitutional norm regulating the pardon power remains unchanged. Although the 2018 constitutional reform deprived the president of several powers, the pardon power was retained. Article 52(1)(f) provides scarce information about the pardon power and stipulates that “the president pardons convicts”.⁶⁵ Article 52 of the Constitution is characterised by general wording regarding the pardon power and does not contain provisions about the aims and scope of the pardon, which would give the pardon power more preciseness and clarity.

The Constitution of Georgia is based on the idea of the exclusivity of the pardon power, which does not extend to the other branches of government. Article 53 of the Constitution of Georgia provides that pardoning does not require the countersignature of the prime minister for the exercise of the pardon power by the president.⁶⁶ The Georgian model of the pardon power is based on the president’s right to exercise it unilaterally and is oriented to preventing the interference of other branches with the exercise of the presidential pardon power.

⁶⁰ *ibid.*, 216-217.

⁶¹ See *supra* note 14, 7.

⁶² *Marbury v. Madison*, 5 U.S. 137, 1803 <<https://supreme.justia.com/cases/federal/us/5/137/>> [last accessed on 8 August 2022].

⁶³ See *supra* note 14, 7.

⁶⁴ *ibid.*

⁶⁵ Article 52, Constitution of Georgia <<https://matsne.gov.ge/ka/document/view/30346?publication=36>> [last accessed on 8 August 2022].

⁶⁶ *ibid.*, Article 53.

In parliamentary systems of governance, the pardon power in the hands of the president as an arbiter (who does not belong to any branch of government) is a significant balancing mechanism for other branches of government, which allows the president to solve political crises. Although the President of Georgia has been deprived of significant constitutional prerogatives as a result of constitutional amendments, the remaining pardon power is one of the basic mechanisms to influence political processes. Especially in parliamentary systems, with a weak president, where the president does not perform executive functions, the pardon power is an instrument in the hands of the president to do politics and is a significant mechanism to achieve control and balance in the system of separation of powers. By having the power to influence criminal law policy and solve governmental crises, the president becomes a real political figure to maintain constitutional order using the pardon power. The pardon power enables the president not to distance himself/herself from political processes and to exercise the functions of the Head of State properly.

The aims of doing politics and solving political crises using the presidential pardon power are read in Edict No 556 of the President of Georgia (26 November 2019) on Approving the Procedure for Pardoning, which stipulates that “the use of the pardon power by the President of Georgia is based on the principle of humanity as well as the national interests”.⁶⁷ In contrast to Edict No 556, Edict No 120 of the President of Georgia (27 March 2014) on Approving the Procedure for Pardoning did not normatively define the aims of pardoning and its political nature,⁶⁸ which led to ambiguity in relation to the aims of pardoning and created false expectations about the rational use of the presidential pardon power. The absence of the aims of the presidential pardon power in legal acts created an information vacuum for convicts regarding the purpose of the pardoning mechanism and the scope of the presidential pardon power.⁶⁹

Although there was no legal regulation of the aims of the pardon power until 2019, the aim of influencing criminal law policy was evident from the pardons granted by the fourth President of Georgia in 2013-2015. During this period, the President of Georgia pardoned 1 559 convicts, of whom 986 (62%) were convicted of drug crimes.⁷⁰ The analysis of the data shows that the aim of the fourth President was to liberalise drug policy, which manifested in the liberal approach towards the prisoners convicted of drug crimes. Furthermore, the fourth President demonstrated a liberal approach to the interests of juvenile justice and the resocialisation and rehabilitation of minor convicts.

⁶⁷ Preamble, Edict No 556 of the President of Georgia on Approving the Procedure for Pardoning, 26 November 2019 <<https://matsne.gov.ge/ka/document/view/4712933?publication=0/>> [last accessed on 8 August 2022].

⁶⁸ Edict No 120 of the President of Georgia on Approving the Procedure for Pardoning, 27 March 2014 <<https://matsne.gov.ge/ka/document/view/2299717?publication=0/>> [last accessed on 8 August 2022].

⁶⁹ See *supra* note 4, 14.

⁷⁰ *ibid.*

In 2013-2015, the President pardoned 62 out of 87 minor convicts (approximately 60% of the minor convicts).⁷¹

The aim of solving political crises is evident in the pardons granted by the fifth President of Georgia.

On 15 May 2020, the fifth President of Georgia pardoned politicians *Irakli Okruashvili* and *Giorgi Ugulava* and based it on the interest of solving the political crisis.⁷² The fifth President of Georgia pardoned media manager *Giorgi Rurua* for political purposes.⁷³

The problem of inadequate understanding of the pardon power was revealed through the declaration of a moratorium on pardons by the fifth President. By declaring a moratorium in 2019, the President of Georgia ignored the constitutional principles and refused to exercise the constitutional pardon power. In fact, by declaring a moratorium, the President of Georgia refused to fulfil her constitutional obligations. She jeopardised the practical realisation of the constitutional logic of pardoning and the implementation of criminal law policy. The President of Georgia ignored those convicts for whom a pardon was the last way to escape repressive criminal law policy.⁷⁴ By declaring a moratorium, the President placed herself above the constitutional principles ignoring the principle of accountability to the public and the interests of the convicts who had suffered from repressive criminal law policy. The President viewed the discretionary pardon power outside the constitutional logic and context, thereby arbitrarily interpreting the essence and purpose of the presidential pardon power.

The constitutional standard for exercising the pardon power requires the President to exercise it based on foreseeable and clear criteria.

Article 78 of the Criminal Code of Georgia was amended in 2019, making the presidential pardon power more foreseeable and reducing the possibility of the arbitrary use of the pardon power by the president. According to Article 78(1) of the Criminal Code of Georgia, “pardon shall be granted by the President of Georgia in relation to an individually defined person, under the procedure established by the edict of the President of Georgia”.⁷⁵ The amendments to the Criminal Code of Georgia determined the normative scope of exercising the pardon power, thus making more foreseeable the procedure for exercising the pardon power by the president.

⁷¹ *ibid.*

⁷² News Agency „Reginfo“, “Information on Pardoning” (webpage of the News Agency, 15 May 2020) <<https://reginfo.ge/politics/item/17927-prezidentma-gigi-ugulava-da-irakli-okruashvili-sheixybala/>> [last accessed on 8 August 2022].

⁷³ Kviris Palitra, “Information on Pardoning” (webpage of Kviris Palitra, 29 April 2021) <<https://kvirispalitra.ge/article/77235-qzurabishvilma-rom-thqva-zhorika-ruruas-gavathavisuflebo-ver-davijere-qzaralasthanacq-vapireb-brdzolasq-thamar-thoradze-prezidentis-gadadgomias-ithkhovs/>> [last accessed on 8 August 2022].

⁷⁴ See *supra* note 2.

⁷⁵ Article 78, Criminal Code of Georgia <<https://matsne.gov.ge/ka/document/view/16426?publication=238>> [last accessed on 8 August 2022].

Furthermore, one of the gaps in the Georgian model of pardoning is that neither the Constitution of Georgia nor the presidential edict on the procedure for pardoning provides for an obligation to substantiate the act of pardon, which would make the presidential decision clearer. The substantiation of a pardon decision is a well-known standard in different countries. For example, some states of the US envisage an obligation to substantiate a pardon decision in different forms. An obligation to substantiate a pardon decision is envisaged by the local legislation of several states of the US.⁷⁶ According to the legislation of the US, an obligation to substantiate a pardon decision does not apply to a federal procedure for pardoning.⁷⁷

The Georgian model of the pardon power is also vague because, according to the presidential edict, pardoning can be used “as an exception”.⁷⁸ The presidential edict does not define what is meant by using a pardon as an exception, which creates the possibility for the President to exercise the pardon power arbitrarily. Besides, such vague norms may cause uncertainty and confusion among convicts and lawyers, which logically provokes dissatisfaction among convicts.

VII. CONCLUSION

The analysis carried out in the Article reveals that the pardon power is an important mechanism for the Head of State to do politics and influence it. The mechanism is based on the idea of exclusivity and inalienability of the pardon power. Because of the exclusive nature of the pardon power, it is important that the law regulate a clear and foreseeable procedure for pardoning, which derives from the principle of the rule of law. Although the constitutional principles are binding upon the branches of government, it is important that the legislation contain clear and unambiguous provisions on the exercise of the pardon power, which will minimise the risk of a subjective interpretation of the pardon power and its arbitrary use in practice. Furthermore, it is important that the provisions regulating the procedure for pardoning contain norms on the transparency and openness of the process. At the same time, it is advisable that the law obliges the president to substantiate pardon decisions, thus increasing the accountability and responsibility of the president before the public.

⁷⁶ See *supra* note 1, 842.

⁷⁷ *ibid.*

⁷⁸ Preamble, Edict No 556 of the President of Georgia on Approving the Procedure for Pardoning, 26 November 2019 <<https://matsne.gov.ge/ka/document/view/4712933?publication=0/>> [last accessed on 8 August 2022].