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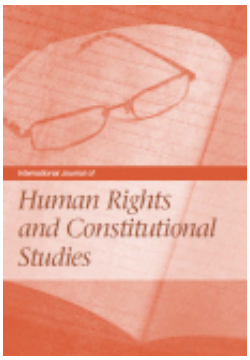

International Journal of Human Rights and Constitutional Studies

ISSN online: 2050-1048 - ISSN print: 2050-103X
https://www.inderscience.com/ijhrcs

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DOI: 10.1504/IJHRCS.2023.10055066

Article History:

Received:	07 January 2023
Last revised:	10 January 2023
Accepted:	28 February 2023
Published online:	04 April 2024

Presidential pardon power in North Macedonia – controversies and dilemmas

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Abstract: This paper analyses the constitutional, legal, and practical aspects of the presidential pardon power in North Macedonia. This paper focuses on the controversial legal provision of Article 11 of the Law on Pardon, whose application on three occasions so far has caused a wider social revolt. This is due to the avoidance of criminal responsibility by politicians, and especially the pardons of 56 people in the form of the abolition by President Ivanov of April 12, 2016. Their subsequent revocation had caused not only domestic but also international legal effects. Due to the opening of the first cases before the ECtHR involving people who were previously subject to these pardons, North Macedonia is actually facing a big challenge for a possible unfavourable outcome and is waiting for the lessons that will be given in the near future by the Court in Strasbourg.

Keywords: abolition; President of the State; rule of law; legal certainty; North Macedonia.

Reference to this paper should be made as follows: Shasivari, J. (2024) 'Presidential pardon power in North Macedonia – controversies and dilemmas', *Int. J. Human Rights and Constitutional Studies*, Vol. 11, No. 2, pp.144–153.

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1 Introduction

In North Macedonia, the pardon power is an indisputable constitutional competence and an irrevocable and final act of mercy of the President of the Republic, which expresses a more lenient attitude towards the perpetrator of the crime, with what the President does not decide in the role of a judicial authority, but as a body representing the Republic which derives the legitimacy of this competence from the people through free and democratic elections, with secret ballot. Pardon can be granted before the sentence is imposed in the form of exemption from criminal prosecution (abolition) or after the finality of the judgment by which the sentence is imposed. The President of the Republic

can use this right according to his assessment, in the procedure defined by law, for various reasons of a criminal, social, health or political nature, but without interfering in the factual and legal assessment of the judicial authority. In this regard, the right of the President of the Republic to grant a pardon is a constitutional competence of the head of state, while the Constitution, in the same constitutional provision in which this competence is determined, prescribes that it be carried out in accordance with the law; namely according to Article 84 line 9 of the Constitution, the President of the Republic grants pardons in accordance with the law. This competence of the President of the Republic is a constitutional category, which means that it cannot be abolished or modified by law. On the other hand, since the exercise of this constitutional competence, also refers to the rights and freedoms of the citizens, therefore, from a constitutional point of view, there is a need to operationalise this constitutional competence with a special Law on Pardon in relation to the procedure in which it will be decided to grant a pardon; defining its content and the obligations of other authorities participating in this procedure, as well as the rights of the persons at whose request pardon is requested.

2 Legal regulation of the presidential pardon power

The content of the pardon is regulated by the Criminal Code, namely Article 114 para. 1 of the Criminal Code stipulates that with the pardon a named person is granted exemption from prosecution or complete or partial exemption from execution of the sentence; the imposed sentence is replaced by a lighter sentence or alternative measures; or expungement of the conviction is determined; or it is cancelled or a shorter duration of a certain legal consequence is determined.

On the other hand, the Law on Criminal Procedure regulates the legal effect of the granted pardon in the criminal procedure, whereby the granted pardon is one of the grounds for: rejection of the criminal charge (Article 288, para. 1); stopping the investigative procedure (Article 304, para. 1, line 2); passing a judgment on rejection of the charge where the accused was released from criminal prosecution with a pardon (Article 402, point 6); existence of a violation of the Criminal Code as a ground of appeal when the prosecution is excluded due to a pardon (Article 416, point 3); modification of a final judgment without repeating the procedure by which a single sentence was imposed for several criminal offenses which could not be carried out in one part due to a pardon (Article 447, para. 1, point 4); and submitting a request to repeat the criminal procedure after the convicted person has served the sentence regardless of the pardon (Article 451, para. 2).

In this regard, in North Macedonia, the Law on Pardon was adopted for the first time on March 25, 1993, which determines the content of the pardon, namely, the President of the Republic grants pardon to named persons for crimes stipulated by the laws of North Macedonia, in accordance with the provisions of the Criminal Law and the provisions of this law; furthermore, the ways of initiating a procedure for granting a pardon are regulated; the obligations of other authorities participating in this procedure, namely the court and the Ministry of Justice, are also regulated, as well as the rights of persons that require pardon.

The most controversial provision of this law was the provision of Article 11, which prescribed an exception for the granting of a pardon even without conducting a pardon procedure, namely, as an exception, the President of the Republic may grant a pardon

without conducting a pardon procedure prescribed by this law when it is in the interest of the Republic, or when special circumstances relating to the person and the crime indicate that it is justified. The controversy of this article is related to the fact that, as can be seen, this legal provision prescribes pardon power in the form of abolition, which is the ultimate form of mercy, which has its roots in the time of absolute monarchy, when monarchs as the only holders of state power had unlimited powers while abolition was an instrument of political power, not an instrument for correcting justice in society (Shasivari, 2016).

On January 27, 2009, the Parliament adopted the Law on amendments and supplements to the Law on Pardon, whereby three major changes were made to the legal system of pardons, namely: firstly, limitation of pardons for certain crimes, i.e., pardons cannot be granted to persons convicted of crimes against elections and voting; crimes against sexual freedom and sexual morality committed against children and minors; the crime of unauthorised production and placing on the market of narcotic drugs, psychotropic substances and precursors and the crime of facilitating the use of narcotics and for crimes against humanity and international law; secondly, the establishment of the Pardon Commission by the President of the Republic; and thirdly, Article 10 of this Law deleted the previous controversial Article 11.

However, on March 16, 2016, the Constitutional Court made a decision that abolished the entire Law on amendments and supplements to the Law on Pardon of 2009. In the explanation of its decision, the Court considered that the contested Law of 2009 is not in accordance with the Constitution, because it contains provisions that violate the fundamental value of the constitutional order – the separation of powers into legislative, executive and judicial; limits the authority of the President of the Republic to grant pardons; violates the constitutional right to equality of citizens; and regulates issues related to the organisation and work of the President of the Republic as a state body. According to the Court, the way in which criminal acts are defined in criminal law of North Macedonia does not provide a basis for the legislator to exclude certain acts from the possibility of pardon. From the legal definition of the crime, it follows that there is no division or gradation of crimes, but what is common to all of them is that they are illegal acts that are defined by law as criminal acts and whose features are defined by law. For the Court, the social danger of the crimes that are exempted by the disputed law from the possibility of granting pardon is not in dispute at all, but it cannot be accepted as a criterion or reason for such exemption, because the social danger is simultaneously a feature of other crimes that are not exempted, and for some of them the strictest punishments provided by the Criminal Code can be imposed. According to the Court, limiting the right to pardon of the President of the Republic means encroaching on his constitutional competence by the legislator. If the possibility of the legislator having this right were to be accepted, the question arises as to what would be the limit and criterion for such limitation and whether in this way the meaning of the constitutional institution of pardon would be lost, which would depend on the perception of the legislator and certain phenomena at a certain time in society. Pardon is related to the individualisation of the perpetrators of the crimes, and not to a general enumeration of the crimes that are eliminated by the pardon, because the generality is an element of the amnesty, not of the pardon. The Constitution, did not limit the pardon for specific crimes, that is, the Constitution does not determine which crimes can and which cannot be covered by the constitutional institution of pardon. In view of that, the general definition by law of which crimes can and cannot be pardoned has no constitutional basis, since the Constitution did

not engage in a general enumeration of which crimes cannot be pardoned, especially because of the undisputed legal basis that individualisation is an element of the pardon. On the other hand, the need for the existence of an expert body (commission) that would assist the President of the Republic in exercising his constitutional competence is indisputable, but what makes this legal solution problematic from a constitutional point of view is that the legislator does not have a constitutional authority to regulate issues related to the internal organisation and work of the President of the Republic as one of the bodies of the state. For comparison, the Constitution, in relation to the other holder of the executive power – the Government, explicitly establishes that the organisation and the way of work of the Government is regulated by law (Article 89, para. 6) and in accordance with this constitutional authority, the legislator adopted the Law on the Government. The constitutional position of the President of the Republic as part of the executive power cannot be a basis for using an analogy according to which, if the Constitution provided one solution for one body that is part of the executive power, the same solution can be applied to other body (Case number 19/2016-1 of March 16, 2016a).

3 The controversial application of Article 11 of the Law on Pardon

The controversial legal provision from Article 11 of the Law on Pardon, on three occasions so far, caused a wider revolt in society for the impunity of politicians, regarding the way this provision was applied by the President of the Republic.

The first case is referred to the affair known as 'The big ear' from 2001, related to the wiretapping of hundreds of politicians, diplomats and journalists [Prezelj and Ristevska, (2023), pp.152–155]. The persons who were the victims of the wiretapping confirmed the authenticity of the transcripts before the investigating judge and the public prosecutor, and after the end of the investigation, in March 2003, the former minister of the interior Dosta Dimovska and the head of the police department for operational technique Aleksandar Cvetkov were criminally accused as the orders of this wiretapping, however, while waiting for the date of the first court hearing, the President of the Republic Boris Trajkovski on April 7, 2003 made a decision to pardon these two officials based on Article 11, which stopped the court proceedings [Decision of the President on pardon release from prosecution, without proceeding, no. 07-396, (2003), p.15]. The second case refers to the affair known as 'Global mall', for which then mayor of the municipality of Strumica and vice-president of the political party SDSM Zoran Zaev was accused and detained together with five of his associates, for suspicions of the abuse of eight million euros, but all this was terminated by the pardon decision of the President of the Republic Branko Crvenkovski of August 2, 2008, also based on Article 11 of the Law on Pardon [Damjanovska and Jovevska, (2008), pp.55–56; Decision of the President on pardon release from prosecution, without proceeding, no. 07674, (2008), p.49].

The third and most controversial case so far of a pardon in the form of an abolition through Article 11 of the Law on Pardon is that of April 12, 2016 by the President of the Republic Gjorge Ivanov with 41 decisions for 56 people, mainly politicians in high positions (such as former prime minister and leader of VMRO-DPMNE Nikola Gruevski, speaker of the Parliament Trajko Veljanoski, ministers Mile Janakieski and Gordana Jankuloska, head of the secret police Sašo Mijalkov, and others), due to suspicions that they committed serious crimes related to their functions, which were the subject of

investigations by the Special Public Prosecutor's Office [Marušič, 2016; Decisions of the President on pardon-release from prosecution, without proceeding, (2016a), p.173-184].

4 National and international legal aspects of President Ivanov abolitions of April 12, 2016

The most controversial pardons in the form of abolition so far of the President Ivanov, caused great national protests and legal dilemmas as well as international effects, due to the opening of the first cases before the ECtHR involving people who were previously subject to these pardons (EctHR, Questions to the parties, 2020).

By the way, when talking about the international effects of these pardons, the first international judicial warning about the significance of this legal situation came from the Supreme Court of Greece on May 18, 2018, by accepting the appeals of two citizens of North Macedonia covered by these pardons, against the decisions of the Court of Appeal in Thessaloniki, which gave a positive opinion on the extradition of these two persons to the judicial authorities of North Macedonia, but the Supreme Court of Greece revoked those two decisions on the grounds that these persons are covered by a pardon from the President of the Republic and such a decision is irrevocable because cannot be withdrawn or revoked by reference to a later law, since they cannot have retroactive effect to the detriment of the defendants (Decisions of the Supreme Court of Greece, 839/2018 and 840/2018, 2018).

The Parliament of North Macedonia, under great pressure from the public, but also from the international community, sought a legal modus operandi for revocation of the controversial pardon decisions of President Ivanov, and on May 19, 2016, the new Law on amendments to the Law on Pardon was adopted, which introduced a new provision with Article 11-a, according to which the President of the Republic within 30 days from the day of the adoption of this law, may revoke the pardon granted without a prior pardon procedure and is not obliged to explain the decision. Thus, President Ivanov on two occasions, on May 27, 2016 and June 7, 2016, on the basis of the new Article 11-a, revoked all his pardon decisions from April 12, 2016 whereas with these decisions to revoke previously granted pardons, the criminal proceedings against a considerable part of the pardoned persons continued, and in several criminal cases final court judgments were passed, by which several of the pardoned persons were sentenced to prison sentences [Decisions of the President to revoke pardons, (2016b), pp.4–40, pp.3–20].

In this regard, the Constitutional Court, at the session held on November 27, 2019, adopted a decision to initiate a procedure for evaluating the constitutionality of the Law on amendments to the Law on Pardon. According to the Court, this law establishes a legal basis on which the granted pardon can be revoked, however, such legal arrangement goes beyond the competences given to the President of the Republic in Article 84 of the Constitution, and the same basis can be questioned because violates the principle of the rule of law and the legal certainty of the citizens of North Macedonia. This amendment to the Law on Pardon, which gives the President the opportunity to revoke the already granted pardon, leads to unequal treatment of the subjects. Namely, according to the Constitution, the President has the right only to grant pardons, but not to revoke them, which means that the Constitution does not allow this, i.e., it does not provide the possibility of withdrawing or revoking the previously granted pardon. In most of the member states of the European Union, from which an opinion was requested, from the

received materials, the Court states that in their legislation there is no possibility of withdrawing the granted pardons. Namely, the pardon decision made by the President is a sui generis act, which is neither an administrative act (which would be contested before the administrative courts), nor a normative act (which could be contested before the constitutional courts). The European Court of Human Rights in Strasbourg in the case of Lexa v. Slovakia examines in detail the problem of the withdrawal of the amnesty from a human rights perspective, concluding that in this case it constitutes a violation of the European Convention on Human Rights. Critical was the circumstance that the pardon was legal, and the withdrawal was not at all foreseen by the Constitution of Slovakia. The court suggests that in such a case the criminal proceedings should be stopped and the case should be considered res judicata. From a comparative point of view, according to Article 122 of the Constitution of the Netherlands, pardons are granted by royal decree on the recommendation of a court and in a procedure established by law. The pardon is regulated by a law passed by the Parliament. According to Article 13 of that law, pardon is granted under certain conditions. If those conditions are not respected, the royal decree can be revoked. The person to whom the pardon applies must be heard and an official report must be compiled. In the Republic of Croatia, on the other hand, the basis for pardon granted by the President of the Republic of Croatia is Article 98 para. 4 of the Constitution, according to which the President grants pardon. There is a Law on Pardon, which determines the form of the pardon, the authorised persons for submitting a request for a pardon, as well as the procedure of the competent authorities in connection with the pardon. According to the Constitution, the President has the right only to grant pardons, so neither the Constitution nor the Law on Pardon provides for the possibility of withdrawing a previously granted pardon. In Slovakia, according to the Slovak Constitution, the President of the Republic has the authority to grant pardons and amnesties, with the Prime Minister's signature being required for the amnesty to be valid. This presidential restriction on amnesty was introduced in 1999. In the legal system of Slovakia, there are no provisions that expressly foresee the possibility for the President to revoke a previously granted pardon, and so far, Slovakia has had no such cases. In the Czech Republic, the President's authority to grant amnesty and pardon are established in the Constitution, which does not expressly provide for the possibility of cancelling or revoking a previously granted pardon, so discussions on this issue are mainly conducted in academic circles. The Criminal Procedure Code of the Czech Republic provides for the possibility of a conditional pardon, so that failure to fulfil certain conditions by the convicted person could lead to the withdrawal of the pardon. However, the question of compliance with the basic constitutional principles of legal certainty and the rule of law remains open. Furthermore, in Latvia, Article 45 of the Constitution stipulates that the President has the right to pardon the perpetrators of crimes convicted by a final court verdict. The scope, procedure and use of this right of the president are determined by a separate law. That law is the Law on Pardon, which stipulates that the President of the state can grant a pardon at the request of the convicted person, his lawyer, legal representative or parent, husband or child, as well as on his own initiative. Pursuant to Article 9 of the Law on Pardon, pardon requests are considered only if the convicted person agrees to it. Neither the Constitution nor the Law on Pardon provide for the right of the President to revoke or withdraw the already granted pardon, so it can be said that in the legal system of Latvia the President has no right to withdraw a pardon because it is not expressly provided for in the Constitution. Also, from the answers received from the constitutional courts of Slovenia, Serbia, Bosnia and Herzegovina, Kosovo, Finland and

Luxembourg, the Court determined that in their legislation there is no possibility of withdrawing an already granted pardon and that they have no practice regarding this matter. Hence, bearing in mind the constitutional judicial analysis, as well as the international practice, according to the Court, with the introduction of the legal possibility to revoke the granted pardon, its compliance with the principle of the rule of law and legal certainty of the citizens of North Macedonia is rightly questioned (Case number 163/2016 of November 27, 2016b).

Nevertheless, when it was expected that the Constitutional Court in the role of guardian of constitutionality and legality and protector of citizens' rights would resolve the issue of the final fate of the controversial pardons of President Ivanov due to its exceptional importance not only from a constitutional-legal point of view, but also from a criminal-legal point of view due to the large number of criminal proceedings that are led against the pardoned persons before the domestic courts, but also from an international legal point of view due to the opening of the first cases before the ECtHR involving people who were previously subject to these pardons, however, this did not happen.

Namely, at the session held on November 18, 2020, the Constitutional Court passed a decision to stop the procedure for evaluating the constitutionality of the Law on amendments to the Law on Pardon. According to the reasoning of the Court, this law produces a legal effect only in the period of 30 days after its publication, that is, the actions provided for in the contested law can be taken only within 30 days from the day of its publication, considered from May 20, 2016. According to Article 110 para. 1 and 2 of the Constitution, the Court decides on the conformity of laws with the Constitution and on the conformity of other regulations and collective agreements with the Constitution and laws. According to Article 47 para. 3 of the Rules of Procedure of the Court, the Court will stop the procedure if it is determined that the initiation of the procedure was based on a wrong factual situation. According to Article 47 para. 5 of the Rules of Procedure, the Court will stop the procedure if during the procedure the procedural assumptions for its further management cease. Taking into account the above, it follows that during the initiated procedure, the Court determined that the contested law, due to its temporal nature, has been exhausted in its application and it can no longer produce legal effects, which represents a procedural obstacle for further conduct of the procedure. Hence, the Court, when passing the decision of November 27, 2019, didn't take into account the temporal nature of the contested law, which expired after the deadline for its application, therefore, it turns out that, the initiation of the procedure was based on a wrong factual situation. Due to the above, the Court determined that have been met the conditions of Article 47 para. 3 and 5 of the Rules of Procedure of the Court, for stopping the procedure, which is why it decided to stop this procedure (Case number 163/2016-1 of November 18, 2020).

In this way, the Constitutional Court did not clear up the confusion it created in 2016 because didn't give final answers to two key questions, firstly, whether there is a constitutional basis in North Macedonia for revoking a previously granted pardon, for which in the Court's decision to initiate a procedure of November 27, 2019, the Court gave the rationale that the President of the Republic according to the Constitution only has the right to grant a pardon, but not to revoke it, which means that the Constitution does not allow it i.e., does not provide the possibility of withdrawal the previously granted pardon; and secondly, whether the Law on amendments to the Law on Pardon of May 19, 2016, through the introduction of a new provision of Article 11-a, gave legitimacy and legality to the pardons in the form of the abolition by President Ivanov of

April 12, 2016, considering the fact that Article 11 of the 1993 Law on Pardon, as the legal basis for these pardons, was deleted by Article 10 of the Law on amendments and supplements to the Law on Pardon of January 27, 2009.

In North Macedonia, there is an almost unanimous scientific opinion that the decision of the Constitutional Court of March 16, 2016, that abolished the entire Law on amendments and supplements to the Law on Pardon of 2009 (including Article 10 which deleted Article 11), cannot restore the legal provision of Article 11, with which President Ivanov granted 56 pardons in the form of an abolition, and therefore had no legal basis at all and those pardons are illegal and invalid from the moment they were granted, and as such are not in accordance with Article 84 line 9 of the Constitution according to which pardons are granted in accordance with the law, which is not the case here, because there is no legal basis from Article 11 of the Law on Pardon. President Ivanov's pardons of 56 persons are null and void and as such do not produce legal consequences for anyone because they are based on a non-existent legal norm. What is void from the beginning remains so forever. A void norm is equal to a non-existent norm – a norm that is considered as if it had not been enacted. It is about absolute nothingness, about something that is considered non-existent in the real world. If a norm is born 'hunchback', then 'hunchback' remains forever as a fact. But in 2016, due to a change in circumstances, a paradox occurred. The government that abolished the abolition in 2009 has again expressed a desire to restore it, in order to protect itself from criminal responsibility. In the return of something that cannot be returned, the Constitutional Court and the Parliament, as a team together with President Ivanov, were involved in a dishonest way. The Constitutional Court tried to create the appearance of reviving the deleted legal norm, and the Parliament sanctioned it in a perfidious way – by grafting a new Article on a dead root (Škarić, 2018).

In the constitutional-legal theory, a clear answer is given to the question of whether, through a decision of the constitutional court, can be restored the legal provisions that were previously deleted by a law that was found to be unconstitutional. Namely, the decision of the constitutional court is binding, just like the law. However, the decision of the court by which the law is abolished or annulled does not mean the re-regulation of the law, because in this way the court would appropriate the function of the legislator. This is not even possible from the point of view of the separation of powers, because the decision on changing the law remains a issue for the legislator only. However, the unconstitutional norm is removed from the legal order. For this reason, it is rightly asserted that in this case the constitutional court appears as a 'negative legislator' [Saliu, (2004), p.199; Grad et al., (1999), p.209].

As a matter of fact, this clear theoretical answer to that question is established in the actual jurisprudence of the Constitutional Court of North Macedonia. Thus, at the session held on February 29, 2012, the Constitutional Court passed a decision rejecting the initiative for a procedure for evaluating the constitutionality of Article 6 para. 1 and Article 10 para. 1 of the Law on amendments and supplements to the Law on employment and insurance in case of unemployment. With this initiative, it was requested that the parts of the provisions of the Law that were deleted to be returned to the legal order, contesting for that purpose Article 6 para. 1 and Article 10 para. 1 of the Law on amendments and supplements to the Law on employment and insurance in case of unemployment. The petitioners of the initiative actually demanded that the Court assume competence in this case to amend the norms in the Law by restoring the deleted parts, which is not its competence. In its explanation, the Court considered that according

to Article 110 of the Constitution, the Court is not competent to perform a legislative function and to regulate provisions, by bringing back into force those provisions that are no longer in the legal order, nor does it have procedural assumptions to act according to the initiative, i.e. to assess the constitutional validity of the deleted provisions and, on the other hand, the constitutional validity of the provisions by which they were deleted from the Law, as well as the justification of these legal decisions, and therefore in this particular case have been met the conditions of Article 28 para. 1 and 3 from the Rules of Procedure of the Court for rejecting the initiative (Case number 97/2011-0-0 of February 29, 2012).

5 Conclusions

The main goal of this paper is to provide an overview of the constitutional and legal solutions for presidential pardon power in North Macedonia, focusing on the current presidential practice of their application. In this direction, it was ascertained that, this constitutional competence has some obvious shortcomings related to its interweaving and identification with abolition as the ultimate form of mercy through the no longer existing Article 11 of the Law on Pardon according to which the President of the Republic may grant a pardon without conducting a pardon procedure prescribed by this law when it is in the interest of the Republic, or when special circumstances relating to the person and the crime indicate that it is justified, which taking into account the political provenance of the President of the Republic with the pardoned persons, in three practical cases from 2001, 2008, and especially in 2016, it manifested visible and worrisome elements of arbitrary and unlimited power of the President of the state, primarily serving as an instrument of political power, and not as an instrument of correcting justice in society. Therefore, in order to make the presidential pardon power only a mercy and to prevent any arbitrariness of the President of the state in granting the pardon, in the future, constitutional amendments ‘de constitutio ferenda’ are needed in three directions, namely: firstly, this constitutional competence should cover only the convicted persons with a final court verdict, excluding the right of the President of the state to grant abolition in the form of exemption from criminal prosecution; secondly, the President of the state should not grant the pardon by itself, but based on the proposal of the Ministry of Justice and after the previous opinion of the judicial authorities; and thirdly, the legal acts and actions of the President of the state should be subject to constitutional-judicial control by Constitutional Court, which is currently a constitutional-legal gap.

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