

# Pardon Power of the President of North Macedonia – Uses and Misuses

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## **Abstract**

*The President of the Republic of Macedonia, Gjorge Ivanov in 2016 pardoned 56 individuals. Some of them were pardoned more than once (the former Minister for Transport and Communications was pardoned 16 times, the former Minister for Interior was pardoned 13 times etc.). Most of the pardoned persons were politicians or their close collaborators. The President's explanations for the pardons were that he sought to help the country overcome political crisis, that the country had been facing for almost two years. This event raised many questions about the constitutional aspects of the pardons in North Macedonia, which will be analyzed in this paper. The analysis shows that these pardons were unlawful and the presidential power was misused. Because similar questions about misuse of presidential pardons were debated in USA under Trump rule, this paper will also make comparisons of the (mis)use of presidential power to grant pardons in North Macedonia and in the USA. At the end the paper will discuss the possible legal solutions for overcoming the misuse of this power of the President of North Macedonia.*

**Keywords:** pardons, Constitutional Court, President of the Republic, North Macedonia.

**JEL Classification:** K19, K42

## **1. Introduction**

One of the most controversial competencies of executive power is the pardon. In contemporary constitutional systems, some authors consider pardons as “constitutional anomalies” outside of the system of the separation of power. There is, moreover, public stigma regarding the use of this competence by heads of states. The ability to pardon is a powerful legal tool because it is more powerful than a judicial decision, and in the case of abolition it is more powerful even than the statute itself.<sup>2</sup>

Granting pardons affects an executive's political popularity because by pardoning the executive either corrects mistakes and unjust outcomes in the legal system or introduces new injustice to the legal system. Because of that the public is interested in this executive competence. They provoke interest among the victims, their families, but also the general public. Thus, the procedure of pardoning should be transparent in order to prevent pardoning from becoming an act of unlimited political arbitrariness.

The competence of the President to issue pardons raised public concern in several countries including USA, especially during Donald Trump era, and Macedonia under Gjorge Ivanov presidency. There are many articles published on the Trump pardons, discussing their constitutionality, legality, corrupt use and proposing even constitutional changes in order to prevent future irresponsible use of this presidential competence.<sup>3</sup> The pardons issued by Ivanov are analyzed

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<sup>2</sup> Anita Kurtović, “Pomilovanje u kaznenom pravosuđu (povodom novoga Zakonona o pomilovanju)”, Hrvatski letopis za kazneno pravo i praksu, Zagreb, vol. 10, No. 2 (2003), p. 489.

<sup>3</sup> Sanya Shahrastbi, “Can a Presidential Pardon Trump an Article III Court's Criminal Contempt Conviction? A Separation of Powers Analysis of President Trump's Pardon of Sheriff Joe Arpaio”, 18 The Geo. J.L. & Pub. Pol'y 207 (2020); Scott P. Johnson, “President Donald J. Trump and the Potential Abuse of the Pardon Power”, 9 Faulkner L. Rev. 289 (2017-2018); Nicolo A. Lozano, “Can President Trump Become His Own Judge and Jury: A Legal Analysis of President Trump's Amenability to Criminal Indictment and Ability to Self-Pardon”, 43 Nova L. Rev. 151 (2018-2019); Michael Conklin, “Please Allow Myself to Pardon... Myself: The Constitutionality of a Presidential Self-Pardon” 97 U. Det. Mercy L. Rev. 291 (2019-2020); Budd N. Shenkin and David I. Levine, “Should the Power of Presidential Pardon Be Revised”, 47 Hastings Const. L.Q. 3 (2019-2020); Bernadette Mayler, “Trump's Theater of Pardoning”, 72 Stan. L. Rev. Online 92 (2019-2020); Paul F. Eckstein and Mikaela Colby, “Presidential Pardon Power: Are There Limits and, If Not, Should There Be?”, 51 Ariz. St. L.J. 71 (2019); Aaron Rappaport, “An Unappreciated Constraint on the President's Pardon Power”, 52 Conn. L. Rev. 271 (2020-2021); Genevieve A. Bentz, “A Blank Check: Constitutional Consequences of President Trump's Arpaio Pardon” 11 Alb. Gov't L. Rev. 250 (2017-2018); Albert W. Alschuler, “Limiting the Pardon Power”, 63 Ariz. L. Rev. 545 (2021); Daniel T. Kobil, “Article II and the Pardon Power: Did the Framers Drop the Ball?”, Federal Sentencing Reporter, 33/5/June/2021; Mark Greenberg and Harry Litman, “Trump's Corrupt Use of the Pardon Power”, Lawfare (June 19, 2018), UCLA School of Law, Public Law Research Paper No. 18-25, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3202408](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202408); Zachary J. Broughton, “Con-

in very few articles written in Macedonian language.<sup>4</sup> This issue could become more attention of scholars from outside of North Macedonia after the end of eventual new judicial processes before the European Court of Human Rights, because some of the pardoned persons, whose pardons were revoked submitted applications to the Court, but their applications were declared inadmissible, because they failed to exhaust domestic remedies.<sup>5</sup> So, we can expect new applications after exhausting domestic remedies.

This paper analyzes the constitutional and legal frame of the pardoning power of the President of the Republic of North Macedonia and points to its misuse by the President Gjorge Ivanov in 2016. Also, the paper focuses on the possible legal solutions, for overcoming legal problems in performing this presidential competence. This is especially important in this period when procedure for adoption of new Law on pardons is opened in the Ministry of Justice in North Macedonia. The analysis will also point to some similarities between the pardons issued by Ivanov and Trump, as well as the similarities in the legal frame that exist in both countries.

## **2. The reasons and effects of pardoning – correcting injustice or promoting injustice and awarding loyalty**

The President of the Republic of Macedonia Gjorge Ivanov in April 2016 demonstrated that the prerogative of pardoning is far from “benign”, as it was called by Alexander Hamilton.<sup>6</sup> On 12 April 2016, he pardoned 56 individuals and took the public of Macedonia by surprise.<sup>7</sup> Some of the individuals were pardoned more than once. For example, the former Minister for Transport and Communications was pardoned 16 times in 16 decisions, the former Minister for Interior was pardoned 13 times, the former Director of the Intelligence Services was pardoned six times, the former Prime Minister was pardoned five times, and so on. Most of the pardoned persons are politicians or their close collaborators. Such “special status” of pardoned persons can be found also in Trump’s pardons. Trump “engaged in untamed pattern of granting clemency to those that (1) were employees on his presidential campaign or the White House; 2) had strong connections to the President, either through prior business encounters or through surrogates; and/or (3) were members of, or closely affiliated with, the Republican party.”<sup>8</sup>

When “special status” of the individuals is key precondition for granting them pardons, then the competence of the president to issue pardons is morally unjustifiable and damages criminal justice system. The pardon system is morally justifiable and consistent with the rule of law to the extent that it “safeguards against arbitrary presidential fiat and ensures the equal application of reasons for mercy or forgiveness.”<sup>9</sup> From this point of views, neither Trump’s, nor Ivanov’s pardons were consistent with the rule of law and damaged national criminal justice system.

The public was even more surprised to learn that no charges had been brought against some of the pardoned persons, nor had they been under investigation but were only witnesses in procedures against senior politicians. The President’s explanations for the pardons were that he sought to help the country overcome political crisis.

For almost two years, the country had been facing a deep political crisis. After parliamentary

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stitutional Law - Loyalty, Money, and Business: The New Price for a Presidential Pardon”, 44 W. New Eng. L. Rev. 259 (2022), <https://digitalcommons.law.wne.edu/lawreview/vol44/iss2/5>; Margaret Colgate Love, “After Trump: Restoring Legitimacy to the Pardon Power”, 33 Federal Sentencing Reporter, No. 5 (June 2021); Michael Conklin, “Yes, Self-Pardons Are Constitutional, Even for Donald Trump”, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3667738](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3667738); Mark Osler, “The Trump Clemencies: Celebrities, Chaos, and Lost Opportunity”, 31 William & Mary Bill of Rights Journal 487 (2022), <https://scholarship.law.wm.edu/wmborj/vol31/iss2/6>.

<sup>4</sup> Renata Treneska Deskoska, “Constitutional paradoxes of pardons in the Republic of Macedonia from 12.04.2016”, Yearbook of the Law Faculty “Justinian I” in Skopje in honor of Jane Miljovski, volume 54, Skopje, 2016; Renata Treneska Deskoska, Marika Ristovska, Jelena Trajkovska-Hristovska, “Constitutional law”, Skopje, 2021.

<sup>5</sup> Taleski and Others v. North Macedonia (App. Nos 77796/17, 80003/17, 81848/17, 81862/17, 11583/18 and 30884/18).

<sup>6</sup> Alexander Hamilton, The Federalist No. 74 (Penguin Books, New York, 1987), 422.

<sup>7</sup> Decisions for pardons are published in the Official Gazette of the Republic of Macedonia, No. 72/2016.

<sup>8</sup> Zachary J. Broughton, *op. cit.*, pp. 260-261.

<sup>9</sup> Mark Greenberg and Harry Litman, *op. cit.*, p. 3.

elections in 2014, the opposition did not recognize the results from the elections and accused the ruling party of electoral fraud. Soon, after that accusation, the leader of the opposition disclosed a massive wiretapping operation by the Ministry of Interior. At a number of press conferences, the opposition disclosed wire-tapped conversations between senior governmental officials, which revealed: “apparent direct involvement of senior government and party officials in illegal activities including electoral fraud, corruption, abuse of power and authority, conflict of interest, blackmail, extortion (pressure on public employees to vote for a certain party with the threat to be fired), criminal damage, severe procurement procedure infringements aimed at gaining an illicit profit, nepotism and cronyism; indications of unacceptable political interference in the nomination/appointment of judges as well as interference with other supposedly independent institutions for either personal or political party advantages.”<sup>10</sup>

The leaders of the four biggest political parties in Macedonia entered negotiations to overcome the crisis (along with EU and US mediation) and in the summer of 2015 they signed an agreement that was to pave the way out of the crisis, providing reforms in many areas such as: electoral legislation, the media, the establishment of the Special Public Prosecutor’s Office for crimes connected and arising from the wiretapped materials, the technical government that would carry elections and a date for early parliamentary elections. The negotiation process for the implementation of this Agreement was difficult and protracted. The reforms in many areas have remained incomplete and in other areas they have not even been started. In a situation of unfinished reforms, the ruling majority dissolved the Parliament and called for early elections. The opposition stated that they would not participate in yet further fraudulent elections.

Under such circumstances, and in a situation in which the Special Public Prosecutor initiated an investigation of senior politicians from the ruling coalition, the President of the Republic claimed that “with an intention to contribute to the resolution of the crisis, relaxation of relations and decrease of tensions between the confronted political forces and their supporters” he decided to cut the knot “with a Decision to discontinue all the proceedings against politicians and their supporters belonging to the confronted parties”.<sup>11</sup> President Ivanov explained that he could not allow politicians to undertake decisions under the pressure of criminal procedures and as he said “blackmail by an external or internal factor”. This explanation of the President was consistent with the statement of the former Prime Minister that wiretapping was conducted by foreign secret services and given to the leader of the opposition with the aim of blackmailing Macedonian politicians.<sup>12</sup>

Most of the proceedings were terminated at the indictment stage for criminal charges and, except in a few cases, no actual investigations, indictments, or court hearings were undertaken. There was one decision in which a person was convicted and the court’s judgment was effective.

Additionally, the President announced that he did not exclude the possibility of issuing new pardons for other persons in similar situations. The President stressed that “we need national reconciliation” and he sees his decisions as a step in that direction. According to him: “The crisis will end when everyone stops being hostages of fear, personal vendetta, anger, hatred and divisions ... This is the beginning of the end of this crisis and I wish it ends with fair and democratic elections by all standards; legitimized and recognized by international institutions. Thus reconciled, the country will be able to move forward, leaving behind these two dark years that history will consider as a black mark on our generation.”<sup>13</sup>

Yet despite the announcements of the President, the political crisis escalated further after his controversial decision. The crisis was not a result of mere personal animosity and enmity between politicians in Macedonia and it could not therefore end when they cease being “hostages of fear,

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<sup>10</sup> Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015, Brussels, 8 June 2015, p. 6, <[http://ec.europa.eu/enlargement/news\\_corner/news/news-files/20150619\\_recommendations\\_of\\_the\\_senior\\_experts\\_group.pdf](http://ec.europa.eu/enlargement/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf)>.

<sup>11</sup> “Address by the President of the Republic of Macedonia, Dr. Gjorge Ivanov, to the citizens of the Republic of Macedonia” (12 April 2016) <<http://www.president.gov.mk/en/media-centre/speeches/3797.html>>.

<sup>12</sup> Address by the Prime Minister of the Republic of Macedonia, Nikola Gruevski (31 January 2015) <<http://novatv.mk/video-gruevski-zaev-me-ucenuvashe-so-snimki-od-stranski-sluzhbi/>>.

<sup>13</sup> Ibid.

personal revenge, anger, hatred and divisions". The crisis resulted from criminal and corrupt governance accompanied by massive abuse of power and thus it could not end by "pardoning" high politicians. Special Public Prosecutor's Office was one of the pillars of the Agreement signed for overcoming of the crisis. It was introduced because of the ineffectiveness of the current prosecutors' office and "the concern that so far prosecutions arising from the scandal appear to have been selective and have related exclusively to the acts of making, obtaining, releasing and publishing the interceptions but not to the many potentially criminal or otherwise illegal acts revealed in the content of the interceptions themselves."<sup>14</sup>

The pardons were issued in a situation when the Special Public Prosecutor's Office started investigating several cases of senior politicians from the Government, including cases of electoral fraud, wiretapping, and corruption. All the pardons that were issued affected cases in the area of the Special Public Prosecutor's Office's competence. Actually, if functioning of this new institution, which was introduced for a first time in Macedonia, was considered as basic for overcoming the crisis, the President with his pardons took away its competencies.

Because of the range of persons and offenses covered by the pardons, the decision of the President looks more like a general amnesty of, rather than pardons for, politicians and persons associated with them in crime. As the President of the Republic said, he made "a Decision for all proceedings against politicians and their collaborators who belong to the confronted parties to be discontinued". Being a "politician" or "his or her collaborator" is an utterly unusual criterion for a pardon. The President in his speech even used the term "amnesty" instead of the term "pardon". One should point out that he has no right under the Constitution to give amnesty, which is the competence of Parliament.

These politically controversial and legally problematic decisions provoked a general revolt amongst the public, expressed through daily protests in the capital and in other cities around the country.

First of all, it was unclear why some people, who were only witnesses and against whom there were no criminal charges, were pardoned. Secondly, the pardons of certain persons for whom pre-investigative procedures were initiated were also problematic, particularly because those procedures should be confidential. It remains an open secret how the President got the information about the names of the persons under pre-investigative proceedings. And thirdly, the most problematic thing is that the President gave a pardon without conducting the required procedures, but he referred to Article 11 of the Law on Pardoning, which is no longer in force. In fact, having the pardons based on Article 11 from the 1993 Law on Pardoning opened a public debate about the constitutional and legal grounds of the pardons and the effect of the decisions adopted by the Constitutional Court of the Republic of Macedonia.

### **3. Constitutional and legal framework of pardons in the Republic of North Macedonia**

According to Article 84, paragraph 1, item 9 of the Constitution, the President grants pardons in accordance with the law. This means that the Constitution defines the authority of the President to pardon and then it leaves this presidential competence to be further regulated by law.

The Law on Pardoning was adopted in 1993.<sup>15</sup> The Law is short, with only 16 articles, and three of them are transitional and closing provisions. According to the Law, the President of the Republic may pardon an individual for offenses as regulated by the laws of the country. The provisions of the Law stipulate that the President can pardon to the effect that the person pardoned is exempted from prosecution, relieved from punishment, has their sentence substituted with probation, etc.

The pardon is even more precisely defined in the Criminal Code, while the Law on Criminal

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<sup>14</sup> Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015, Brussels, 8 June 2015, p. 11, <[http://ec.europa.eu/enlargement/news\\_corner/news/news-files/20150619\\_recommendations\\_of\\_the\\_senior\\_experts\\_group.pdf](http://ec.europa.eu/enlargement/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf)>.

<sup>15</sup> Official Gazette of the Republic of Macedonia, No. 20/1993.

Procedure<sup>16</sup> determines the legal effect of the pardon in the criminal procedure. According to the Criminal Code the pardon does not affect the rights of third parties based on the sentence. This provision means that the pardon should not affect the rights of third parties that are based on, or would have been based on, the judgment that was delivered or would have been delivered if the pardon was not issued. These rights cannot be restricted because of the pardon since the pardon may only refer to the crime in question, but not the civil law consequences of the crime.

The Law on Pardoning determines the pardoning procedure in the Republic of North Macedonia. The procedure can be initiated based on a request by a convict or ex officio. In favor of the convict, a request for clemency may be submitted by a spouse, a blood relative in direct line, a brother, a sister, an adoptive parent, a guardian or a custodian. This application may be filed after the judgment is final. The court examines the facts and the circumstances relevant to a decision referred to by the applicant and forwards them to the Ministry of Justice. The Minister of Justice immediately upon receipt assesses the application and other documents and together with a proposal submits them to the President of the Republic. If the request “fails”, another request for clemency may be submitted again three months from the date of the decision of the previous proceedings, depending of the length of the prison sentence.

The Minister of Justice initiates amnesty procedure ex officio. The Law also stipulates that the procedure for exemption from prosecution can be initiated only ex officio at any stage of the criminal proceedings.

Article 11 of the Law anticipated the possibility of granting clemency without applying the procedure prescribed by law or without a request from the convicted person or without ex officio procedure instituted by the Minister of Justice. Namely, according to this article the President of the Republic as an exception can give pardon without conducting a procedure for clemency when it is in the interest of the Republic, or when special circumstances relating to the personality and the crime show that it is justified.

Up until 2009, pardons without the relevant proceedings have been issued twice by two Presidents. These pardons were followed with great controversy and public debate and because of that the Pardon Law was amended in 2009. The 2009 Law Amending the Law on Pardoning (hereinafter the 2009 Law) abolished the possibility of giving pardon without conducting the relevant proceedings (which was previously conducted based on Article 11 of the Law), enumerated crimes that might not be pardoned, and specified the procedure for pardoning.

Pursuant to these amendments the President of the Republic cannot pardon people convicted of electoral and voting-related crimes, crimes against sexual freedom and morality, crimes against public health, crimes of illegal production and sale of narcotic drugs and psychotropic substances, and enabling the use of narcotic drugs as well as crimes against humanity and international law. Also, the President cannot pardon a citizen serving a sentence in Macedonia but who has been convicted by the International Criminal Court.

The 2009 Law prescribed the procedure for pardoning. It introduced a Commission for Pardoning within Presidential Cabinet, with the competence to give proposals for whom could be pardoned to the President. The 2009 Law also introduced a criterion which should be observed by the Commission during making proposals for pardons.

#### **4. A decision by the Constitutional Court regarding the Law on pardoning**

In March 2016, in an unusually expedited procedure, the Constitutional Court abolished the 2009 Law.<sup>17</sup> The whole procedure over the decision of the Constitutional Court to abolish the 2009 Law was followed by controversy and public protests. First, the proceedings before the Constitutional Court proceeded unusually quickly. While usually it takes about a year or more for a case to be heard by the Court, the decision in this case was adopted one month after the initiative was submitted. At

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<sup>16</sup> Official Gazette of the Republic of Macedonia, No. 150/2010 and 100/2012.

<sup>17</sup> Decision of the Constitutional Court No. 19-2016-0-1.

the time when the session of the Constitutional Court was underway, at which it was deciding on this point, outside there were protests and counter-protests between two groups. On one side were opposition supporters protesting against the political instrumentalization of the Constitutional Court to allow clemency for electoral malpractices by abolishing the article from the 2009 Law which prohibited it. On the other side were supporters of the government who defended the work of the Constitutional Court.

In its decision the Constitutional Court raised the question of whether the provisions of the 2009 Law violated the fundamental value of the constitutional order—the separation of powers, equality of citizens, the constitutional competence of the President of the Republic to give pardons and his constitutional position as part of the executive power.

The Constitutional Court exceeded its competencies because in this decision it assessed the appropriateness of the legal provisions to prohibit clemency for certain crimes. The competence of the Constitutional Court is to decide on the constitutionality and legality of the acts, but not on their appropriateness. Thus, the Constitutional Court refers to the reasoning of the 2009 Law, which states that the main objective of the proposed amendments, which prohibit clemency for certain crimes “is prevention from committing these crimes in the future”. The Constitutional Court in its decision argues against the rationale of the legislature, indicating that prevention from performing certain crimes in the future “cannot be a reason for restricting the right to grant a pardon”. The Constitutional Court has exceeded its jurisdiction in an attempt to prove that it is not expedient to limit the possibility for pardoning certain crimes because it would not achieve the purpose for which that limitation is introduced, namely, to prevent committing such crimes?! Further, the Court assesses the expediency of the legal provision, pointing that the social danger of some crimes cannot be accepted as a criterion or a reason for an exemption of these crimes from clemency, because social danger is also a characteristic of other crimes that are not exempted.

In addition, the Constitutional Court notes that the pardon was the “inviolable constitutional and legal right of the President of the Republic of Macedonia, who may use it, based on his/her assessment within framework of the procedure which is established by law.”<sup>18</sup> This interpretation of the Constitutional Court is outside the constitutional framework of the power to pardon. The Constitution states that the President “grants pardons in accordance with the law”. The claim by the Constitutional Court about the inviolability of the right of the President to pardon and that the law can only regulate the pardoning procedure is shocking. Such an argument, making the President equal to a medieval monarch, confirms the allegations and suspicions of the public about the political instrumentalization of the Constitutional Court, which in this case used unsustainable arguments to verify their scandalous decision. The Constitution gives the opportunity to the legislator to regulate in the law, not only the procedure but also all aspects of pardon. Rather, the Constitution suggests that the President has no unlimited power and he or she must not act arbitrarily in granting pardons, but he or she must perform this competence in compliance with the law. By comparison, there are provisions in the Constitution giving authority to the legislature to regulate only the procedure and not to enter into other substantive issues, such as Article 19, which stipulates that religious communities and religious groups “are free to establish religious schools and social and charitable institutions in a procedure regulated by law”.

Furthermore, the Constitutional Court argues that the Constitution “with its norms has not restricted the pardon only for specific crimes.” For the Court there is no constitutional basis for forbidding pardoning for certain crimes, because the Constitution does not enumerate the crimes that cannot be pardoned. This argument of the Constitutional Court expresses the expectation that the Constitution should regulate the issues in detail. Anyone with basic knowledge of constitutional law knows that it cannot be expected nor is it good for the Constitution to regulate the details of every constitutional issue. On the contrary, the Constitution should provide the framework and limitations of behavior and should not go into details. It makes the Constitution a durable document that is able to adapt to developments in society. The constitutional provision of the right of the President to

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<sup>18</sup> Ibid.

pardon “in accordance with law” has created an opportunity for the law to regulate in detail all the aspects of the pardons including the question which crimes can or cannot be pardoned.

As a second argument for its decision, the Constitutional Court invoked the right to equality, arguing that the ban on pardoning for certain offenses violates the constitutional right of equality of citizens. “The convicted perpetrators of crimes for which the legislature stipulated are exempt from pardoning are deprived of the opportunity to be pardoned, unlike the convicted offenders of other crimes, which represents a different treatment of persons who have the same status (convicts) and are in the same legal situation.”<sup>19</sup>

This statement of the Constitutional Court is paradoxical because persons who have been convicted of different crimes cannot be treated as having the same status. For example, a person convicted of pedophilia and a person convicted of petty theft cannot be considered as having the same status. In fact, criminal law provides different penalties for various offenses. Even the same Law on Pardons has different deadlines for submitting an application for clemency depending of the length of the penalty. Availability of pardons, parole, and the length of sentence are legal matters and the legislature could regulate criteria depending on the severity and social danger of crimes, because the weight and social danger of the crimes are criteria that distinguish the status of offenders. The weightiness and social danger of the crime are not prohibited grounds for different treatment of offenders neither in the Constitution nor in any international document.

The third argument on which the Constitutional Court based its decision is the separation of powers. The Constitutional court argued that with the 2009 Law, the Assembly, which prohibited pardoning for certain crimes and established the Commission for Pardoning within Presidential Cabinet, intruded the competencies of the President. For the Constitutional Court the Assembly violated the principle of the separation of powers and limited the competencies of the President. This argument of the Constitutional Court is also unsustainable. There is no violation of the principle of separation of powers if the Assembly on the grounds of a constitutional provision regulates the right of pardon and lists cases that cannot be pardoned. Especially, if the Constitution states that the President will issue pardons according to the law.

Next, the Constitutional Court challenges the provision of the 2009 Law, which provides that the President with his decision establishes a Commission for Pardons and determines its composition and number of members. The Constitutional Court held that this legal provision “is problematic from a constitutional standpoint” because “the legislator has no constitutional power to regulate matters related to the internal organization and work of the President of the Republic”.

What is really surprising is that the Constitutional Court abolished the whole 2009 Law but argues about the alleged unconstitutionality of only two provisions.

The Constitutional Court decision was adopted with a majority of five votes, while four judges in presenting their opinion said that there was no constitutional ground for the abolition of the Law. In their dissenting opinion, the constitutional judges noted that their colleagues adopted “arbitrary” decision “without adequate explanation”. In their dissenting opinion they highlight the constitutional grounds for legal regulation of pardons, and that the abolished law did not violate the right to equality. They point out that there is no difference of treatment of persons who have the same status (prisoners) and who are in a similar situation from a legal perspective because those people have committed different crimes trigger different criminal responsibilities depending on the nature of the crime. At the same time, all the perpetrators of some specific crime are treated as equals in their specific group. They are equal in their inability to be pardoned. An additional argument in the dissenting opinion is that according to the repealed provision the President of the Republic could not have pardoned persons convicted with an effective verdict by an international criminal court for crimes against humanity under international law. So, in the context of the constitutional fundamental value of the rule of law, a majority of judges had to have regard of the constitutional obligation of Macedonia to respect generally accepted norms of the international law and all international conventions, which are ratified and are an integral part of the domestic legal order. For these crimes the Criminal Code

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<sup>19</sup> Decision of the Constitutional Court No. 19-2016-0-1.

provides that they cannot become obsolete for criminal prosecution and criminal punishment. The four constitutional judges believe that “there is not only concern but also a real opportunity for the violation of international public law” with this decision of the Constitutional Court, as they wrote, “because of future legal consequences”.<sup>20</sup>

The Dissenting opinion also concludes that with its decision, “the Constitutional Court directly infringes the principle of the separation of powers ... enhancing the competencies of the President, which are determined by the Constitution and the law ... The Constitutional Court with the adopted decision does not only create a norm, but also interferes with the constitutional competences of the legislator to adopt laws, which is within the scope of his or her constitutionally determined authority. The Constitutional Court, which is supposed to protect the Constitution, with this decision violates the Constitution, and brings into question the rule of law.”<sup>21</sup>

### 5. Legal controversies of the 2016 presidential pardons

After the Decision of the Constitutional Court entered into force, the President of the Republic adopted the scandalous pardon decisions based on Article 11 from the 1993 Law without carrying out the adequate procedure for pardoning. This provoked new public debates. Since, the 2009 Law abolished the Article 11 from the 1993 Law and the Decision of the Constitutional Court abolished the 2009 Law, the question that was posed in the public was whether Article 11 from the 1993 Law was rebound into force with the Constitutional Court’s Decision, or the pardons of the President were not only morally, but also legally problematic.

Even Hans Kelsen, the “founding father of the constitutional justice”, wrote that legal status, which existed prior to the enactment of the annulled statute, is not automatically restored with the decision of a court.<sup>22</sup> The earlier statute, or the previously valid rule of law, has been derogated by the latter that was annulled. If the statute is not void *ab initio*, but only invalidated, the previous provision is not restored.<sup>23</sup> “The revival of the first statute or the rule of common law is not possible without an express provision of the constitution which attributes this effect to judgments of nullification by the Court.”<sup>24</sup>

Because it is a very undesirable situation, which leaves certain areas free from any regulation, the Austrian Constitution contains the following provision: “If by a decision of the Constitutional Court a statute or a part of it has been annulled on the ground of its unconstitutionality the legal rules derogated by the mentioned statute come into force simultaneously with the decision of the Constitutional Court unless the latter provides otherwise.”<sup>25</sup>

So according to the dominant theoretical attitude it should be undisputed that the decision of the Constitutional Court abolishing the 2009 Law does not rebound into life the provision of Article 11 of the 1993 Law. This means that the President of the Republic of Macedonia did not have legal grounds to give clemency based on that article without initiating the relevant procedures.

But the Dissenting Opinion does not support this position, stressing that Article 11 is enforced and it gives the possibility for the President of the Republic to pardon without following the procedure.<sup>26</sup>

Besides the aforementioned controversy and legal problems of the given pardons from 12 April 2016, other legal dilemma also appeared in public, namely, the question of whether it is possible

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<sup>20</sup> Dissenting Opinion of the Decision of the Constitutional Court, No. 19-2016-0-1.

<sup>21</sup> Ibid.

<sup>22</sup> Hans Kelsen, “Judicial Review of Legislation – A Comparative Study of the Austrian and the American Constitution”, *The Journal of Politics*, vol. 4 (1942), p. 198.

<sup>23</sup> “If the statute declared by the court unconstitutional were void *ab initio* (and that means that of the statute has been annulled with retroactive force) the previous statute, or the previously valid rule of common law, would be applicable. For the statute declared unconstitutional with retroactive force could not derogate the previous statute, or more exactly expressed, the derogatory effect of the statute declared unconstitutional has been annulled.” Hans Kelsen, *op. cit.*, pp. 199-200.

<sup>24</sup> Hans Kelsen, *op. cit.*, p. 199.

<sup>25</sup> Hans Kelsen, *op. cit.*, p. 199.

<sup>26</sup> Decision of the Constitutional Court of the Republic of Macedonia, No. 19/2016-0-1 from 16.03.2016.



to revoke pardons. If a person who is pardoned rejects the clemency in order to defend himself in a court of law, which body is competent to annul the pardons? How can the legality be restored if the pardons were legally invalid because they were based on a non-existing article of the law?

In the past, President Gjorge Ivanov revoked a pardon. That was done in 2009 when he “made a decision to revoke a pardon decision because of technical problems”.<sup>27</sup>

Some of the persons pardoned in 2016 have demanded that the President revoke their clemencies because they wish to invoke their right to a fair trial and to defend their innocence and reputation in a court of law. One of the principles of the judicial system is the principle of the presumption of innocence, while clemency incorporates “the presumption of guilt” and thus entails in some sense a tarnishing of the reputations of individuals who are given clemency. That is even truer for individuals against whom no criminal procedures were initiated and who were only witnesses in the proceedings against politicians. Experts have debated whether the right to access to a court of law, guaranteed in Article 6 of the ECHR, could be used as the basis for withdrawing or revoking the clemencies. Some of them argued that the President should revoke the pardons of persons who demanded them from him. The President should base his decisions for revoking these pardons on the Article 6 of the ECHR, which guarantees the right to a fair trial. The pardoned persons, who want to go to court and prove their innocence, can demand that their pardons be revoked. Some of them were in custody and want to go through judicial process to obtain redress for unlawful custody. So, according to some of the experts, the President is obliged to revoke their pardons, after their demand, on the basis of the Article 6 of ECHR.<sup>28</sup>

The public also disputed whether the President could himself annul his pardons because they are legally invalid. The President and the ruling party refused the idea that the President could annul the pardons, and the Parliament on 19 May 2016 adopted a Law amending the Law on Pardons, which added an additional Article 11-a. The additional article stipulates that the President of the Republic may annul the pardons given without following previous procedure within 30 days of the adoption of a Law. The President does not need to explain his decision for the annulment of the pardons. Also, the new Article 11-a stipulates that pardoned persons can file a request for annulment of the decision for their pardon, in which case the President of the Republic is obligated to annul the pardon within 30 days of the submitted request.

These legislative changes are problematic for several reasons. First, it is an alien phenomenon to withdraw the given pardons, unless they are illegal. Annulment of an issued pardon would be contrary to the principle of legal certainty and acquired rights unless the pardon was issued contrary to the law. Of course, the fact that pardons were illegal should be established through legal procedure. The ruling parties wanted to avoid the recognition of the illegality of the given pardons and tried to leave room for the retention of the given pardons. In a situation in which the President decides to annul some pardons, the persons who have not submitted the request for annulment, and who are facing serious accusations of criminal offenses, will dispute the annulment of the pardons on the basis of violation of their acquired rights and the principle of legal certainty. The question of the constitutionality of the legal provision can be put before the Constitutional Court and the Court would have arguments to annul it.

Secondly, as a result of this constitutionally problematic legal provision, it is feasible that in the future the Constitutional Court can decide that nullifications of the pardons are not constitutional, except those nullifications that were demanded by the pardoned persons. As a consequence, the other illegal pardons will remain effective.

Thirdly, the refusal of the ruling parties to recognize the illegality of the pardons is with intention to keep the door open, or to create an escape option for their party members to keep the pardons in order to avoid criminal prosecution. But also, by refusing to recognize the illegality of the pardons, they are protecting the President from being accountable for his illegal decisions.

<sup>27</sup> Announcement from the Cabinet of President Ivanov. See: “Ivanov pardoned Lambe Arnaudov, then changed his mind” (in Macedonian) (12 April 2016) <<http://www.vest.mk/?ItemID=EF54842EFF4E0141910F4EF97879D913>>.

<sup>28</sup> This is argued by the prof. Vlado Kambovski. See: <<http://sdk.mk/index.php/makedonija/kambovski-go-uchi-ivanov-evropskata-konventsija-e-posilna-od-tvojata-abolitsija/>>.

After the adoption of the Law amending the Law on Pardons, the Parliament issued an authentic interpretation in which it pronounced the nonexistence of Article 11. Also, the Constitutional Court, rejected the initiative to decide on the constitutionality of Article 11 of the Law, on the grounds that it is not in force.<sup>29</sup> As, it was already mentioned, several of the pardoned persons, submitted the applications to the European Court of Human Rights, which were found inadmissible on procedural basis. The Ministry of Justice formed the working group for drafting the new Law on Pardons.

## 6. Possible legal changes on the presidential pardons

North Macedonia today faces the challenge to create a legal frame for a more equitable, justice-driven process of pardoning, as well as to limit its corrupt use. In that legal reform, the arguments that were given in the US debate on restoring legitimacy of pardon power after Trump can assist in evaluating the possible solutions.

As in USA<sup>30</sup>, also in Macedonia in some cases the Presidents issued generic pardons, without specifying the violation of the law which is pardoned.<sup>31</sup> That was possible because the presidents issued pardons even without indictment against certain person. One possible option is limiting this competence of the president only to instance wherein a conviction occurred. This proposal was considered by Kobil in US debate: “An after-conviction limitation would have prevented some of the most questionable pardons that have been issued by modern presidents”<sup>32</sup> and ensure that clemency is granted only for specific violations of the law.<sup>33</sup> Kobil considers President Ford’s pardon of former President Richard Nixon prior to indictment, as the most controversial preemptive pardon in US history and points that it would have been far preferable for the country if it could only have been accomplished after Nixon has been held accountable and taken responsibility.<sup>34</sup> The major benefit of proposal for after-conviction pardon is the requirement of a trial, which is public process.<sup>35</sup> That means that public reactions during the judicial process might influence the President to reconsider executing the pardon power.

The involvement of another body in the process of pardoning could also contribute to transparency of the process and to limiting its abuses. In USA, where is a presidential system, the proposal for legislative involvement in the process were given.<sup>36</sup> In North Macedonia, in which mixed system of organization of powers is implemented, the obligatory involvement of the Ministry of Justice in the pardoning process can assist the prevention of abuses. If the president issues the pardon, in the case in which the Ministry of Justice gives negative proposal, then the public should be informed and the president should give his/her reasons for that. That is even recommendable for all pardons, because the presidential decision for pardoning in North Macedonia is published in the Official Gazette, but it contains only the name of the pardoned person, without any explanation. So, the law can include the requirement, the President to give the reasons for issuing the pardon. Also, forming the commission consisted of experts within the Ministry of Justice for reviewing the pleas for pardons can contribute for thorough examination of the circumstances of the cases and assist the Minister of Justice to formulate the proposal to the President.

There is example in Slovakia, where the Parliament gave itself the power to annul a president’s pardon, by a three-fifths vote, if the pardon “was incompatible with the principles of

<sup>29</sup> Resolution of the Constitutional Court No. 163/2016.

<sup>30</sup> Although the vast majority of pardon warrants do specify particular federal offenses, some presidents have exercised the authority to issue generic pardons, with President Ford’s pardon of Richard Nixon being Exhibit “A”. Ford issued a pardon “for all offences against United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969, through August 9, 1974”. Daniel T. Kobil, *op. cit.*, 2021, p. 7.

<sup>31</sup> For example, generic pardons were issued by the President Boris Trajkovski for pardoning the Director of the Intelligence Agency - Dosta Dimovska in 2003 and by the President Branko Crvenkovski for pardoning the Mayer of Strumica – Zoran Zaev in 2008.

<sup>32</sup> Daniel T. Kobil, *op. cit.*, 2021, p. 5.

<sup>33</sup> *Ibid*, p. 8.

<sup>34</sup> *Ibid*, p. 6.

<sup>35</sup> Zachary J. Broughton, *op. cit.*, p. 269.

<sup>36</sup> Proposal of Laura Palacios. Quoted in Zachary J. Broughton, *op. cit.*, p. 270.

democracy and rule of law”.<sup>37</sup> All legislative annulments of a pardon should be reviewed by the Constitutional Court, which will determine whether the annulment complied with the constitution. But this solution is not applicable in North Macedonia without amending the constitution. “Opening” of the Constitution in North Macedonia is equal with opening the “Pandora box”, so this option is not recommendable. So, finding the solution within the existing constitutional frame is preferable.

## 7. Conclusion

When the competence to pardon is introduced in each constitutional system, it is meant to flow from positive values: mercy, redemption and reconciliation.<sup>38</sup> But, the pardons are not used only for correction of individual mistakes in the criminal system. Pardons can also result in injustice. The new kinds of injustices can come out from the way pardons are given. Actually, this kind of injustice introduced by pardoning 56 people, politicians and their collaborators, was the reason for the huge protests in 2016 in the Republic of Macedonia.

Usually, when pardoning becomes a regular instrument of intervention of the executive power, i.e., the non-judicial authorities in the field of judiciary, it means that something is not right with the law or it is applied wrongly. In other countries, this indicates a problem in criminal legislation (substantive and/or procedural) or a problem in the application of the law by the courts.

But the pardons issued in Macedonia in 2016 show that the problem may also be in the manner of regulating the right to pardons, as well as that wrong application of the law can be done also by the President who has the competence to give pardons.

The power to pardon, as a living fossil or relic of the role of the absolute sovereign in the sphere of the judiciary, should in the modern legal systems be a “constitutional exception” that is strictly regulated and used for the provision, rather than the disruption, of justice. The pardons must respond to those situations where the public interest needs them. The modern constitutional system must ensure the accountability of the President for the given pardons in order to avoid corruption and the disruption of justice. The pardons from 2016 were not “exceptions”, but they were given to 56 persons (to some of them for more cases) and they were completely contrary to the public interest.

As in the past, when a personal relationship between the king and the pardoned person was the key to getting a pardon, a leading motive for the 2016’s pardons was a partisan relationship between the President and majority of the pardoned persons. The rest of them were only decor and served as an alibi for those who were the primary target of the pardons.

It has already been recognized in theory and practice that presidents use pardons in situations of political crisis or emergencies. In such politically turbulent times, pardons are given if there is a huge probability of conviction of innocent persons or to persons convicted for “political” reasons. The fact is that there is a political crisis in Macedonia, but it is also a fact that pardons cannot be means for overcoming this crisis. The crisis that arose from crimes, corruption, electoral fraud, and cannot be overcome by pardoning the perpetrators. Pardoning has even made the crisis deeper. Actually, the pardons of the politicians during the current political crisis were a kind of rubbing of “salt into the wound”. They made the situation worse. With these pardons, Ivanov, just as Trump “not only detached the pardon power from the structure and operation of the justice system, he used the power to challenge and frustrate that system.”<sup>39</sup>

After the massive public protests, the ruling majority adopted legislative changes containing “legal injustice”. The last amendments to the Law on Pardoning are not aimed at regulating a future situation, but past situations. One will inevitably conclude that there is a need of a new Law on Pardons, which will determine the procedure for pardons and will prevent the abuse of this competence of the President. Of course, there are no simple, or even perfect solutions for that, but excluding generic and pre-conviction pardons, obligatory involvement of the Ministry of Justice, as

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<sup>37</sup> Broughton writes for USA. Zachary J. Broughton, *op. cit.*, pp. 272-273.

<sup>38</sup> Mark Osler, *op. cit.*, p. 488.

<sup>39</sup> Margaret Colgate Love, *op. cit.*, p. 285.

well as obligation for reasoning of the decisions for pardoning can lead toward “rule of law driven process” more than keeping *status quo*.

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