

PARDON POWER



GEORGIAN MODEL AND INTERNATIONAL EXPERIENCE



2016

THE POWER OF PARDON
THE GEORGIAN MODEL
AND
INTERNATIONAL EXPERIENCE



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Non-governmental organization the Human Rights Center, formerly Human Rights Information and Documentation Center (HRIDC) was founded on December 10, 1996 in Tbilisi, Georgia.

The HRIDC aims to increase respect for human rights, fundamental freedoms and facilitate peacebuilding process in Georgia. To achieve this goal it is essential to ensure that authorities respect the rule of law and principles of transparency and separation of powers, to eliminate discrimination at all levels, increase awareness and respect for human rights among the people in Georgia.

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TABLE OF CONTENTS

THE NEED OF THE SURVEY IN THE GEORGIAN MODEL OF PARDON POWER	4
THE STRUCTURE OF THE STUDY	5
INTRODUCTION	6
METHODOLOGY OF THE SURVEY IN THE PARDON POWER	7
HOW WE SELECTED COMPARISON COUNTRIES (SAMPLING)	7
1. CONCEPT OF THE PARDON, ITS ORIGIN AND HISTORICAL DEVELOPMENT.....	8
2. OBJECTIVES OF THE PARDON POWER (IN ACCORDANCE TO THE U.S. MODEL).....	9
3. POSITIVE AMENDMENTS TO THE MARCH 27, 2014 EDICT OF THE PRESIDENT.....	11
4. GOALS OF APPLYING PARDON POWER BY THE PRESIDENT OF GEORGIA – UNREGULATED ISSUE IN THE GEORGIAN REALITY	11
5. LEGAL REGULATION OF PARDON POWER AND ITS IMPACT ON THE CRIMINAL LAW (IN ACCORDANCE TO THE GEORGIAN MODEL)	12
6. THE TENDENCY OF USING PARDON POWER WITH REGARD TO DIFFERENT CRIMES AND THE LIBERAL APPROACH OF THE PRESIDENT OF GEORGIA TOWARDS THE CONVICTS FOR DRUG- RELATED OFFENCES	14
7. TENDENCIES OF USE PARDON POWER IN 2004-2015	15
8. PARDON POWER FOR LIFE-SENTENCES	17
9. REVIEW OF THE PARDON POWER IN ACCORDANCE WITH LEGAL SYSTEMS.....	17
10. REVIEW OF THE PARDON POWER IN ACCORDANCE WITH STATE GOVERNANCE MODELS.....	18
11. DECISIONS ON PARDON CASES ACCORDING TO DIFFERENT MODELS	19
12. COMPARATIVE ANALYSIS OF THE PARDON POWER AND INTERNATIONAL PRACTICE	22
13. PARDON ACTS ACCORDING TO THE GEORGIAN MODEL AND RELATED SHORTCOMINGS	28
14.RECOMMENDATIONS FOR AN IMPROVED PARDON POWE.....	41
14.CONCLUSION	43

THE NEED OF THE SURVEY IN THE GEORGIAN MODEL OF PARDON POWER

The Human Rights Center has many years of experience working on pardon cases. This experience has revealed a number of problems and their identification, and at a later stage, their eradication will significantly improve the implementation of pardons.

For convicts and for society in general, the following issues raise questions and are at times vague:

- ❖ The Pardon Commission and the President do not agree -_When the Pardon Commission concludes a petitioner should be pardoned, but the President does not pardon him. In other cases, the Commission members unanimously chooses not to pardon a petitioner, but the President pardons him.
- ❖ The President directly pardons a petitioner based on reasons not in alignment with the approved criteria or on unclear reasoning and without consulting the Pardon Commission -_If there is a Pardon Commission, and its role is to advise the President in cases of pardons, it is unclear why the President pardons convicts without first consulting with the Commission. Petitioners cannot then understand the criteria on which the President or the Pardon Commission base pardons.
- ❖ The role and influence of the Patriarchate and the principle of equality in the pardon process -_For many years, the Patriarchate sent lists of petitioners to the President directly without forwarding them to the Pardon Commission. This established a practice in which the Patriarchate became the key actor in the pardon process. While an orthodox clergyman is a member of the Pardon Commission, representatives of other religious groups are not on the Commission. The lack of representation by other religious groups is at odds with the principle of equality.
- ❖ Role of the Public Defender in the pardon process -_In accordance with Article 21 (h) of the Organic Law of Georgia on the Public Defender, the Public Defender is authorized to apply in writing to the President and/or Prime Minister of Georgia if the Public Defender of Georgia considers that the means of response at the disposal of the Public Defender of Georgia are not sufficient. In 2013-15, the Public Defender of Georgia used this authority only twice, when he proposed to both the Pardon Commission and the President to pardon concrete persons. The annual parliamentary reports of the Public Defender often provide information about the findings in different criminal cases. In many cases significant procedural and material miscarriages were identified. One tool the Public Defender uses to mitigate human rights violations is the pardon. In this context it is valuable to analyse and study the role of the Public Defender; the collaboration between the President of Georgia and the Public Defender can help mitigate alleged miscarriages of justice.

To identify and analyze these and other significant issues, the Human Rights Center conducted a survey to understand the level of transparency and effectiveness of the pardon power in Georgia.

In the framework of this study, the pardon powers of foreign countries were compared with those of Georgia. The practice of clemency and legal regulations of more than ten countries were analyzed.

The study shows that since the Constitution of Georgia grants the right to pardon convicts exclusively to the head of the state (President), the institution of the pardon will be evaluated as positive only when the President creates an advisory body (Pardon Commission) which may advise him on specific petitions by convicts. This model, although democratic, needs improvement to prevent the appearance of randomness and partiality of pardons granted by the President both in society and among convicts. The recommendations elaborated in this study aim to achieve these goals.

THE STRUCTURE OF THE STUDY

The Study was organized according to the following structure:

The Introduction reviews the necessity of the Study, methodology of the Study and selection of the comparison countries (sampling).

The first chapter reviews the concept of the pardon, its origin and historical development. **The second chapter** presents objectives of the Pardon Power in accordance to the U.S. model. **The third chapter** presents Positive amendments to the March 27, 2014 Edict of the President. **The fourth chapter** reviews the goals of applying pardon power by the President of Georgia. **The fifth chapter** is about legal regulation of pardon power and its impact on the criminal law (Georgian model). **The sixth chapter** reviews the tendency of using pardon power with regard to different crimes and the liberal approach of the President of Georgia towards the convicts for drug-related offences. **The seventh chapter** analyzes Tendencies of use pardon power in 2004-2015. **The eighth chapter** analyzes apply of pardon power for life-sentenced convicts. **The ninth chapter** reviews the pardon power in accordance with legal systems. **The tenth chapter** analyzes the pardon power in accordance with state governance models. **The eleventh chapter** reviews decisions on pardon cases according to different models. **The twelfth chapter** presents comparative analysis of the pardon power and international practice. **The thirteenth chapter** reviews the shortcomings in the Georgian model of the pardon power. **The fourteenth chapter** presents recommendations for an improved pardon power. The **fifteenth chapter** summarizes the study conclusions.

INTRODUCTION

Absolute majority of the legal systems across the world allows for the use of pardons in criminal law cases. The pardon power is an act of clemency and it is applied when the use of coarse and inflexible laws against a person is deemed a harsh application of the law. Pardon, as a concept, is not only a legal act, but it is widely applied in different religious traditions. Many societies and states with non-Western legal traditions also use the pardon power. For example, it is still actively applied in Sharia law and it was widely used by pre-colonial societies (Novak 2016).

Nevertheless, the modern concept of the pardon power is defined as the:¹

- ❖ *absolute discharge from criminal liability;*
- ❖ *reprieve or suspension of punishment;*
- ❖ *commutation of sentence into less grave punishment; and*
- ❖ *absolute discharge from criminal record and its consequent restrictions.*

It is noteworthy that the executive branch is equipped with the power of pardon. Unlike amnesty, which is most common in countries with continental law and is used only by the legislative body, the pardon power is prerogative of the executive branch. The governor (sovereign, monarch, president) or collegial body, subordinate to the executive authority, has the right to use the power. Additionally, the pardon applies to an individual and it is important to apply the power to both the offender and the offence. Amnesty, as a rule, applies to a wider circle of individuals and regulates discharging people from criminal liabilities for concrete wrongdoings (Novak 2016).

This study analyzes:

- ❖ the Georgian model of the pardon power and reviews its positive and negative aspects;
- ❖ its being the exclusive competence of the President's;
- ❖ the President's cooperation with the Pardon Commission and decision making process;
- ❖ the criteria of selecting the Pardon Commission members and any conflict of interest;
- ❖ the role of the Public Defender in the pardon process and;
- ❖ the influence of the Patriarchate on the pardon process.

In addition, this study reviews:

- ❖ the concept of the pardon Power and its origin and historical evaluation;
- ❖ different models of pardon powers against the backdrop of different legal systems and governance models;
- ❖ the regulations of the decision making process; and
- ❖ the use of the Pardon Power in the preliminarily selected 8 European States and in the USA.² The models of other countries were also reviewed for illustration.³

To improve the Georgian pardon model, this study offers recommendations based on best international practice.

¹ Term "pardon" is used in the presented Study in the context of full discharge from criminal liability or/and removal of criminal record and its consequent restrictions (pardon power), reprieve or suspension of the punishment, commutation of sentence.

² USA, Austria, Bulgaria, Ireland, Poland, Romania, Hungary, Croatia, Czech Republic

³ Singapore, New Zealand, India, Ghana, Bhutan, etc

METHODOLOGY OF THE SURVEY IN THE PARDON POWER

- ❖ Legal acts were analyzed using a descriptive methods and we received information about legal regulations of the pardon power (Constitution of Georgia and other legal acts);
- ❖ Information about the practical performance of the Commission was obtained by conducting interviews with members of the Pardon Commission;
- ❖ Interviews with the Public Defender of Georgia provided us with information about the role of the Ombudsman in the Pardon process (Article 21 Paragraph (h) of the Organic Law of Georgia on Public Defender about the right to apply to the Prime Minister in written form);
- ❖ Meetings with the representatives of non-governmental organizations and experts (mostly with the criminal law lawyers) provided additional insights related to this study;
- ❖ Additional public information was requested from the Pardon Commission and the President's administration;
- ❖ Meetings with the Pardon Commission chairman and representatives of the President's administration provided relevant information about the functioning of the pardon power; and
- ❖ Meetings with the representatives of the Georgian Patriarchate provided information about the cooperation between the Patriarchate and the Pardon Commission.

This study's methodology is based on conventional methods of qualitative analysis. This methodology is grounded in written documents (including legal acts) and describes the processing of the gathered information (Neuman 2013). Specifically, the materials we obtained in this study were analyzed vis-a-vis the use of the pardon power by authorized persons in selected countries against the backdrop of their applied legal procedures and criteria.

We compare in this study the pardon powers of the foreign countries with the Georgian model in terms of legislative regulations based on the shortcomings we identified in the Georgian model.

We use the *de lege ferenda* methodology to elaborate recommendations to address legislative shortcomings and introduce amendments to existing regulations based on the laws and a practical analysis of foreign countries.

HOW WE SELECTED COMPARISON COUNTRIES (SAMPLING)

The study reviews pardon power models mainly in the USA, Poland, Czech Republic, Romania, Bulgaria, Croatia, Ireland, Austria, and Hungary. The countries were selected according to the following criteria: Poland, Czech Republic, Romania, Bulgaria, Croatia and Hungary are new democracies like Georgia and they all similarly have a socialist history and corresponding legal traditions. Consequently, a study of their pardon powers was relevant to identify the problems and shortcomings they had and how they successfully solved them.

It was also important to study the models of Ireland, Austria, and the USA because these countries have spent decades developing their pardon power and today they have some of the most well-established models.

In addition, the following aspects were researched during the survey:

- ❖ *the constitutional regulation of the pardon power;*

- ❖ *legal regulations of the pardon power;*
- ❖ *the criteria to elect the Pardon Commission (or relevant structure, criteria for the selection of members and issue of conflict interest); and*
- ❖ *the criteria to select pardon cases; discussion procedure and decision making.*

Reference materials:

- ❖ *Relevant legal frameworks of each country;*
- ❖ *Scientific literature (books, articles, monographs).*

1. CONCEPT OF THE PARDON, ITS ORIGIN AND HISTORICAL DEVELOPMENT

To better analyze the pardon power as a legal concept and its purpose, it is important to review its historical origin and evolution.

The pardon was used in ancient Greece and during the Roman Empire. The pardon in ancient Athens did not function as we know it today mostly due to Greece's governance model (direct democracy). Before 403 B.C., according to the law known as *Adeia*, a person could be pardoned if 6,000 Athenians voted for his pardon via a secret ballot. It was very difficult to collect that quantity of ballots. Consequently, only athletes, orators, and people with power would be pardoned. The pardon power was not a prerogative of the executive authority and ordinary citizens could make use of it (NIDA 1999).

In the Roman Empire, the purpose of the pardon was not a mechanism to forgive a person of a crime nor an act of clemency, but it was applied for political purposes and to control the masses. Romans punished soldiers who had committed crimes selectively, not in mass. The pardon served to establish discipline in the army and to instill a fear of the ruler. The British model of the pardon power was created and developed based on both the ancient Greek and Roman models and is considered to be the foundation of the modern pardon system (NIDA 1999).

William Blackstone clarifies that the historical roots of the British pardon power lie in Roman legal traditions. However, the purpose of granting absolute pardon power to the British monarch was to reinforce devotion of subordinates to the monarch; to obtain their loyalty and support. In 1536, the Parliament of Britain granted absolute pardon power to King Henry VIII for persons convicted of state treason, murder, and other crimes. The act did not limit the ability to pardon oneself, however, since Parliament did not envision that a monarch would commit a crime against the state or himself. Consequently, Parliament only had the right to impeach the monarch. Later, the absolute pardon power of the monarch was restricted – the monarch was no longer authorized to pardon a person (including himself) in the case of impeachment. This regulation was reflected in the U.S. constitution, which will be described below in more detail (NIDA 1999).

2. OBJECTIVES OF THE PARDON POWER (IN ACCORDANCE TO THE U.S. MODEL)

In accordance to the Article 2 Section 2 of the U.S. Constitution, *President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.*⁴ This provision stipulates that the pardon is exclusively the competence of the President if a person committed a federal crime, except in the case of impeachment.

Hamilton, in the Federalist Papers,⁵ clarified the reasons why the U.S. founding fathers granted this power to the President. According to Hamilton, it is reasonable for the President to pardon in the cases of state treason and rebellion.

The right of the U.S. President to pardon convicts has four main goals:

The first goal is to grant pardons in respect of state interests and to avoid political crises. Examples of this application include the pardon of the President Nixon by his successor, President Gerald Ford, before an investigation started and charges were brought against him. In addition, the offering of pardons to persons by President Lincoln to maintain national unity and to the southern secessionists by the President Johnson after the American Civil War (Harrison 2001).

The goal of the pardon may be to counteract a miscarriage of justice. Any judicial system cannot be void of mistakes which cannot be improved by the judicial body itself. In such cases, it is effective to use pardon power to mitigate miscarriages of justice and reverse the judgment of an innocent person (Harrison 2001).

The pardon power may also be used a person is guilty, does not deny it, but acknowledges the crime and deserves one more chance. Throughout last century, presidents often pardoned people who were offenders, whose pardon did not aim to avoid a political crisis or mitigate a miscarriage of justice, but aimed to give another chance to reintegrate into society. The pardon in most of these cases sought to give mercy; because of old age or grave health conditions, for example, or when the sentence was disproportionate to the crime (Harrison 2001).

The President can influence policies of federal criminal law with the pardon power. The President can use a pardon if he refuses to criminalize a concrete action or dislikes a particularly strict punishment. In such cases, the President can either free the person from punishment or lessen the punishment and in doing so significantly influence criminal law (Harrison 2001).

It is noteworthy that this power only applies to federal crimes. While in separate states, as a rule, governors have the authority to pardon and each state has different pardon power models (Novak 2016). The U.S. Supreme Court, in *Herrera v Collins* 506 U.S. 390 (1993), ruled that in accordance to the U.S. Constitution the states are not obliged to have pardon power as well as they can elaborate their own model according to their own views.⁶ Each state has a different model that will be reviewed in different parts of this study.

⁴ See US Constitution <https://www.law.cornell.edu/constitution>

⁵ see <http://federalistpapers.ge/federali74.php>

⁶ See <https://supreme.justia.com/cases/federal/us/506/390/case.html>

At different stages in U.S. history, presidents granted varying numbers of pardons. For example, President Lincoln pardoned 200 citizens and hundreds of soldiers. In his first years as President, Theodor Roosevelt pardoned 134 people, Franklin Roosevelt – 204, and President Truman – 107. President Obama wanted to consider 5,000 pardon petitions (Colgate Love 2001). Nevertheless, according to official statistics, in 2009-2010 President Obama did not pardon anybody. In 2011 he pardoned only 17 persons, in 2012 – 6, in 2013 – 17, in 2014 – 22 and 91 persons in 2015.⁷

Generally, number of pardoned persons by U.S. presidents significantly declined after the 1970s. In 1961-1980, applicants had a 30 percent chance to be pardoned. In the administration of President Clinton, this chance declined to 3 percent. The decline is attributed to various reasons including bureaucratic and routine pardon procedures (ROSENZWEIG 2012).

The Department of Justice administers the pardon process in the US. In 1898, President McKinley issued the first pardon act in U.S. history. According to this act, any person could apply to the Justice Department for a pardon. The head of the Department of Justice, the Attorney General, was responsible for reviewing the applications and presenting them to the President (Colgate Love 2001).

Late in 1970s, this authority was delegated Pardon Attorney within the Department of Justice, who is responsible for reviewing the applications and presenting them to the President. A person who wishes to apply to the President for a pardon must submit a special application form to the Justice Department after he has served at least 5 years of his sentence or at least 5 years have passed after he released from prison, or if a person who has not yet been convicted for the crime and at least 5 years have passed since the charge was first brought against him. A probationer, a person with conditional sentence, or an early release may not apply for a pardon.⁸ After the Justice Department reviews the petitions, the Pardon Attorney addresses the President with concrete recommendations (pardon or not to pardon). It is not obligatory for the President to follow the Pardon Attorney's recommendations.

The U.S. President is authorized to pardon a person without considering the recommendations of the Justice Department. Several pardons issued by President Clinton in his last days in office provides a good example of this. However, these pardons (the midnight pardon acts of President Clinton) were strongly criticized for being the close allies and relatives of the President, criticism largely a result of neglecting the pardoning procedures (Colgate Love 2001).

To summarize, the pardon concept is the prerogative of the executive branch of government. The executive branch may completely free a person from criminal liability, remove altogether his criminal record and related records, or lessen the severity of a punishment for a variety of reasons.

Historically, the authority to pardon was exclusive prerogative of the autocratic monarch. More recently, in republics or constitutional monarchies, this authority is still the exclusive competence of the executive authority in several countries (U.S. and British models). However, the modern concept of the pardon power does not embrace the universal model, including the possibility to exercise this power autocratically.

⁷ See official pardon statistics at: <http://www.justice.gov/pardon/clemency-statistics>

⁸ See: <http://www.justice.gov/pardon/rules-governing-petitions-executive-clemency>

3. POSITIVE AMENDMENTS TO THE MARCH 27, 2014 EDICT OF THE PRESIDENT

With the 27 March 2014 Edict #120, the President of Georgia established a new rule of pardon⁹, making the pardon power more fair and forward-looking.

The new edict enables convicts with a life sentence to request that their sentence be commuted after only 15 years, not 25 years.

Before the edict, unless the convict admitted to a crime, the Pardon Commission would not consider his petition. After the edict, a confession is no longer an obligatory criterion for clemency.

In 2014, the resolution on juvenile convicts was amended to enable the Pardon Commission to review cases of adults, who committed crimes while still a juvenile, without all the same criteria.

Convicts, who have conditional sentences, will be reviewed by the Pardon Commission based on their original prison term, not the conditional sentence.

Also, a convict will only be able to re-petition the Pardon Commission six months after a previous attempt, while before it was only three months.

While previously the Pardon Commission would not consider petitions of amnestied or pardoned convicts who are repeat offenders, the new norms allow for such petitions, but only if the convict has served at least two-thirds of his terms.

4. GOALS OF APPLYING PARDON POWER BY THE PRESIDENT OF GEORGIA – UNREGULATED ISSUE IN THE GEORGIAN REALITY

In the U.S. the presidential pardon exists for four main reasons. Those reasons include:

1. in support of state interests and averting of political crises;
2. the mitigation of miscarriages of justice;
3. pardoning of a person who has committed crime, acknowledges it, and seeks mercy; and
4. to impact the criminal law.

The effectiveness of the institution of the pardon is mostly guaranteed by legal regulations and in the practice of communicating to society and particularly the convict about the nature of the pardon power and its use.

⁹ With the new decree of the President, the July 19, 2004 Decree N 277 of the President of Georgia on the Pardon Power was annulled.

Neither the Georgian Constitution nor regulating acts contain information about the purpose of the pardon, creating confusion about its use and encourage false expectations.

Both Pardon Commission members and representatives of non-governmental organizations state that convicts often perceive the purpose of the pardon is to undo miscarriages of justice. This misperception is a result of unimplemented regulations specifying the purpose of pardons. The Commission and NGOs also added that since the state has not yet fully consolidated its power, convicts consider the pardon to be the only tool to restore justice by either commuting sentences or altogether excusing the offense.

Some of the Commission members also stated that prisoners apply for pardons who believe they are victims of arbitrary judgments. Both the President of Georgia and the Pardon Commission reject these types of applications because a pardon cannot be applied as tool to review a verdict even if the prisoner believes himself a victim of an arbitrary verdict.

To avoid false expectations about the clemency among the convicts, the purpose of the pardon power should be normatively regulated, a correct practice established, and that it be adequately presented to convicts.

5. LEGAL REGULATION OF PARDON POWER AND ITS IMPACT ON THE CRIMINAL LAW (IN ACCORDANCE TO THE GEORGIAN MODEL)

Pardon is human act of mercy exercised by the head of the state which allows a convict to be freed from punishment, have his term reduced, or criminal record quashed. **One of the main goals of the pardon is to give an extra chance to the convict to become full member of society.**

As is the case with other foreign models analyzed in the framework of this study, pardon power is mostly the constitutional prerogative of the head of the state¹⁰ and is regulated by state constitutions and other legal acts. Only the head of state is legally authorized to issue a pardon.

In Georgia, the institution of the pardon is the exclusive constitutional prerogative of the President as the head of the state. Article 73 of the Constitution of Georgia stipulates that “the President of Georgia shall grant pardon to convicts.”¹¹

The pardon power of the President of Georgia stems from the Constitution. Article 69 of the Georgian Constitution stipulates that the “*President of Georgia shall be the Head of State of Georgia. He/she shall ensure the unity and integrity of the country and the activity of the state bodies in accordance with the Constitution.*”

The institution of the pardon aims to effectively carry out the mandate of the Criminal Code of the Georgia. In accordance with Article 78 of the Criminal Code of Georgia, “The President of Georgia shall administer pardon toward individually unspecified persons. The criminal may be released from criminal liability under the act of pardon and the convict may be released from the sentence or the sentence

¹⁰ According to the governance form it may be president, king, queen, etc

¹¹ See the Constitution of Georgia at http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf

rewarded against him/her may be commuted to a less severe sentence. The act of pardon may quash the previous conviction of the person who has served s sentence.”

The basis for the President’s pardon is comprised of human principles, whose unity creates a significant part of state policy.

In accordance with Article 11 of the Law of Georgia on Normative Acts,¹² the President of Georgia shall issue edicts, decrees, and orders based on and within the scope of the authority granted to him by the Constitution of Georgia.

The President of Georgia determines the rules and conditions for pardons by decree compliant with the Constitution of Georgia. Presidential Edict #120, established on 27 March 2014, regulates pardon power and relevant procedures.¹³ The Edict contains regulations about pardoning prisoners and those former prisoners, who have served terms and do not have their past criminal record quashed yet. The Edict establishes the main conditions and rules which ensure the implementation of the President’s pardon. The Edict provides the criteria a convict must meet, and also rules for decision-making on pardoning the applicant.

The Pardon Commission with its nine members was established on 26 November 2013 by Presidential Edict #928 to promote the implementation of the constitutional power of pardon by the President of Georgia.¹⁴ In February, 2016, based on the amendments to the November 26, 2013 Decree # 928 of the President of Georgia, two more members were added to the Pardon Commission.¹⁵

Based on the Edict #120 of the President issued on March 27, 2014,

The Pardon Commission, based on Edict #120, is authorized to review the cases of prisoners who are serving a life sentence and have already served several years and cases of prisoners who are serving terms of many years while part of their term is conditional. The Pardon Commission is authorized to review cases of former prisoners for the purpose of quashing past sentences.

¹² See the law on Normative Acts at: <https://matsne.gov.ge/en/document/view/90052>

¹³ See the President’s edict at: <https://matsne.gov.ge/en/document/view/2299717>

¹⁴ See the President’s edict at: <https://matsne.gov.ge/en/document/view/2997072>

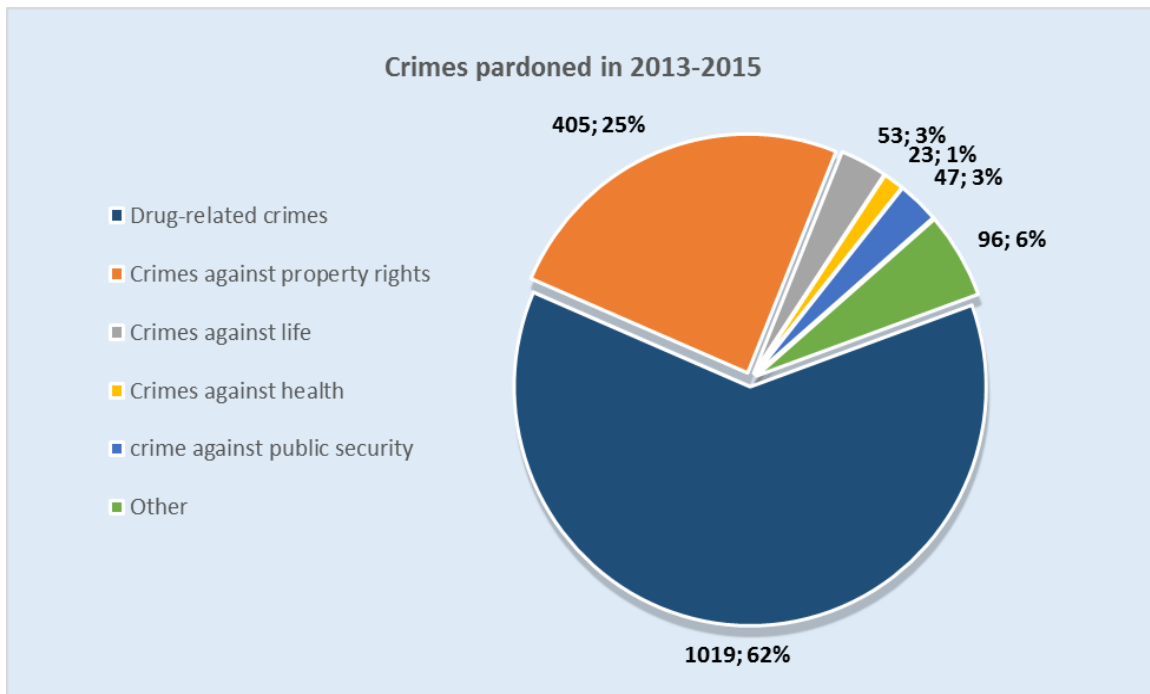
¹⁵ Zaza Piralishvili, philosopher and Nona Gaprindashvili, five-time world chess champion were added to the Commission. Apart to them the Commission members are: Zviad Koridze – the Commission Chairman, journalist, member of the Journalistic Ethic Charter, Lia Mukhashavria – lawyer, human rights defender, Eka Gigauri –executive director of the Transparency International Georgia; Vasil (Basa) Janikashvili – writer, dramaturge; Revaz Kiknadze – rector at the Tbilisi State Vano Sarajishvili State Conservatoire; Konstantine Jandieri – writer; Ucha Nanuashvili – Public Defender of Georgia; Givi Shahnazari – writer; Mitropolit Theodor (Tchudaze) – Chorepiscop of the Catholicos-Patriarch of Georgia, Mitropolit of Akhaltsikhe and Tao – Klarjeti Diocese.

6. THE TENDENCY OF USING PARDON POWER WITH REGARD TO DIFFERENT CRIMES AND THE LIBERAL APPROACH OF THE PRESIDENT OF GEORGIA TOWARDS THE CONVICTS FOR DRUG-RELATED OFFENCES

Between 18 November 2013 and 3 November 2015 the President of Georgia pardoned 1,559 prisoners based on the recommendations of the Pardon Commission in accordance to the following chapters of the Criminal Code of Georgia:¹⁶

An analysis of the information provided by the administration of the President of Georgia¹⁷ has shown that the President has a liberal approach towards prisoners convicted of drug-related offences. Between 18 November 2013 and 3 November 2015, out of a total of 1,559 convicts, the President pardoned 986 (62%) persons for drug-related crimes. 25% of those pardoned were convicted for the crimes against property, while the remaining 13% were for other crimes.

See the tendency in the diagram



Our analysis of the information provided by the administration of the President show that the President rarely pardons those prisoners, who are convicted for violent offences, including crimes against life and health, sexual freedom and inviolability, public security and order, etc.

¹⁶ Letter # 10824 of the head of the department for Rewards, citizenship and pardon Issues, November 3, 2015

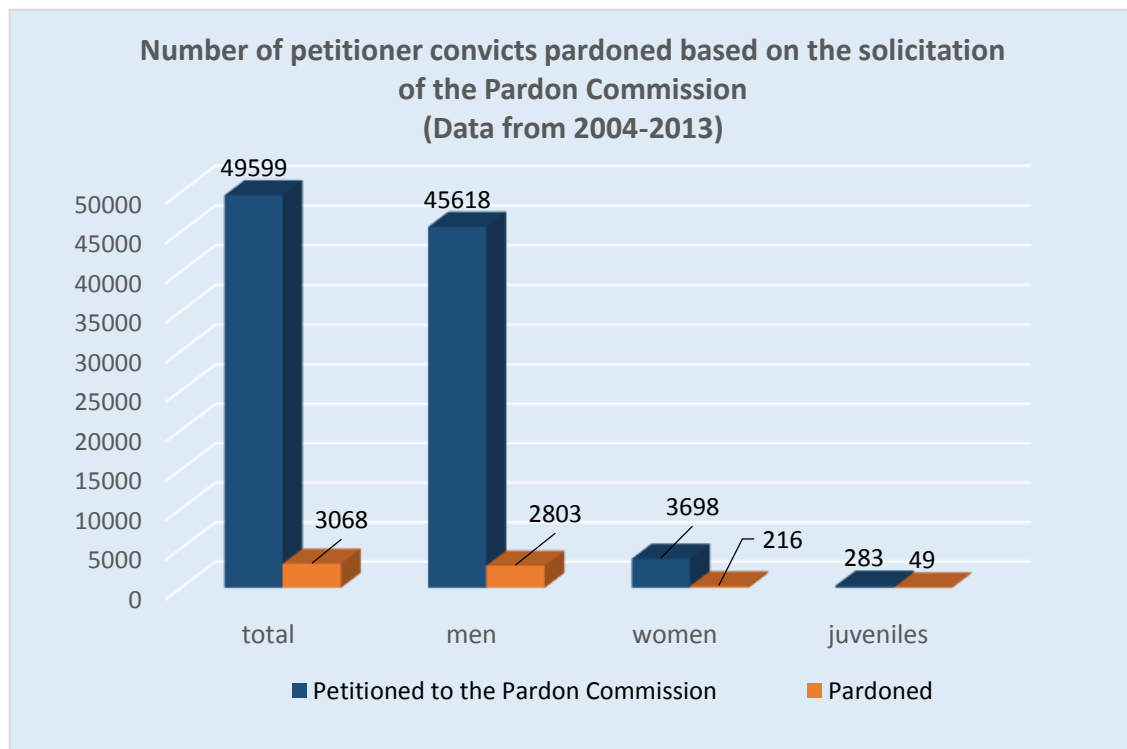
¹⁷ See letter # 10824 of the Georgian President's administration, dated by November 3, 2015

7. TENDENCIES OF USE PARDON POWER IN 2004-2015¹⁸

Between January 2004 and November 2013 49,599 convicts petitioned the Pardon Commission. Among them 45,618 petitioners were men, 3,698 were women, and 283 were juveniles. Among them, based on the recommendations of the Pardon Commission, the President of Georgia pardoned 3,068 convicts. Among those pardoned, 2,803 petitioners were men, 216 were women,¹⁹ and 49 were juveniles.²⁰

Between January 2004 and November 2013, about 6% of the male convicts were pardoned (2,803 out of 45,618 convicted men), about 6% of the female convicts were pardoned (216 out of 3,698 convicted women), and about 18% of the juvenile convicts were pardoned (49 out of 283 convicted juveniles).

See the tendency in the diagram



Between November 2013 and December 2015 13,394 convicts petitioned the Pardon Commission. Among them 12,680 petitioners were men, 627 were women, and 87 were juveniles. Based on the recommendations of the Pardon Commission, the President of Georgia pardoned 1,797 convicts. Among them 1,665 convicts were men²¹, 80 were women,²² and 52 were juveniles.²³

¹⁸ Human Rights Center analyzed data before December 25, 2015 provided by the Department of Rewards, Citizenship and Pardons

¹⁹ 130 women were freed from imprisonment terms; 86 women had their imprisonment terms half-reduced.

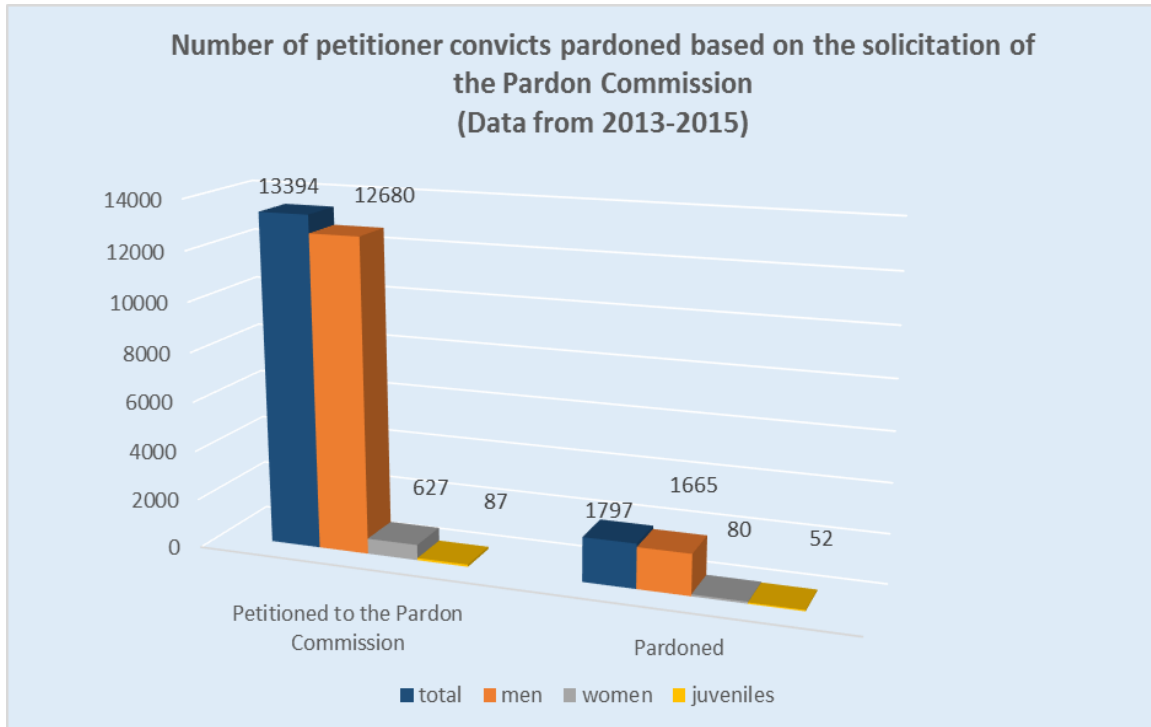
²⁰ 40 juveniles were freed from imprisonment terms, 9 juveniles had their terms reduced.

²¹ 1217 convicts were freed from imprisonment term; 448 had their terms reduced.

²² 49 female convicts were freed from imprisonment terms, 31 had their terms reduced.

Of those pardoned, about 13% of the male convicts were pardoned (1665 out of 12,680 convicted men), about 13% of the female convicts were pardoned (80 out of 627 convicted women), and about 60% of the convicted juveniles were pardoned (52 out of 87 convicted juveniles).

See the tendency in the diagram:



The statistic data²⁴ provided by the President’s administration shows that in the two years between November 2013 until the end of 2015 (1,797 prisoners were pardoned) more convicts were pardoned than in the ten years between 2004-2013 (3,068 convicts were pardoned).

At the same time, it can be observed that from November 2013 the President of Georgia has had a more human approach towards women and juvenile convicts. In the 10 years between 2004-2013 the President pardoned 216 women, he pardoned 80 women in the two years between November 2013 to the end of 2015.

Between November 2013 and the end of 2015 the President pardoned 52 out of 87 juvenile convicts (about 60%).

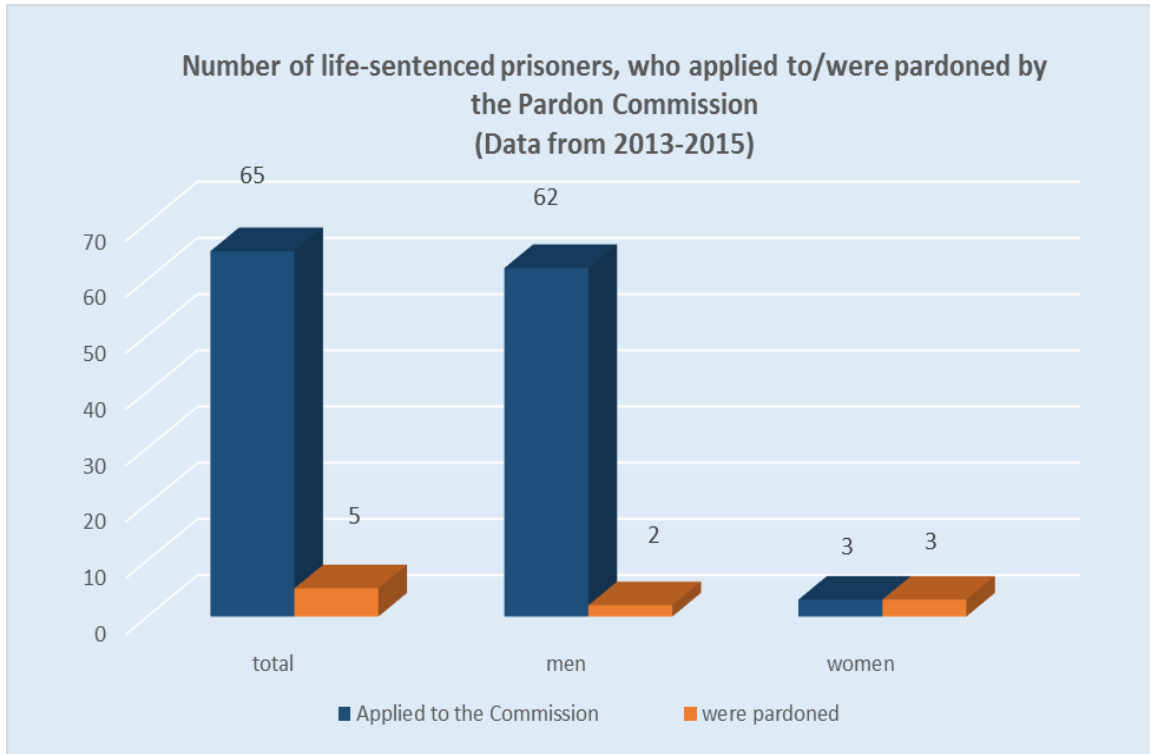
²³ 22 juveniles were freed from imprisonment terms, 30 of them had their prison terms reduced.

²⁴ December 25, 2015 Letter #13020 of the President’s Administration to Human Rights Center

8. PARDON POWER FOR LIFE-SENTENCES

Between November 2013 and the end of 2015, 65 convicts with life sentences (62 men, 3 women) petitioned to the Pardon Commission. Based on the Commission's recommendation, the President pardoned 5 convicts (3 women and 2 men), whose imprisonment due dates were estimated.²⁵

See the tendency in the diagram:



Considering the fact that female convicts (about 300 prisoners) are much fewer than male convicts (approximately 10,000), we can clearly observe a liberal approach of the President of Georgia towards women with life sentences (there were 3 women with life sentences and all of them were pardoned). The President pardoned approximately 3% of men with life sentences (3 out of 62 convicts).

9. REVIEW OF THE PARDON POWER IN ACCORDANCE WITH LEGAL SYSTEMS

In general, different states have different models of pardon power. However, there are some similarities and differences according to the legal systems in each country. The countries with continental law, unlike those with common law systems, strictly regulate pardon power and procedures on constitutional or legislative levels (Novak 2016). For example, in Turkey, Switzerland, and Uruguay mostly the legislative

²⁵ Ibid

body executes the pardon power. In accordance with Article 104 of the Constitution of Turkey, the President is authorized to remit, on grounds of chronic illness, disability, or old age, all or part of the sentences imposed on certain individuals.²⁶ In Switzerland, only the legislative body can issue pardon acts.²⁷ The same procedure is regulated by the Constitution of Uruguay.²⁸

In accordance with Article 47 of the Constitution of Greece, The President of the Republic shall have the right, pursuant to a recommendation by the Minister of Justice and after consulting with a council composed in its majority of judges, to grant pardons.²⁹ However, unlike the recommendation from the Minister of Justice, it is not obligatory to conduct consultations with the Council. In Greece and Denmark, the president can pardon a minister only upon the agreement of the Parliament (Novak 2016).

In some countries like Portugal, Finland, and Indonesia the president is obliged to consult with the government and consider the opinion of the Supreme Court with regard to the specific application of a pardon. In the countries with continental law, the legislative bodies prefer amnesties to pardons (Novak 2016).

Unlike the countries with continental law, in countries with common law, the British model of pardon power dominates. In the period of British colonies, the British monarch delegated pardon power to local governors and they executed it within their jurisdictions. Today, both Commonwealth Member States and all former British colonies have different models of pardon power (Novak 2016).

10. REVIEW OF THE PARDON POWER IN ACCORDANCE WITH STATE GOVERNANCE MODELS

Models of pardon power also differ according to different state governance systems. More precisely, in countries, which are governed with collective bodies (like the German Democratic Republic or Soviet Union in the past, or China in present) the pardon power is assigned to the collegial body (Novak 2016).

In the countries, where executive authority is divided between the president and the prime minister the pardon power needs countersigning. For example, in accordance with Article 94 of the Constitution of Romania, the President pardons convicts.³⁰ However, according to acting regulations, the pardon power applies only to imprisonments and can be applied only after the guilty verdict goes into force. In addition, the President's act is valid only after the Prime Minister countersigns it. The President can also consult with the Minister of Justice, but it is not obligatory to execute the recommendation of the Minister of Justice.

Unlike Romania, the President of Poland is authorized to pardon a person and he does not need the countersignature of the Prime Minister regardless of the fact that similar approval is obligatory for the execution of other constitutional authorities.³¹ In case of France, the President is authorized to lessen a sentence, commute or reprieve punishment - i.e. implement pardon power with a limited scope (Novak 2016).

²⁶ See the Constitution of Turkey available at: http://www.hri.org/docs/turkey/part_iii_2.html

²⁷ See Article 157 of the Swiss Constitution at: <https://www.admin.ch/opc/en/classified-compilation/19995395/201506140000/101.pdf>

²⁸ See Article 85 Section 14 of the Constitution of Uruguay at: https://www.unodc.org/tldb/pdf/Uruguay_const_1967.doc

²⁹ See the Constitution of Greece at <http://www.hri.org/docs/syntagma/artcl50.html#A47>

³⁰ See the Constitution of Romania at: http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=3#t3c2s0sba94

³¹ See the Constitution of Poland, Article 139 at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

To summarize, in countries with continental law the pardon power is clearly regulated by the constitution or/and the law. In some countries a representative of the executive authority fully or partly executes the pardon power (as a rule the President of the states) or this responsibility is assigned to the legislative body. In countries with common law, with respect of historical experience, the British model dominates, but the current systems in each country are significantly amended. In some countries the responsibility of pardons are divided between several persons while in other cases it is executed autocratically, but with limited scope.

11. DECISIONS ON PARDON CASES ACCORDING TO DIFFERENT MODELS

11.1. Decision-making autocratically

Autocratic decisions on pardon cases is most common for countries with common law and the same rule operates in relation with the U.S. President, too. However, similar practices have been established in some EU states. For example, in accordance with Article 62 of the Constitution of Czech Republic, the President of the Republic is granted exclusive pardon power, including the power to pardon and quash the criminal record for the person before a charge was brought against him.³²

In accordance with the Constitution of the Kingdom of Bhutan, the monarch has absolute and unlimited power to pardon a person or issue an act of amnesty.³³ The same regulations function in Bangladesh, Maldives and Sudan (Novak 2016). The same regulations work in several states of the U.S. (total 21 states). For example, the Governor of California is authorized to autocratically make decisions on pardon cases including impeachment procedures. However, he requires the recommendations of four justices of the Supreme Court of the State if the petitioning prisoner has been convicted two or more times in the past.³⁴

11.2. Decision making together with the minister

The constitutions and legislation of several countries require participation of a government member (Minister) in the decision making process on pardon cases. The participation of the government member in the process may be obligatory or have an advisory character. The participation of the government member is based on the need for a person, who is accountable before the people, to also participate in the pardon process, making it more fair (Novak 2016).

For example, in the case of New Zealand the Governor General of Zealand makes decisions on pardons together with the Minister of Justice (Novak 2016). In accordance to Article 13 Section 6 of the Constitution of Ireland, the President is authorized to pardon a person, including to commute specific sentences and suspend or reprieve punishment. However, the commuting or suspension of the punishment may be delegated to another authorized person as specified in the law.³⁵ In this part of pardon granting process the Minister of Justice may make the decision autocratically.

³² See the Constitution of Czech Republic at <http://www.psp.cz/cgi-bin/eng/docs/laws/1993/1.html>

³³ Article 2 (16) of the Constitution of Bhutan at <http://www.bhutanaudit.gov.bt/About%20Us/Mandates/Constitution%20of%20Bhutan%202008.pdf>

³⁴ See Article 5 (8) of the Constitution of California at http://www.leginfo.ca.gov/const/article_5

³⁵ See the Constitution of Ireland at: http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/

In the state of Florida, the governor is authorized to suspend or relieve punishments that do not exceed sixty days, except in the cases of impeachment and state treason. However, for full implementation of the pardon power, the governor needs the approval of at least two members of the Cabinet of Ministers.³⁶

11.3. Decision-making together with the government (full Cabinet of Ministers)

The legislation of several states requires the participation of not only government members, but of the entire government as a collegial body in the decision making process to pardon. It aims to delegate the responsibility of the decision to pardon to the entire executive government equally (Novak 2016).

For example, according to the Singapore Constitution the government, with the participation of the Prime Minister and MPs, issues an advisory conclusion on the pardon case and the President makes the final decision.³⁷ In accordance with the Constitution of Zimbabwe, the President makes the decision to pardon upon consulting with the government.³⁸ According to Botswana legislation, consultation with the government is necessary if it has practical purposes (Novak 2016).

In the case of India, the president of the country and governor of the state have the authority to pardon. However, in accordance with the case law of the Supreme Court of India, the president or governor should consult with the Council of Ministers when making decision to pardon. The decision of the Council of Ministers must be executed. If the President does not agree with the Council's conclusion, he returns the case with comments back to the Council for a repeated discussion. The Council of Ministers again considers the comments of the President and can decline them. In this case, the Council again sends the conclusion to the President and the latter makes the decision to pardon. Due to the complicated nature of the procedures, since 1997 three different presidents have pardoned only one out of twenty-six petitions (Novak 2016).

11.4. Making decision together with the advisory body

Making the decision to pardon together with an advisory body differs from the decision making process with the participation of the Cabinet of Ministers or Pardon Commission. The advisory body provides recommendations to the authorized person not only in cases of pardons, but generally about any issues (Novak 2016).

The constitution of Ghana obliges the President of the country to make decisions about pardons together with the Council of State.³⁹ The Council of State is a traditional assembly of elders, which gives recommendations to the President about issues within his competence. The elected members, citizens appointed by the President, Defense Minister, Inspector General of Police, and Chairman of the Upper Chamber of the Parliament with ex officio status all make up the Council of State together with the elders. There are twenty-four members in the Council and it is one of the largest bodies among the Commonwealth countries which participates in the decision making process by the government, including issues related with pardon power.⁴⁰

³⁶ See the Constitution of Florida, Article 4(8) at: <http://www.leg.state.fl.us/statutes/index.cfm?submenu=3#A4>

³⁷ See the Constitution of Singapore, Article 22P at <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=fea16a0c-d9c2-44fa-926a-69218f273b07;page=0;query=DocId%3A%22cf2412ff-fca5-4a64-a8ef-b95b8987728e%22%20Status%3Ainforce%20Depth%3A0;rec=0#pr22P-he->

³⁸ See the Constitution of Zimbabwe, Article 112(1) at https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf

³⁹ See the Constitution of Ghana, Article 72 (1) at http://www.judicial.gov.gh/constitution/chapter/chap_8.htm

⁴⁰ See <http://www.ghana.gov.gh/index.php/governance/council-of-state>

The case is similar in the state of Massachusetts. Namely, the state governor is authorized to consult with the Governor's Council before making a decision on issues within his competence. The Council has eight members who are elected from different settlements of the state. However, unlike the Ghana model, the Council's conclusion does not have an advisory nature. The conclusion issued by the Council on a pardon issue is obligatory and the governor must execute it.⁴¹ The model in the state of New Hampshire is also same. The state governor is obliged to follow the recommendation of the Executive Council regarding the pardon. There are five members in the Council who are elected from five settlements within the state and, like the Council of Massachusetts, they can veto the Governor's decision.⁴²

11.5. Making decision together with the Pardon Commission

An authorized person to pardon may establish a special body which issues recommendations about each pardon case. This model works in different countries like: Zambia, Malaysia, Papua New Guinea, Malawi, Belize, Solomon Isles, etc (Novak 2016).

This model is used in several states in the U.S. For example, the governor of the State of Wisconsin enjoys absolute discretion when making a decision on a pardon case. However, a Pardon Commission is created under the auspices of the governor's administration, which includes a representative of the Department of Justice, four members from society, and employees of the legal department of the governor. The commission sends recommendations to the governor about each pardon case.⁴³

In accordance with the legislation of the state of Iowa, the state governor is obliged to consult with the Pardon Commission even though its recommendations are not obligatory.⁴⁴ The same model works in the state of Kentucky, namely according to the state constitution, the governor is obliged to consult with the Pardon Commission, but its conclusion is not obligatory.⁴⁵ In the state of Maine, the Pardon Commission reviews the pardon application with an oral hearing and the participation of the applicant. After this procedure, the Commission sends a recommendation to the governor.⁴⁶ Similar procedures are envisaged in the legislation bodies of the states of Michigan and Missouri. In both states, the Pardon Commission considers the pardon cases at oral hearings and sends recommendations to the governor.⁴⁷ Similar regulations work in the states of South Dakota, Colorado, Tennessee, and Maryland.

11.6. Decision-making exclusively by the Pardon Commission

In some states in the U.S. the Pardon Commission makes the final decision on pardon cases. This model is applied in the following states: Alabama, Connecticut, Georgia, Idaho, Minnesota, Nebraska, Nevada, South Carolina, and Utah. In accordance with the legislation of the state of Nevada, the Pardon Commission is made up of the Governor, justices of the Supreme Court of the state and the Chief Prosecutor of the state (Novak 2016). In case of Minnesota, the Commission is made up of the Governor,

⁴¹ See <http://www.mass.gov/portal/government-taxes-public-service/about-state-government/govs-council.html>

⁴² See the Constitution of New Hampshire, Article 52 at <https://www.nh.gov/constitution/governor.html>

⁴³ See the Constitution of the State of Wisconsin, Article 5(6) at <https://docs.legis.wisconsin.gov/constitution/wi>

⁴⁴ See the Constitution of the State of Iowa, Article 4(16) at <https://www.legis.iowa.gov/docs/publications/icnst/402726.pdf>

⁴⁵ See the Constitution of the State of Kentucky, Article 77 at <http://www.lrc.ky.gov/legresou/constitu/077.htm>

⁴⁶ See the Constitution of the State of Maine, Article 5(11) at <http://legislature.maine.gov/const/>

⁴⁷ See the Constitution of the State of Michigan, Article 5(14) at [http://www.legislature.mi.gov/\(S\(15ygf052jfqbs44xw5mcejz\)\)/mileg.aspx?page=getObject&objectName=mcl-Article-V-14](http://www.legislature.mi.gov/(S(15ygf052jfqbs44xw5mcejz))/mileg.aspx?page=getObject&objectName=mcl-Article-V-14) also the Constitution of the State of Missouri, Article 4(7) at <http://www.moga.mo.gov/MoStatutes/ConstHTML/A040071.html>

Chief Prosecutor of the State, and justices of the Supreme Court of the state.⁴⁸ The Pardon Commission of the State of Alabama has the same members.

In case of the state of Idaho, the Commission has five members, who are appointed by the governor and approved by the legislative body of the state for three years. Only three out of five Commission Members may represent one and the same political party.⁴⁹ In South Carolina, the state governor appoints seven members of the Pardon Commission, who discuss the issues related to the pardon.⁵⁰ In the state of Utah, the governor appoints the Pardon Commission members upon agreement of the state senate, who are authorized to make final decisions on pardon cases.⁵¹ The governor of the state of Georgia appoints five members to the Pardon Commission for seven years. The governor of the state of Connecticut is also authorized to appoint Commission members.

12. COMPARATIVE ANALYSIS OF THE PARDON POWER AND INTERNATIONAL PRACTICE

12.1.Austria

In accordance with Article 65 Section 2 (c) of the Constitution of Austria, in individual cases the President is authorized to pardon persons sentenced without further resources of appeal, to mitigate and commute sentences pronounced by the courts, as an act of grace to annul sentences and to grant remission from their legal consequences, and moreover to quash criminal proceedings in actions subject to prosecution ex officio.⁵²

It is noteworthy that the President of Austria enjoys his authority under the Constitution only in the case of an appeal from the Minister of Justice and a relevant recommendation from the Minister.⁵³ Unlike the U.S. model, in Austria, the Minister of Justice makes the decision to pardon and the President just formally approves it. This model is based on the President's status and his constitutional power.

In addition to individual pardons by the President, amnesties (Christmas Amnesty or Weihnachtsamnestie) are actively used in Austria, when every year hundreds of prisoners are pardoned on Christmas.⁵⁴ This authority is also executed by the Minister of Justice.

12.2.Bulgaria

In accordance with Article 98 Section 11 of the Constitution of Bulgaria the President can exercise the right to pardon.⁵⁵ The President of Bulgaria delegated this power to the Vice-President.⁵⁶ In addition, based on the Presidential Edict #80, issued on 23 February 2012, a Pardon Commission was established

⁴⁸ See the Constitution of the Minnesota Article 5(7) at https://www.revisor.mn.gov/constitution/#article_5

⁴⁹ See the Constitution of Idaho Article 4(7) at <http://legislature.idaho.gov/idstat/IC/ArtIVSect7.htm>

⁵⁰ See S.C CODE ANN at <http://www.scstatehouse.gov/code/title24.php>

⁵¹ See the Constitution of Iota Article 7(12) at <http://le.utah.gov/UtahCode/section.jsp?code=Article%20VII>

⁵² See the Constitution of Austria at: https://www.constituteproject.org/constitution/Austria_2009.pdf

⁵³

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/365085/New_Global_Prisoners_Pack_AUSTR.pdf

⁵⁴ Ibid

⁵⁵ See the Constitution of Bulgaria at <http://www.parliament.bg/en/const>

⁵⁶ <http://www.president.bg/cat21/87/pardons-committee.html&lang=en>

which prepares opinions about every individual case and submits recommendations to the President or Vice President. Non-governmental organizations may participate in the Pardon Commission though they do not have the right to vote.⁵⁷

This edict regulates the functions of the commission, its membership, rules for reviews of pardon applications, and the decision-making process. In accordance with Article 1 Section 1 of the edict, the Commission has an advisory role and prepares expert opinions. It is accountable to the President or Vice President. The Commission acts in accordance with the legislation of Bulgaria and their expert views, which also consider the opinions of the legal council working on the pardon issues under the auspices of the President as well as requirements of international human rights documents and relevant practice.⁵⁸

Functions of the Commission are:⁵⁹

- ❖ to assist the President to execute the constitutional authority of pardon; prepare and present a well-grounded decision about each pardon application to the President or Vice President;
- ❖ to elaborate and establish a policy by the state with regard to pardons and to analyze relevant practices of local and international courts, scientific publications, and other significant information;
- ❖ to promote the protection of human rights when implementing pardons; to process, analyze, and make publicly available the outcomes of the Commission's work; to participate in and provide professional recommendations to the legal council of the President working on pardon issues;
- ❖ to implement its functions, the Commission shall adopt all necessary regulations related with its performance; to ensure the elaboration of fair and equal rules through respecting the peculiarity of each case, public interests, and rights and interests of the applicant;
- ❖ to estimate the terms to consider an application, procedures, and pre-conditions for the acceptance of the case and application.

The commission is composed of the chairman and members. The Commission structure is approved by the President's decree. One Commission member is elected every twelve months by members of the Legal Council working on pardon issues under auspices of the President; they are specialists of criminal law, criminal procedural law, enforcement law, European law or human rights law. The Commission chairman and permanent members are appointed by the President's decree. **The Commission members receive salaries from the budget of the President's administration while the Commission chair receives his salary in accordance with labor agreement regulations.** Employees of the President's administration provide the Commission with logistical assistance.⁶⁰

The Commission implements its functions through plenary sessions. The Commission meets at least twice a month and has power if at least four-fifths of its member participate. The Commission makes decisions with a simple majority after having heard the opinions of each member attending the session. If the votes are divided, the Chair has decisive vote. The Commission decides each case within two weeks of receiving an application. The term may be extended only in exceptional cases with the preliminary agreement of the President.⁶¹

⁵⁷ Ibid

⁵⁸ See <http://www.president.bg/cat21/87/pardons-committee.html&lang=bg>

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid

12.3.Ireland

In accordance with Article 13 Section 6 of the Constitution of Ireland, the right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities.⁶²

Procedures related with the decision-making on pardon are regulated by the Criminal Procedure Act of Ireland.⁶³ In accordance to Section 7 of the Act, if a person, who has been convicted of an offence and afterwards appeals against the conviction stands convicted of an offence, and alleges that a new or newly-discovered fact shows that a miscarriage of justice has occurred in relation to the conviction, he can petition the Minister for Justice.⁶⁴

The Minister for Justice accepts and reviews the application if he is of the opinion either that the matters dealt with in the petition could appropriately be dealt with. If a case has not been made that a miscarriage of justice has occurred and that no useful purpose would be served by further investigation, the Minister informs the petitioner accordingly and take no further action.⁶⁵

In any other case the Minister for Justice recommends the government that it should advise the President to grant a pardon. The government creates special committee to investigate the facts indicated in the application and, if they are valid, address to the President to grant pardon.

The Committee functions as a tribunal and it is composed of one or more acting or former justices. The Committee may process all evidence admissible under the national law during ordinary litigation process. If the Committee issues a conclusion in the affirmative, it is sent to the President, who makes final decision on pardon.⁶⁶

12.4.Poland

In accordance with Article 139 of the Constitution of Poland, the President of the Republic has the power of pardon. The power of pardon may not be extended to individuals convicted by the Tribunal of State. In accordance with Article 198 of the Constitution, for violations of the Constitution or of a statute committed by them within their office or within its scope, the following persons shall be constitutionally accountable to the Tribunal of State: the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces.

The President of Poland makes autocratic decisions on pardons. Unlike other constitutional authorities, the President's decision on a pardon does not require a countersignature by the Prime Minister.

⁶² See the Constitution of Ireland at http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/

⁶³ See <http://www.irishstatutebook.ie/eli/1993/act/40/enacted/en/html>

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

Chapter 59 of the Criminal Procedure Code of Poland regulates the procedures of clemency.⁶⁷ A petition for clemency with respect to a sentenced person may be filed by that person, by a person authorized to bring an appellate measure on his behalf, by direct lineal relatives, an adoptive parent or adopted child, brother, sister, or spouse of the sentenced person or a person who cohabitates with the sentenced person.⁶⁸

The petition for clemency is forwarded to the court which has rendered the judgment in the first instance. The court examines the petition for clemency within 2 months from the date on which the petition was received.

In the event that the decision was issued by a single-judge panel, the order is issued by a panel of one judge and two lay judges. In examining the petition for clemency, the court takes into special consideration:

- ❖ the conduct of the sentenced person while serving his sentence;
- ❖ the time already served;
- ❖ his state of health and family circumstances after the rendering of the judgment;
- ❖ the degree to which the damages caused by the offence have been repaired; and
- ❖ above all, any special circumstances which may have occurred after the rendering of the judgment.

If the court affirms the decision for clemency, the Attorney General presents the decision to the President. In the case that the petition of clemency is submitted directly to the President, the petition is referred to the Attorney General, after which, in the case of affirmation, he presents the decision to the President. If the clemency petition is not approved, the applicant may file repeated applications to the Court no sooner than 6 months after his most recent application.

Once the President receives a recommendation, he can choose whether or not to approve it.

12.5. Romania

In accordance with Article 94 (d) of the Constitution of Romania, the President has the right to grant pardons. In accordance with Article 100 of the Constitution, the decrees issued by the President of Romania in the exercise of his powers, must be countersigned by the Prime Minister. It is noteworthy that the President of Romania, like the President of Poland, can grant pardons only to prisoners.

Like Poland, a petition for clemency is given to the President of Romania via the courts. After granting a pardon to a person, based on Article 459 of the Criminal Procedure Code, the court which passed the original guilty verdict issues the verdict on his pardon.⁶⁹

12.6. Hungary

In accordance with Article 9 of the Constitution of Hungary, the President has the right to grant a pardon.⁷⁰ Presidential pardons may be granted for specific sentences, whereas in the case of criminal measures it only covers conditional sentencing and detention for juvenile delinquents.⁷¹

⁶⁷ See Criminal Procedure Code of Poland at

file:///C:/Users/user/Downloads/Polish%20CPC%201997_am%202003_en.pdf

⁶⁸ See Constitution of Hungary at: https://www.constituteproject.org/constitution/Hungary_2011.pdf

⁶⁹ See the Criminal Procedure Code of Romania at

http://www.vertic.org/media/National%20Legislation/Romania/RO_Criminal_Procedure_Code.pdf

⁷⁰ See the Constitution of Hungary at https://www.constituteproject.org/constitution/Hungary_2011.pdf

The President of the Republic is not bound by any conditions or circumstances when exercising his rights. However, the President cannot proceed directly on pardons cases. The President's power to pardon is dependent on the Minister of Public Administration and Justice or the Supreme Prosecutor. The President does not discuss the reasons for granting or denying a pardon. The ruling of the President enters into force if the Minister of Public Administration and Justice countersigns it.⁷²

The right of the President to grant a pardon does not extend to any related consequences of having a criminal record and do not expunge the petitioner's name from the criminal records registry. The individual pardon process is conducted in accordance with the stipulations of the Criminal Procedure Code. Petitions to terminate the criminal process may be submitted to the authority acting in the case. When a court sentence is final, petitions related to the punishment, conditional sentences, remission or commutation of a juvenile detention sentence, as well as petitions for the relief from any collateral consequences of a criminal record must be submitted to the competent court.⁷³

Petitions for procedural pardons may be submitted by the accused, suspect, or defendant, or by an official representative or a relative of the accused. The documentation for a decision and the pardon petition is then forwarded by the proceeding authority to the Supreme Prosecutor prior to an indictment. If the indictment has already been filed, then the court sends it to the Minister of Public Administration and Justice. In cases involving procedural pardons, recommendations to the President of the Republic are made by the Supreme Prosecutor prior to an indictment and after it by the Minister of Public Administration and Justice, whereas for all cases involving the remission or commutation of a sentence, conditional sentencing or juvenile detention, the Minister of Public Administration and Justice has the right to make recommendations to the President of the Republic. The President also makes a decision in accordance with the same principle. An applicant or his defense attorney cannot present verbal argumentation when discussing the pardon issue.⁷⁴

A negative decision for pardon petition cannot be appealed. However, the petitioner can repeatedly apply to relevant bodies and the President will review the new petition regardless of any previous negative decisions.

12.7.Croatia

In accordance with Article 98 of the Constitution of Croatia, the President has the right to grant a pardon.⁷⁵ The procedures of decision-making on pardons are regulated by the pardon act.⁷⁶ In accordance with Article 1 of the Act, the President of the Republic of Croatia grants pardons to convicted persons for criminal sanctions pronounced by the courts in the Republic of Croatia.

Pardon proceedings are initiated by an application for a pardon for a convicted person. An application may also be submitted by a person who is authorised to submit an appeal in favour of the defendant.⁷⁷ If the petition is declined, an application may be repeated one year after the day of the last pardon decision,

⁷¹ http://www.keh.hu/presidential_pardons/1585-Presidential_pardons&pnr=1

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ See the Constitution of Croatia at <http://www.sabor.hr/fgs.axd?id=17074>

⁷⁶ See the Pardon Act at <http://pak.hr/cke/propisi,%20zakoni/en/PardonAct/EN.pdf>

⁷⁷ Ibid Article 4

if a punishment of more than three years of imprisonment was pronounced by a ruling. If a punishment of up to three years of imprisonment or a more moderate punishment was pronounced by a ruling, the application may be repeated after only six months. The application of a convict punished with a life sentence may be repeated only ten years after the day of the last pardon decision.⁷⁸

The convict petitions the Minister for Justice for clemency. The Minister will reject the petition if:

- it is estimated that the circumstances in the petition do not form the basis for clemency;
- the petitioner withdrew his petition;
- the petitioner is deceased; and
- if the court's verdict is an extraordinary legal tool.

If these circumstances are not observed, the Minister for Justice informs the penitentiary or the prison, the court of first instance and the executive judge that an application was submitted and requests them to provide data which are relevant for the drafting of an application report. These bodies are obliged to deliver the data requested by the Ministry having jurisdiction over judicial matters without any delay and may also deliver other data which are of relevance for the examination of the application. The Ministry having jurisdiction over judicial matters may also request any data necessary for deciding on the application from other state bodies, institutions, units of local and regional self-government and other entities.⁷⁹

The Minister for Justice delivers the application to the President of the Republic together with all the reports and data which are relevant for a decision.⁸⁰

The President of the Republic delivers a pardon decision to the convict via the Minister for Justice. The Minister of Justice is obliged to inform the applicant, the court of first instance, the penitentiary or the prison and the executive judge. The pardon decision is published in the official publication of the Republic of Croatia.⁸¹

12.8. Czech Republic

In accordance with Article 62 of the Constitution of Czech Republic, the President of the Republic may grant pardons or commute sentences imposed by courts and order that a criminal record be expunged.⁸²

Although the President of Czech Republic has an absolute prerogative to pardon, in accordance with the acting laws, the current President of the Republic, Milos Zeman, has delegated this power to the Minister for Justice. More precisely, in every single case, the President individually makes a decision which case will be reviewed by him or by the Minister for Justice.⁸³

The previous president, Vaclav Klaus (2003-2013), received 5,000 applications and granted a pardon to only 412 petitioners. However, some of these decisions were quite controversial and ultimately led to the

⁷⁸ Ibid Article 5

⁷⁹ Ibid Article 9

⁸⁰ Ibid Article 11

⁸¹ Ibid Article 12

⁸² See the Constitution of Czech Republic at

http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Ustava_EN_ve_zneni_zak_c.98-2013.pdf

⁸³ <http://www.praguepost.com/czech-news/49487-president-zeman-grants-no-pardons>

initiation of impeachment procedures for the President. In 2015, 400 petitions were registered at the Ministry of Justice, but the President did not pardon any of them. The President stated that he exercises his power only for humanitarian purposes (namely for grave health conditions).⁸⁴

The President of Czech Republic, based on his own personal views, is reluctant to exercise his absolute and exclusive power of pardon.

13. PARDON ACTS ACCORDING TO THE GEORGIAN MODEL AND RELATED SHORTCOMINGS

13.1. The legal nature of the pardon act by the President of Georgia

In accordance with Article 5 of the Edict #120 of the President of Georgia, the clemency is issued based on a decree by the President.

The President has constitutional right to grant pardons to convicts in accordance with Article 73 Section I (n) of the Constitution of Georgia.

When pardoning convicts, the President does not perform administrative activities, since the decree is not an administrative-legal act and as such is not regulated by the General Administrative Code of Georgia and consequently cannot be appealed at the Court. When executing the pardon power the President does not represent the administrative body. The pardon of convicts is a constitutional-legal responsibility of the President and is the exclusive prerogative of the President with wide discretion.

In compliance with the Edict #120, the President grants pardon to convicts. From a legal point of view, the President does not issue any legal act for rejected pardon applications. If the President does not issue a pardon within thirty days after the Pardon Commission's session, it means he has not granted the petitions.

Due to legal nature of the Act of Clemency, the President pardons convicts, the constitutional right to pardon aims at clemency and not rejecting the pardon petitions. However, no respond to the pardon petitions means denial to pardon for the convicts, who have petitioned to the President but were not pardoned.

13.2. Legal nature of the Pardon Commission and rules of its formation

In accordance with Presidential Edict #120, *“The Pardon Commission is established to discuss the pardon petitions and clemency of convicts, as well as quashing of past criminal sentences of former convicts and present relevant recommendations to the President of Georgia.”*

The Pardon Commission is an advisory body of the President. It assists the President to execute the constitutional power of pardon and to make decisions on clemency.

The Commission makes positive or negative decisions on pardon petitions through studying individual cases based on the criteria presented in the March 27, 2014 Edict # 120 of the President.

⁸⁴ Ibid

The Commission, as an advisory body, issues recommendatory decisions. The President of Georgia considers the recommendation of the Commission and makes final decision on it.

In accordance with Edict #120, the President may pardon convicts without consulting the Pardon Commission and by ignoring the pardon criteria.

Due to the constitutional nature of the pardon, the President of Georgia may pardon convicts even in the absence of the Pardon Commission.

Neither legislative nor law-subordinate normative acts regulate the rule and procedures of the formation of the Pardon Commission, selection criteria of its members, and the number of members for a miscarriage. It is desirable to normatively regulate the number of the Pardon Commission members and their educational requirements.

In accordance with 26 November 2013 Edict #928 of the President of Georgia, only the names and positions of Pardon Commission members are listed. Edict #120 only states that the Commission members are the Public Defender of Georgia and others.

Lawyers of Human Rights Center, in its survey, interviewed five members of the Commission⁸⁵, representatives of academic circles,⁸⁶ non-governmental organizations,⁸⁷ and practicing lawyers⁸⁸ to ascertain the rules establishing the formation of the Pardon Commission. Two different points of view emerged as a result of the interviews:

Some of the members of the Commission think it is desirable to regulate the Commission's formation and procedures. Selection criteria on a normative level that would make the the pardon power more well thought out in Georgia. Other members believe it is not reasonable to regulate the formation of the Pardon Commission with normative acts because the Commission is the President's advisory body and the President forms it in accordance to his personal views and with trusted members that cannot be prescribed in advance.

Due to the significant status of the Pardon Commission and mandate of its members, it is desirable to determine the formation rule of the Pardon Commission, procedure, and criteria for the members' selection with normative acts that will promote increased public awareness about the acting pardon power in Georgia.

Commission members also drew attention about the educational requirements of members and whether or not lawyers should make up majority of the Commission.

Today, the Commission Members are represent different professional backgrounds. They are writers, journalists, lawyers, human rights defenders, musicians, and a representative of the Georgian Orthodox Patriarchate and Public Defender.

⁸⁵ Zviad Koridze, Lia Mukhashavria, Eka Gigauri, Ucha Nanuashvili, Givi Shahnazari

⁸⁶ Professors of the Law Faculty of the Tbilisi Iv. Javakishvili State University

⁸⁷ Lawyers of the Georgian Young Lawyers' Association, Article 42 of the Constitution and Human Rights Center, who actively cooperate with the Pardon Mechanism. The NGOs were selected for the interview in accordance to the aforementioned criteria.

⁸⁸ Lawyers, members of the Georgian Bar Association, who actively cooperate with the Pardon Mechanism.

Five Commission members, relevant academics, NGOs, and practicing lawyers were interviewed about their views on educational requirements of Commission members. Two main opinions emerged: the majority of interviewees believes that since clemency is humanitarian act, the Commission members should represent different professions and not only lawyers, who, due to their profession, will try to consider the cases only as they pertain to the law. A small number of interviewees thinks the Pardon Commission should be composed mostly of lawyers and good specialists within the penitentiary sector, who can better assess cases of clemency. A number of Pardon Commission members desired to have a doctor, teacher and psychologist in the Commission, professions which are able to consider the petitioner's personality from different perspectives due to their professional backgrounds. For example, when a convicted has severe health problems and petitions for a pardon on these grounds, the Commission members need the qualified opinion of a doctor to ascertain how grave the health conditions of the applicant are and whether or not his disease is relevant to the term of imprisonment. The involvement of a teacher, psychologist and social worker is particularly important when reviewing petitions of juveniles.

This study concludes that it is desirable to have Pardon Commission members with diverse backgrounds, as they are more prepared to deal with the human nature of clemency. More specifically, it is advisable to have members with a medical, teaching, and psychology background.

13.3. Conflict of interests among Pardon Commission members

Edict #120 regulates issue related to conflicts of interest among Pardon Commission members. Article 4 states that there is a conflict of interest among Pardon Commission members during a petition for a pardon petition if:

- a commission member has provided or provides a petitioner with legal aid and he has petitioned the President for clemency;
- a convict or former convict, who has petitioned the President for clemency, is relative of a Commission member as is stated in Article 31 Section 2 of the Civil Procedure Code of Georgia⁸⁹;
- a Commission member was or is financially linked with the activities of the legal person or organization, which is providing the petitioner with legal aid and if the Commission member is aware of it.

A conflict of interest is a real or possible obstacle between the private interests of a person and his public or/and corporate obligations.⁹⁰ The Edict provides a short clarification of conflict of interests and underlines possible links of the Commission members with the petitioner.

A Pardon Commission member, who has a conflict of interest with a petitioner, will not attend the discussion process of that case and will not participate in the vote.

13.4. Clemency based on standard and special circumstances

The standard criteria for clemency are determined in Article 2 Section I and II of Edict #120. In accordance with the standard criteria, a pardon does not apply to the convicts, who have not served part of their term, who are negatively evaluated by the prison administration, for whom all three instances of the

⁸⁹ In accordance to the Article 31 Section 2 of the Civil Procedure Code, relatives are: wife, engaged person, relatives in direct line, siblings, nephews and nieces, uncles and aunts, in-laws who have been relative for a long time.

⁹⁰ Dictionary of main legal terms, Tbilisi Appeal Court http://oldtbappeal.court.ge/upload/sr_187.pdf

court have not finished their discussion of the petitioner's case, the term estimated by the law for the appeal of the court verdict in the upper instances has not expired, or if the convict does not ask for clemency.

In accordance with Article 2 Section III of the President, the Pardon Commission reviews the case of the convict notwithstanding the standard criteria if there are *special conditions*. However, the Edict does not define what the phrase *particular conditions* means, creating some confusion for convicts and lawyers. Convicts do not know what these conditions are and which are considered special by the Pardon Commission.

Lawyers working in the non-governmental sector and private lawyers spoke about the confusion around the special conditions and unpredictability of the process for the convicts in their interviews with Human Rights Center. They have regular interaction with convicts and prisoners often ask what is meant by *special conditions* and what they think the Pardon Commission deems a *special condition* under which they can petition the Commission.

The lawyers state that this confusion causes discontent among convicts. They complain that they cannot understand the criteria by which the Commission considers one *special* case and not another by another convict.

The majority Pardon Commission members who were interviewed believe the Commission, due to its mandate, cannot revise a court's verdict or estimate its legitimacy, but considering the special conditions of a case, may take into consideration the conclusions of competent organizations about unfair judgments.

Commission members also stated that although miscarriages of justice have been a systemic problem in Georgia for years and many convicts were victims of those miscarriages,⁹¹ the Commission members cannot substantially discuss the verdicts for the purposes of identifying injustices; it contradicts the essence of clemency and the mandate of the Commission.

The increased of petitions to the Commission since 2012 was a result of the ineffective work at local councils at the Ministry of Corrections.

Human Rights Center, in its interviews with five members of the Pardon Commission asked about the use of the special conditions in practice and what they considered to be a special condition and whether it should be determined by normative act or by internal deliberation of the Commission.

All members of the Pardon Commission said they mostly consider the following circumstances, but not only, as special conditions:

- the health of the convict as supported by medical documents;
- difficult family circumstances of the convict, including very poor health or the decease of a family member;
- the status of torture victim of the convict and recognition as a victim;
- a short period (several months) remaining before the end of the prison term;
- if reports by the Public Defender and international organizations mention obvious arbitrary judgment against the convict or ill-treatment of the convict;
- if the convict has underage children whose only bread-winner is the convict;

⁹¹ Since 2012 many convicts in the penitentiary establishments hoped for the establishment of the Commission to Identify Miscarriages of Justice

- in case of a juvenile convict, if the petitioner has a desire to receive an education; and
- cases of obviously arbitrary verdicts, about which competent non-governmental organizations have drawn conclusions and raised questions among society.

The majority Pardon Commission members who were interviewed believes it is impossible to define special conditions because there always might be a condition that the Commission will consider as special and it is not acceptable to limit the Commission in this regard. A small number of Commission members think it is possible to determine an unlimited list of particular conditions in the form of a normative act, in an act by the President or even in a non-normative form, such as internal instruction of the Pardon Commission.

There are some lawyers in non-governmental organizations who do not think that any provision related to clemency should be ambiguous; it should be predictable for convicts. The lawyers think convicts should be more aware about pardon criteria. It is possible that the Pardon Commission define an unlimited list of special conditions in the form of internal instructions.

According to information provided by the Department for Rewards, Citizenship and Pardons at the Administration of the President of Georgia,⁹² between 18 November 2013 and 9 July 2015, based on the recommendations of the Pardon Commission, the President of Georgia pardoned 19 convicts based on special conditions.

Convicts should receive information about the nature, rules and criteria of clemency to avoid false expectations and a feeling of partiality and confusion towards the pardon power.

The Pardon Commission should elaborate an unlimited list of particular conditions as determined by the rule of clemency so that the convicts may understand what a special condition is according to the Commission and when they can petition the Commission. It will promote a raised awareness of the convicts about the work of the Pardon Commission.

The Department of Rewards, Citizenship and Pardons at the Administration of the President of Georgia should systematically analyze the practice of special conditions leading to information that the members of the Pardon Commission can internalize.

13.5. Confession – one of the criteria for clemency

In accordance with Article 9 Section I of Edict #120, “When discussing the pardon petition, the Commission takes into account whether the convict admits and regrets the committed crime.” Although confession is not obligatory, in practice it has particular importance in the decision-making process by the Pardon Commission.

Before Edict #120 was adopted, if the prisoner did not acknowledge their part in the crime, the Pardon Commission could not consider his case.

⁹² Letter # 8398 August 20, 2015 of the Department of Rewards, Citizenship and Pardons at the Administration of the President of Georgia to Human Rights Center

Although a confession is no longer an obligatory precondition for a pardon and it should not impact the pardon, representatives of the NGO sector and practicing lawyers state⁹³ they often encountered in practice the fact that confession is a decisive factor for a pardon.

The confusing and controversial formulation of the criteria for a confession in Article 9 of Edict #120 may place convicts, who admit their crime, in a more privileged position. Convicts who do not admit their guilt and believe they are victims of unfair judgments, may forfeit their chance to be pardoned.

In accordance to the written clarification⁹⁴ of the Head of the Department for Rewards, Citizenship and Pardons at the President's Administration, based on the March 27, 2014 Edict # 120 of the President, confession of the committed crime by the convict is not obligatory pre-condition for the Pardon Commission to discuss the case. It is necessary to file only pardon petition and to meet the criteria determined by the law.

Commission members⁹⁵ stated in interviews that although a confession is not a requirement of the Commission, they do take it into account.

Human Rights Center addressed the chairman of the Pardon Commission and requested information about how many convicts were pardoned by the President based on their confession and how many were pardoned without confession. As the letter from the Head of the Department of Rewards, Citizenship and Pardons at the President's Administration clarified, the Administration does not process these statistics.

It is desirable that confusing norms in the Edict regulating pardon procedures are minimized as they may be misinterpreted by the convicts. It is desirable that a confession not be a decisive factor in the determination of a pardon to avoid the risk of unequal treatment of convicts.

13.6. Role of the victim in the determination of a pardon

Based on the President's edict, the perspective of the victim is considered during the review of the pardon petition.

For crimes similar to murder, rape, robbery, and crimes against property rights⁹⁶, Commission members⁹⁷, as stated in interviews, mostly side with the positions of victims. Some members state that there have been cases when victims had petitioned the Commission to reject the pardon petition of the convict and the Commission respected their wishes. The Chairman of the Commission meets with the victims when they request it.

NGO representatives and practicing lawyers⁹⁸ have stated that they have had cases when the Pardon Commission did not approve a petition and in which the President refused to pardon the convict due to the wishes of the victim.

⁹³ Human Rights Center, Article 42 of the Constitution, GYLA

⁹⁴ Letter # 8398 August 20, 2015 of the Head of the Department for Rewards, Citizenship and Pardon Issues at the President's Administration to Human Rights Center

⁹⁵ five members were interviewed

⁹⁶ Mostly in cases of violent crimes

⁹⁷ Five members were interviewed

⁹⁸ Human Rights Center, Article 42 of the Constitution, GYLA and lawyers of the Georgian Bar Association

It is advisable in cases of serious crimes that the Pardon Commission and the President pay attention to the position of the victim when deciding to pardon. In other cases, forming the basis of a decision on the position of the victim may contradict the essence of the Pardon.

13.7. Direct Pardon by President

In accordance with Edict #120, “[The] President of Georgia is authorized to grant pardon a person based on the requirements of the Edict #120 or not respecting them at any stage of discussing the pardon petition.” This provision considers the direct pardon of the convict by the President notwithstanding the decision of the Pardon Commission. It is noteworthy that a similar practice was established in accordance with the 30 May 2005 amendments, when the following norm was added to the resolution on the pardon: “President of Georgia is authorized to make decision to pardon a person through neglecting the requirements of the resolution or/and any stage of the petition decision.”

This degree of discretion is reflected in Edict #120, according to which the President, notwithstanding the rules and requirements of the clemency, still may pardon a person convicted for any crime at any time and of any number.

According to the Department of Rewards, Citizenship and Pardons at the President’s Administration,⁹⁹ between 18 November 2013 and 9 July 2015 the President directly pardoned 103 convicts (among them 52 were released from their prison sentence) and former convicts.

Some Commission members believe that the President has, constitutionally, the exclusive right to grant pardons while bypassing the criteria of the pardon power. Other members believe the President’s decision on clemency should be rational and predictable for society. At the same time, by ignoring the position of the Commission, direct pardons of convicts may contain the risk of unreasonable use of this right by the President.

Although the pardon is the exclusive prerogative of the President, this issue needs relevant legislative regulation ensuring its predictable nature by convicts and an interested society. Unfortunately, there have been recent cases when presidents have abused this right by pardoning members of their political parties or/and family members¹⁰⁰, causing some doubts about the impartiality of this power by the President.

The use of this exclusive power with so much discretion by the President leads to unhealthy disputes in other countries, too. The pardons granted by the President of the Czech Republic created quite an uproar in society and later became the basis for the impeachment of the President. Subsequently, the following President, based on his predilections, refused to exercise the right to pardon and assigned this authority over to the Minister for Justice. In every case, the President decides which cases he will decide and which the Minister for Justice will decide.¹⁰¹

In *Erukide and Girgvliani v. Georgia*, which was discussed by the European Court on Human Rights, the judgment states, “The Court is struck by the fact that on 25 November 2008 the President of Georgia

⁹⁹ See the letter # 8398 dated August 20, 2015

¹⁰⁰ See information at: <http://civil.ge/eng/article.php?id=26655&search=http://factcheck.ge/en/article/the-president-talks-about-pardoning-his-brother-in-law-and-remarks-that-he-has-pardoned-other-convicts-who-were-prosecuted-on-similar-charges-as-well>

¹⁰¹ See <http://www.praguepost.com/czech-news/49487-president-zeman-grants-no-pardons>

found it appropriate to pardon State agents convicted of such a heinous crime by reducing the remainder of their sentences by half.”¹⁰²

Human Rights Center shares the position of the non-governmental organization, Georgian Young Lawyers’ Association that “the legal provision expressly states that a presidential pardon may serve as grounds for the expunging of a convict that has served a sentence. The Constitutional Court of Georgia has ruled a number of times that Constitutional provisions must be interpreted in conjunction with the principles of the Constitution. The principle of a legal state, envisaged by the Constitutional Preamble, entails legal predictability of decisions of state authorities, as interpreted by the Constitutional Court.”¹⁰³

According to the Georgian Young Lawyers’ Association, this principle implies that discretionary presidential powers must be exercised according to a predetermined and clearly predictable criteria available to the general public, prohibiting arbitrary exercising of the powers as one pleases. Any citizen of Georgia must be able to foresee decisions that state authorities will make under certain individual circumstances.¹⁰⁴

Human Rights Center is aware of several cases when a convict was informed about the criteria set by the pardon standard rules, despite the fact they were not pardoned. By bypassing the Commission and the criteria, the President may pardon a person who has not served the minimal term envisaged under the standard norms, when there is no particular condition, and the convict does not request clemency. Similar examples evoke feelings of injustice and inequality in society and among prisoners that may lead to disorder in the penitentiary system.¹⁰⁵

The Public Defender of Georgia believes that “this privilege of the President of Georgia cannot be unlimited and it should fall within the boundaries of the constitution and legal rationality. Otherwise, there is a possibility of transforming the Presidential Pardon, an institution based on the humanitarian principles, into a means for discrimination, inhumanity, and other injustices.”¹⁰⁶

The Public Defender regards “that it is essential to adopt appropriate changes in order to place this privilege of the President of Georgia within judicially rational constitutional and legal bounds.”¹⁰⁷

Based on the these circumstances, it would be reasonable if the President of Georgia clarifies the reasons and particular conditions of direct pardons of convicts that bypass the role of the Pardon Commission and criteria in written form.

13.8.Cooperation of the Pardon Commission and President in decision-making processes on pardon petitions

In accordance with the Edict of the President of Georgia, when discussing the cases of the prisoners, the Pardon Commission decides whether or not to provide recommendations on a case-by-case basis. The

¹⁰² http://www.univie.ac.at/bimtor/dateien/ECHR_2011_girgvilani_vs_georgia.pdf

¹⁰³ See <http://www.humanrights.ge/index.php?a=main&pid=16919&lang=eng>

¹⁰⁴ Ibid

¹⁰⁵ Lawyers of the nongovernmental organizations and members of the Bar Association speak about this problem in their interviews with the lawyer of Human Rights Center.

¹⁰⁶ Evaluation: <http://www.ombudsman.ge/en/news/1933-statement-regarding-the-pardon-granted-by-the-president-on-october-30-2013.page>

¹⁰⁷ Ibid

President of Georgia reviews the recommendations of the Pardon Commission and ultimately makes a decision to either grant or not grant the pardon.

The President's Administration states,¹⁰⁸ "Between 18 November 2013 and 3 September 2015 the Pardon Commission issued positive recommendations in 1,700 cases. Among them, 284 convicts were not pardoned by the President of Georgia. When the Pardon Commission does not support a recommendation, the President of Georgia decides based on similar cases and his own discretion in accordance with the acting law of Georgia."

The President's Administration has provided information describing cases when the Pardon Commission has issued a positive recommendation, but the President in turn rejected the pardon. In some cases the Commission has did not support a pardon, however the President pardoned the petitioners.

Human Rights Center inquired as to whether or not the President clarifies decisions to the Pardon Commission. According to the members of the Pardon Commission, if the President's decision differs from the Commission, he verbally notifies the Chairman of the Pardon Commission, who in turn informs the Commission members. Written clarification of the President's decision is never submitted.

Since the President's decisions often differ, it is desirable that the President and his advisory body develop a systematic mechanism for communication. The best solution is for the President to meet with the Pardon Commission and inform its members about the rationale behind each decision.

13.9. Legal rights of the Public Defender relevant to pardons

In accordance with Article 21(h) of the Organic Law of Georgia on Public Defender of Georgia, the Public Defender is authorized to appeal in writing to the President of Georgia¹⁰⁹ or to the Prime Minister of Georgia if he believes he does not have enough leverage to make a decision. The authority of the Public Defender is encoded in the constitutional status of the Ombudsman.

In accordance with Article 43 of the Constitution of Georgia, the protection of human rights and the fundamental freedoms within the territory of Georgia are overseen by the Public Defender of Georgia. The Public Defender is authorized to reveal the facts of violations of human rights and freedoms and to report on them to the appropriate bodies and officials.

The findings of inquiries into criminal cases are often presented in the annual parliamentary reports of the Public Defender of Georgia¹¹⁰. In some cases, the Public Defender's Office (PDO) identifies significant violations of procedural and material-legal norms. Very often the Public Defender cannot respond to the violations (impose sanctions on concrete person or exercise some other punitive measures.¹¹¹). In these

¹⁰⁸ Letter #9323 September 17, 2015 of the President's Administration to Human Rights Center

¹⁰⁹ With regard to the concrete convict, if the Public Defender does not have additional leverage, he is authorized to petition to the President in writing to pardon the convict.

¹¹⁰ Reports <http://www.ombudsman.ge/uploads/other/1/1934.pdf>
<http://www.ombudsman.ge/uploads/other/2/2983.pdf>

¹¹¹ For example, the Public Defender cannot impose disciplinary sanctions on an investigator for having missed the remoteness deadline for the investigation into particular case. Also, if reverse power of the law and constitutional principles of prohibition double charge was disregarded when passing the verdict. For that reason, the Public Defender may address the President to discharge the convict from the rest of unserved imprisonment term.

circumstances, the Public Defender has the right to apply in writing to the President to pardon specific convicts.

Based on the Article 21 (h) of the Organic Law of Georgia on Public Defender, the Public Defender and President may mitigate the miscarriages of justice. This approach aligns with the Hamilton's point on pardons in Federalist Paper #74¹¹² - that the institution of the ombudsman is a means to consider individual factors in the process of the execution of justice.

The Public Defender¹¹³ between 2013 and 2016 used its right¹¹⁴ to write the President or Prime Minister under Article 21 (h) of the Organic Law of Georgia on Public Defender only twice. In one case the President's administration did not respond to the Public Defender's appeal, and in the second case the President did not agree with the Ombudsman's position.

The Public Defender's proposal (#04-12/7279) submitted on 15 May 2014 to the President referenced the fact that it was impossible to impose any sanctions on the investigator because the term for disciplinary punishment had expired. The administration of the President¹¹⁵ deemed the Public Defender's request unsatisfactory. The President's administration clarified that "in accordance to Georgian legislation, the President cannot change the decisions of the investigative bodies or the court." The letter clarifies that the President can only grant a pardon to a convict.¹¹⁶

The proposal submitted on 31 March 2014 (# 04-12/5810) by the Public Defender to the President referenced the fact that the court had overstepped its bounds vis-a-vis the constitutional principle of the reverse power of the law and the principle of the prohibition of double charge when passing its verdict. The Public Defender concluded that, for the restitution of justice, it was reasonable to discharge the convict from the remaining portion of his sentence. The Public Defender did not receive a response to this proposal.

Pardon Commission members have stated that the PDO studies the facts of violated rights of convicts and possesses detailed information about their violations. It is recommended that the Pardon Commission and, subsequently the President, thoroughly analyze the issues underlined in the proposals of the Ombudsman.

When the Public Defender exercises his authority as envisaged in Article 21 (h) of the Organic Law of Georgia on Public Defender, the cooperation of the President will promote the defense of human rights and a more effective implementation of the pardon power. The President should clarify decisions that lead to the rejection of a petition for pardon that was initiated by the Public Defender.

13.10. Relation of the Pardon Commission Members with convicts

Pardon Commission members have stated that they do not meet petitioners and do not communicate with the those, who recommend the Commission pardon convicts.

¹¹² Available at http://avalon.law.yale.edu/18th_century/fed74.asp

¹¹³ Letter # 05-4/7627, September 18, 2015 of Public Defender of Georgia

¹¹⁴ Petition the President about pardon

¹¹⁵ September 18, 2014 Letter #3785 of the Georgian President's Administration

¹¹⁶ Ibid

Commission members only review the petitions, they do not communicate with convicts or their references who might assist members to have clearer picture about each case. In rare cases, only the chairman of the Pardon Commission meets with convicts.

Representatives of non-governmental organizations and lawyers have stated that Pardon Commission members should have periodical communication with convicts to inform them about the nature and significance of clemency. Also, Commission members should meet with convicts about their cases to clarify the nature of the convicts and the details of their case. This practice would assist Commission members in making impartial and fair decisions about particularly sensitive cases.

13.11. The Involvement of the Georgian Orthodox Patriarchate in the Pardon Commission and vis-a-vis the President

In accordance with 26 November 2013 Edict #928 of the President of Georgia on the creation of the Pardon Commission, an Orthodox clergyman (the Akhaltsikhe-Tao-Klarjeti Metropolitan) is member of the Commission. No other religious faiths in Georgia have representation in the Commission, creating an unequal environment.

A separate commission to study the clemency of prisoners also exists within the Patriarchate and it is composed of clergymen only.

A representative of the Department for the Relation with Convicts at the Patriarchate, has stated that the Patriarchate has elaborated criteria to review cases of convicts.

The Patriarchate's Pardon Commission only considers the clemency of prisoners if the petition is enclosed with a recommendation by the prisoner's personal priest. The priest's recommendation speaks about regret and the Christian life of the prisoner.

The Patriarchate's representative also stated that the Patriarchate may discuss the petitions of convicts of other faiths, too,¹¹⁷ if the petition is enclosed with a recommendation by his priest. The Patriarchate sends about 200-300 recommendations for convicts to the President and only 15-20 of them might satisfied the President.

The positive decision of the Patriarchate's Pardon Commission relies on the recommendation of the priest and characteristics of the convict. List of convicts, is sent to the President's Pardon Commission from the Patriarchate, and with this the Patriarchate recommends the Commission to pardon concrete convicts.

It is desirable that either there are no representatives of any religious confessions in the Pardon Commission or that representatives of other religious organizations should also be in the Commission together alongside the representative of the Orthodox Church to avoid possible unequal approach to the prisoners with different religions.

13.12. Role of the Department of Rewards, Citizenship, and Pardons at the President's Administration in the Pardon Process

In accordance with Article 5 of the 19 December 2013 Edict #963 of the President of Georgia about the President's Administration, the functions of the Department of Rewards, Citizenship and Pardons are:

¹¹⁷ For example: Muslims, Catholics, parish of Armenian Apostolic Church

- the discussion and development of mediation regarding pardoning which require materials from relevant authorized bodies and the implementation of other necessary actions to prepare pardoning materials for the relevant commission meeting;
- the preparation of draft legal acts to the President of Georgia based on the proposals developed by the relevant pardoning commission;
- within its competence, the preparation of recommendations considering the best international practice regarding discussion and regulation of the issues related to pardoning, Georgian citizenship, and state awards; and
- within its competence, the keeping of statistics of pardoning, Georgian citizenship, and state awards, their analysis and subsequent development of relevant proposals.

Edict #120 states that the President's administration registers submitted pardon petitions that are assigned to the Department of Reward, Citizenship, and Pardons. The Department requests relevant documentations from the penitentiary establishments¹¹⁸ and other relevant institutions, based on which a database is maintained and information prepared for the Pardon Commission's session. The Department presents the information about those convicts to the Pardon Commission, who do not meet the criteria of clemency.

Representatives of the Department of Rewards, Citizenship, and Pardons at the President's Administration have stated to Human Rights Center that they prepare special information papers for Commission members, which provide information from their database and the verdict of the convict. Other information about the convicts is not provided in the information papers as a rule.¹¹⁹

The Pardon Commission members mostly rely on the information provided in the papers and during decision-making process they mostly consider the information provided by the Department. Consequently, it is desirable that the papers do not include just the standard information about the verdict and the personal case details of the convict, but it should include information from other documents, too,¹²⁰ submitted to the administration together with the petition. The submission of incomplete documents to the Pardon Commission substantially violate the rights of convict.

It is necessary that the Department for Rewards, Citizenship, and Pardons of the President's Administration create an electronic database to which the Pardon Commission members will have access and the possibility to study the cases of convicts in detail.

Several of the Pardon Commission members reported that the Department of Rewards, Citizenship, and Pardons notify Commission members about scheduled Commission sessions several days in advance.

¹¹⁸ The Department requests personal case materials, characteristics and other documents on the petitioner convict from the penitentiary establishment

¹¹⁹ Human Rights Center's representative read a sample content of an information paper, which contained information only about the verdict and personal case details of the convict.

¹²⁰ For example characteristics from the convict or his/her family members

There are cases when some of the members were unable to attend sessions because they were too busy. Other members added that they wish the Department would notify them about scheduled sessions at least 14 days in advance so that all members could attend. Not all commission members have equally busy schedules. For example, the public defender of Georgia may have the whole week scheduled in advance and may not be able to participate in some sessions.

Sometimes, a session of the Pardon Commission can last for several days. The Commission members read and analyze hundreds of cases in the Office of the President's Administration from early morning until late at night. The President's Administration should envisage an honorarium for Commission members; it will increase their motivation to more actively engage in the work of the Commission.

Although the Department of Rewards, Citizenship, and Pardons should systematically process and analyze pardon statistics to uncover important trends and make recommendations, the Department does not do this or at least society is not aware of these activities.

It is important that the Department of Rewards, Citizenship, and Pardons periodically publish summary analyses of pardons and observed trends. In this way, society and convicts can find answers to the following questions: What conditions does the Commission consider special? What crimes are the President more likely to pardon? What crimes are more strictly evaluated by the President? And more.

13.13.Maintaining the independence of the Pardon Commission

The Pardon Commission members have stated that the chairman and deputy chairman of the Department of Reward, Citizenship, and Pardons attend sessions of the Pardon Commission.

Sometimes the chairman and deputy chairman attempt to interfere in the work of the Commission by participating in the negotiation process. This practice jeopardizes the independence and interferes in the work of the Pardon Commission.

Some members of the Pardon Commission state that there is no particular necessity for the heads of the Department to attend sessions of the Commission. Other members, however, state they sometimes have specific questions for the Department about a convict for what its participation in the session is necessary.

An employee of the Department may attend a session of the Pardon Commission to draft the session protocol. The participation of the chairman and deputy chairman of the Department in the session is reasonable in case they are needed, however it is important that they remain neutral vis-a-vis the petitioners. Any interference in the work of the Commission by the heads of the Department jeopardizes the independence of the Pardon Commission.

The President of Georgia and the Pardon Commission should take measures to prevent the head and deputy head of the Department from interfering in the work of the Pardon Commission.

14. RECOMMENDATIONS FOR AN IMPROVED PARDON POWER

Human Rights Center recommends to the President of Georgia:

- *To avoid any false expectations about pardons among convicts, the goals of the pardon power should be normatively regulated and a proper practice should be established;*
- *Convicts should receive information about the goals, nature, rules, and criteria of pardons so they do not perceive the pardon power as being impartial or confusing;*
- *Due to the important status of the Pardon Commission and its mandate, it is recommended that the rules for its formation, the procedures and criteria for the selection of its members, and the number of its members be established normatively, increasing the public's awareness of the pardon power in Georgia;*
- *It is recommended that the competence, the working rules, and the accountability of the Pardon Commission before society and petitioners be more predictable. The model of Bulgaria, which presents the competence and legal status of the Pardon Commission, may be used when regulating the functions of the Commission.¹²¹*
- *It is recommended to invite a doctor, teacher, and a psychologist to join the Commission when selecting the Pardon Commission members;*
- *The President should clarify the reasons and special conditions of direct pardons which bypass the Pardon Commission;*
- *The President should ensure that legal regulations of the scope of accountability of direct pardons exist so that the pardons will be predictable for the petitioners and society. This will allay doubts in the society about any impartiality towards applicants on the part of the President;*
- *To better explain differences between the decisions of the President and the Pardon Commission, his advisory body, vis-a-vis pardon confirmations, it is recommended that the President and the Commission systematize their communications. The President should provide the Commission with information about each decision after making a decision about each pardon.*
- *Clergies shall not be engaged in the work of the Pardon Commission as representatives of their religious organizations but as respected public figures, humanists. At the same time it is desirable that representatives of other religious faiths were also allowed to be represented in the Commission to mitigate the unequal representation that currently exists.*

Human Rights Center recommends to the Department of Rewards, Citizenship, and Pardons, at the Administration of the President of Georgia:

- *The Department should systematically perform and publish the analyses of pardon and show trends. In this way, both society and convicts can find answers to sensitive questions such as what*

¹²¹ See information about the model of Bulgaria in paragraph 12.2. of the Report

conditions are considered special by the Pardon Commission, what kind of crimes are most often pardoned by the President, and about what crimes the President is more critical.

- *The Department should provide the Pardon Commission with comprehensive information about all documents submitted by the convict or his family members.*
- *The Department should notify the Pardon Commission members within a reasonable period of time (at least 14 days in advance) about scheduled sessions of the Commission to ensure every member on the Commission might participate; and*
- *The Department should create a comprehensive electronic database of pardon issues to which the Pardon Commission members will have access and can obtain comprehensive information about each petitioner.*

Human Rights Center recommends to the Pardon Commission:

- *The Commission should elaborate an unlimited list of special conditions envisioned in the pardon rule so that convicts can know what conditions fall outside the scope of a pardon and when they can petition the Commission. This will promote an increased awareness among convicts about the work of the Pardon Commission.*
- *It is recommended that Commission members meet with convicts to discuss their cases, to learn more about their personalities, and about the details of each case. This will help Commission members make increasingly impartial and fair decisions in sensitive cases; and*
- *A Commission member, who has a conflict of interest in a case, should not participate in the deliberation process and vote of that case.*

Human Rights Center recommends to the President of Georgia and the Pardon Commission:

- *You should minimize the confusing norms in the resolution which regulates pardons; convicts may perceive these norms incorrectly. It is recommended that the confession of a crime not be a decisive factor for a pardon to mitigate any possible bias towards petitioners.*
- *For serious crimes, the Pardon Commission and the President should take into account the position of the victim. For other crimes of a less grave nature, rejecting a petition based solely on the position of the victim may undermine the nature of the pardon.*
- *The President of Georgia and the Pardon Commission should take into account recommendations from the Public Defender concerning pardons. When acting in accordance with Article 21 (h) of the Organic Law of Georgia on the Public Defender, the Public Defender's cooperation with the President will improve the defense of human rights and effectiveness of the pardon power. If the President does not pardon a convict, for whom the Public Defender has petitioned, it is desirable that the President provide the Public Defender with written clarification about his refusal.*
- *Taking into account the busy schedules of Pardon Commission members, the President's Administration should consider the payment of an honorarium to the members, incentivizing members to more actively engage in the work of the Commission.*

- *The President and the Pardon Commission should take measures to remove any interference by the head and deputy head of the Department of Rewards, Citizenship, and Pardons in the work of the Pardon Commission.*

15.CONCLUSION

This study has clearly presented different perspectives describing the execution of the pardon as a humanitarian act. Historically, the right to pardon was the absolute and exclusive prerogative of the executive authority which was used for different goals and purposes in different periods.

The study has revealed that the modern concept of the pardon power is not limited exclusively to the executive branch of government (be it a monarch, president or another authorized person). We reviewed different approach to this issue in a variety of countries. They differ by their legal systems, models of governance, jurisdictional hierarchies, and cultural and historical backgrounds.

Today, the pardon power may be applied autocratically, but also in collaboration with other actors. In the majority of countries in this study, the executive governor pardons autocratically. Based on an overview of these countries, we conclude that the pardon may be successfully exercised by the executive governor with the support of a collegial body or by the legislative body only.

The scope of the pardon also differs from country to country. Some countries grant one person the authority to exercise the full scope of pardons, while in other countries, different branches of government exercise different responsibilities of pardons.

Any model of pardon power depends on a number of factors. For this reason it is not possible or practical to create a universal model that is effective for all legal systems or states.

Since the Constitution of Georgia grants the authority to pardon convicts exclusively to the head of the state, the President, it is beneficial that the President has created an advisory Board, the Pardon Commission, to make recommendations about each petition for a pardon. This model, although democratic in nature, is not without its shortcomings and requires a number of improvements to reduce confusion and increase the perception of impartiality of pardon decisions in society and among convicts. The recommendations in this study aim to support these goals.