

AN OVERVIEW OF THE CONCEPT OF PARDON IN THE SERBIAN CRIMINAL LEGISLATION ¹

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Abstract. *Pardon is a criminal law institute of a long-standing tradition and profuse historical development which may be traced back to the earliest sources of Serbian law. The earliest Serbian legislation on pardoning dates back to the Middle Ages which bear witness to some of the most significant legal documents of the time, including not only the renowned Tzar Dushan's Code but also the most reputable Byzantine Code of 1335 called the Syntagma, which was translated and adapted by priest Matija Vlastar. The permanent historical development of this institute yields the question whether the ancient origin and the ongoing presence of this institute in the national legal system have ultimately generated good legal solutions or there are, nonetheless, some drawbacks calling for a further improvement and development of a more appropriate and logical concept of pardon..*

Key words: *Concept of pardon, Serbian Criminal Legislation.*

I INTRODUCTION

Pardon is a criminal law institute of a long-standing tradition and profuse historical development which may be traced back to the earliest sources of Serbian law. The earliest Serbian legislation on pardoning dates back to the Middle Ages² which bear witness to some of the most significant legal documents of the time, including not only the renowned Tzar Dushan's Code but also the most reputable Byzantine Code of 1335 called the Syntagma, which was translated and adapted by priest Matija Vlastar. The permanent historical development of this institute yields the question whether the ancient origin and the on-

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² Unfortunately, there is insufficient data on the early Middle Ages, when the first Serbian state was constituted. It may only be assumed that the applicable law of the time was a form of customary law characterized by the prevailing private interests which gradually, in the process of strengthening the role and the position of the state, yielded to the public interests.

going presence of this institute in the national legal system have ultimately generated good legal solutions or there are, nonetheless, some drawbacks calling for a further improvement and development of a more appropriate and logical concept of pardon.

II AN ANALYSIS OF THE SUBSTANTIVE ASPECT OF PARDON

The development of the institute of pardon in our country in the post-war period was characterized by a recurrent extension of its substantive contents, which included not only criminal sanctions (such as preventive and deterring measures) but also some other penal measures. Consequently, there was a departure from the traditional concept, where pardon was defined as a ground for quashing a punishment.³ One of the most disputable substantive elements, which somehow failed to be observed by the national legal theory, is the release from criminal prosecution (abolition). In comparative law, this legal consequence is seldom related to the concept of pardon because it is, as a rule, prescribed in the definition of another criminal law institute - amnesty.⁴

The rationale behind the aforementioned solutions is rather obvious: the very concept of abolition excludes the use of statutory provisions in reaching a decision on the case at issue and bars the instigation of a criminal proceeding against a particular person even if the legal presumptions have been satisfied. Such an important and exceptional power is most commonly vested in the legislative body, which has the authority to make laws and bar their application.⁵ On these grounds, it can be said that the inclusion of abolition into

³ In the Criminal Act of 1947 (The Official Paper of FNRJ, No 106/47), pardon was defined as a full or partial release from serving an enforceable imposed punishment, or a commutation of the imposed punishment by a more lenient one. In the Criminal Act of 1951 (The Official Paper of SFRJ, No. 13/51), the contents were supplemented by the provisions on the release from criminal prosecution and the repeal of the legal consequences of a conviction. The Criminal Act of 1976 (The Official Gazette of SFRJ, No. 44/76), which is considered to be the foundation of the positive criminal law solutions, envisaged the commutation of a punishment by a conditional conviction, prescribed shorter time-limits on the duration of legal consequences, abolished and/or prescribed shorter time-limits for certain preventive and deterring measures, and envisaged an option of expunction (non-disclosure) of a conviction from records. Pursuant to the applicable Criminal Act of 2005 (The Official Gazette of RS, No 86/05), the institute of pardon encompasses the following legal consequences: release from criminal prosecution (abolition); full or partial release from serving the imposed punishment; commutation of a punishment either by a more lenient one or by conditional conviction; rehabilitation; a shorter time-limit for certain legal consequences of the conviction; abolishing an individual or all legal consequences of a conviction; abolishing or prescribing shorter time-limits for preventive and deterring measures; prohibiting the performance of a specific job, activity and duty; imposing a prohibition on driving a motor vehicle; and banning foreigners from the country.

⁴ The examples of this kind can be found, for instance, in the legislations of France, Italy, Germany, Belgium, Austria, Greece and Switzerland. After the reform of their criminal legislations, some of the former SFRJ republics (such as Croatia, and Bosnia and Herzegovina) excluded abolition from the concept of pardon. In the event that some legal systems do make provisions for release from criminal prosecution by means of an act of pardoning, the legislation regularly prescribes some additional requirements (such as: obtaining a consent from the legislature in some of the US States). For more information on the legal consequences of pardon in the comparative law, see L. Sebba: *The Pardoning Power, A World Survey*, the Journal of Criminal Law and Criminology, vol. 66, no.1, 1977, p 85, et seqq.

⁵ Within the dispute on the compliance of pardon with the principle of the separation of powers, it may be interesting to point out that Beccaria asserted that the entire pardoning power was wrongly vested in the executive branch of government: "It is to be borne in mind that the act of pardoning is the virtue of the legislator, and

the concept of pardon disfigures the traditional concept of pardon by making it vague and indistinct, and hinders further differentiation between the institutes of pardon and amnesty, which is after all the prerogative of the legislature. In positive law, the distinction between pardon and amnesty exists only in the domain of competences and powers.⁶ However, we cannot disregard the fact that the principle of the separation of powers is not simply a matter of chance or a mere formality but that the distribution of competences and powers stems from significantly distinct natures and substantive contents of these two institutes. This has to be pointed out primarily because the substantive contents of pardon and amnesty as defined in the provisions of the Serbian Criminal Code (2005) were, without any reasonable justification, drawn closer than ever before.⁷

Another argument in favour of removing abolition from the substantive contents of pardon is the legal requirement on preventing discrimination. We could easily imagine a case where some of the participants in the criminal offence might be released from criminal prosecution whereas others would be deprived of the privilege, which is a direct result of the non-extensive effect of pardoning, i.e. the absence of the cohesion privilege (*beneficium cohaesionis*) which is envisaged in criminal procedure. It does not seem right that the pardoning privilege is to be enjoyed by the criminal offender and denied to his accomplice or assistant, for example. On the other hand, amnesty is quite a different issue; it is a general legal act, a true *lex specialis* in both formal and substantive sense, which excludes the application of positive law. As such, it applies to all criminal offenders, including both the perpetrator and the accomplices.

The ultimate question is whether the release from criminal prosecution (abolition) is in compliance with the presumption of innocence, under which a person is considered innocent until proven guilty in a court of law by an enforceable judicial decision. The problem stems from the fact that the abolition act is completely indifferent to the issue of criminal liability of the person it pertains to. As the abolition act does not include information on whether the pardoned person is guilty or not, there remains what might be called a general public "non-legal" suspicion on one's culpability. Another fact of considerable relevance is that release from criminal prosecution is permanent. The same person cannot be prosecuted again for the same criminal offence even if the abolished person might want to initiate a legal action to prove his/her innocence; such an action would be objected as *res iudicata*. Consequently, in spite of being an act *in favorem* of one person, abolition may cause moral, immaterial harm due to the incompatible legal and material position of the abolished person.⁸ For this reason, our more distant legal theory proposed seeking a prior

not of the one who is in charge of applying the law:" C. Beccaria, *O zločinima i kaznama*, Split, 1984, p. 132 (*On Crimes and Punishments*)

⁶ In the legislation of the Kingdom of Yugoslavia, for example, it was the monarch (the executive authority) that had the power to grant both pardons and amnesties. (*Author's remark*)

⁷ The concept of amnesty as prescribed in the new Criminal Code (2005) includes abolition, full or partial release from serving a punishment, commutation of the imposed punishment by a more lenient one, rehabilitation, repeal of an individual or all legal consequences of a conviction, as well as some specific preventive and deterring measures (such as: prohibition of performing a particular job, activity or duty; prohibition of driving a motor vehicle; and banning foreigners from the country).

⁸ Legally speaking, a person is considered innocent until proven guilty by the enforceable judicial decision. However, from the philosophical point of view, the act of pardoning must be preceded by an act of malice or injustice. Hence, the act of pardoning is by no means acceptable to an innocent person, who can only be satis-

consent⁹ of the person who is to be abolished. The proposal is hardly acceptable considering that one of the basic characteristics of pardon is its compulsory nature, which implies that it does not depend on the free will of the person it pertains to.

There is another argument of a practical nature that supports the proposed thesis. Namely, both the national and foreign practice point to a frequent use of abolition for the purpose of overcoming and resolving political tensions and crises.¹⁰ Obviously, such a goal can be achieved far more efficiently by a general act rather than by a series of individual pardoning acts.

The initial remark on the lack of critical reconsideration of the concept of abolition in the domestic criminal law theory does not apply to some other effects included in the subject matter of this institute. Some authors have observed the incompatibility between the concept of pardon and the preventive and deterring measures.¹¹ Unlike punishment, preventive and deterring measures are sanctions of a non-retributive nature, aimed at eliminating the circumstances and conditions which may affect the perpetrator's prospective commission of criminal offences. On the basis of this generally accepted premise, we can conclude that the preventive and deterring measures should not be included within the framework of pardon. Moreover, the very act of pardoning (which may as well be perceived as "mercy") necessarily and logically presumes that there is some malice or, at least, a threat of malice aimed against the criminal offender. On these premises, we may draw an alternative conclusion: the concept of pardon in our legislation is either contrary to the general idea of pardoning or contradictory to the accepted concept of preventive and deterring measures! For the same reasons, it is highly advisable to reconsider the effect of pardoning on the legal consequences of a conviction, including the provisions on the expunction (non-disclosure) of a conviction from records.¹²

A further analysis of the substantive contents of pardoning indicates that the concept of commuting a punishment by a conditional conviction may not generate a satisfactory solution either, for which reason it is seldom encountered in comparative law.¹³ After the

fied to receive a statement that there has been no wrongdoing and that the person is not guilty of committing a crime.

⁹ For the above reasons, abolition is characterized as one of the worst forms of pardoning; concurrently, it is considered acceptable only for political prisoners. M. Aćimović, *Krivično pravo*, Opšti deo I, Subotica, 1937, p 174. (*Criminal Law*),

¹⁰ For illustrations on the use of pardoning in the field of politics, see: P.S. Ruckman, *Keys to Clemency Reform: Knowledge, Transparency*, 2001, p.2, Source: <http://www.jurist.law.pitt.edu/pardonop5.htm>; P. Hünerfeld: *Le Droit D' Allemagne Fédérale*, Revue Internationale de Droit Pénal, no. 3-4, vol. 61, 1990, p. 705, and others. The phenomenon has been cited by some national authors: T. Živanović, *Krivično pravo Kraljevine Jugoslavije*, Opšti deo, Beograd, 1937, p 404, (*Criminal Law of the Kingdom of Yugoslavia*); B. Čejović and V. Miladinović: *Krivično pravo*, Opšti deo, Niš, 1995, p 551 (*Criminal Law*); Z. Ostojić, *Krivično pravo*, Opšti deo, Beograd, 2003, p 371, (*Criminal Law*), and others. S. Pihler: *Prilog raspravi o pomilovanju*, Pravni život, br. 6/7, Beograd, 1987, p, 695 (*Addendum to the Debate on Pardoning*)

¹¹ S. Pihler: *Prilog raspravi o pomilovanju*, Pravni život, br. 6/7, Beograd, 1987, p 695

¹² *Ibid* and Dj. Marjanović, O suštini pravnih posledica osude, Jugoslovenska revija za kriminologiju i krivično pravo, no 1-2, 1982, p 39, and forth, (*On the Essence of the Legal Consequences of a Conviction, Yugoslav Journal of Criminology and Criminal law*); and D. Jakovljević: *Brisanje osude*, Pravni život, No 2, 1982, p 186 (*Expunction of a Conviction*)

¹³ The commutation of a punishment by a conditional conviction seems to be a relic of an earlier SFRY legislation; such solutions are frequently encountered in the legislations of the former Yugoslav republics, except for Bosnia and Herzegovina. See: *Zakon o pomilovanju*, Službene novine Federacije BiH, No.

abrogation of an earlier federal Pardoning Act¹⁴, there have been no further explicit departures from the general legislative framework. Hence, the present issue of dispute may be the currently existing concept of conditional conviction granted by means of pardon. Hypothetically speaking, the subsequent substantive alterations in the concept of pardon may branch into three different directions: 1) to enact legal provisions which depart from the general legislative framework but keep in line with the previous legislative solutions (to exclude probation and impose special duties and obligations, to impose strict probation terms), 2) to envisage the obligation of observing the general rules of the Criminal Code¹⁵ in the course of commutation, which would ultimately make pardon revocable; or 3) to abolish the option of commuting a punishment by a conditional conviction, as a most radical solution. The third solution seems fairly logical as it would rule out the present contradiction that conditional conviction may be granted by means of pardon but cannot be revoked because the very act of pardoning is irrevocable. Thus, as the substance of the institute is lost, conditional conviction cannot achieve the purpose it rests upon: that the threat of punishment takes effect if the convicted person fails to observe the prescribed requirements. The second alternative has some justification as well; the pardoning body should not enjoy absolute freedom in the decision-making process but has to abide by and act in compliance with the general principles and rules of criminal justice. The first solution seems least likely to produce the anticipated effect.

Another problem within the concept of pardoning is rehabilitation. As previously said, the adoption of the Criminal Code has not generated the expected changes in the substantive contents of pardoning. Thus, it has remained vague whether the requirements pertaining to this institute apply in case of an act of mercy as well. The prospective changes should explicitly exclude the applicability of these conditions. First of all, it would provide for an option of awarding rehabilitation prior to the expiry of the given statutory terms (which must be observed in the "standard" form of rehabilitation). At the same time, it would discard the conditions specifying that rehabilitation cannot be granted if the preventive and deterring measures are still underway, or if a second (additional) penalty has not taken effect. It further implies that rehabilitation shall be granted only to the persons with no prior criminal convictions, or those who are under the law considered as not being convicted¹⁶, particularly in terms of convictions within the statutory scope of rehabilitation. As there is no general rule which deprives the recidivists from the privilege

9/96,13/97.28/04 (*Pardoning Act, Official Journal of B&H Federation*)

¹⁴ The Pardoning Act was abolished by the following act: *Zakon o prestanku važenja pojedinih zakona*, Službeni list SCG, br. 135/04. (*Act on the Termination of Applicability of some Acts, Official Paper of Serbia and Montenegro*)

¹⁵ In the event of commuting a punishment by a more lenient one, some legislations expressly impose an obligation to apply the provisions of the general part of the Criminal Code. See examples in *Zakon o pomilovanju*, Narodne novine Republike Hrvatske, no. 175/03, (*Pardoning Act, National Papers of the Republic of Croatia*); and *Zakon o pomilostitvi*, Uradni list Republike Slovenije, no. 45/95 and 23/05. (*Pardoning Act, Official Paper of the Republic of Slovenia*).

¹⁶ The persons who are under the Criminal Code (2005) considered as not being convicted are those who were, as a single sanction, awarded one of the following: a correctional measure, a preventive measure of compulsory psychiatric treatment and care in a medical institution, a preventive measure of compulsory psychiatric treatment in an outpatients' clinic, or rehabilitation in respect of a former criminal offence.

of being pardoned, there is no justification for imposing such a limitation to any particular form of pardon.

Another disputable issue is the commutation of a punishment by one of the recently instituted penalties, such as a community service in the public interest (Art. 52 of the Criminal Code) and the withdrawal of the driving licence (Art. 53 of the Criminal Code). The power to commute a punishment by a community service is first vested in a competent court of law, in case of those criminal offences for the commission of which the legislator has prescribed the maximum punishment of up to three years' imprisonment or a fine, but also taking into consideration the type of the committed offence, the offender's personality profile and his/her consent to do the community work. Therefore, this new penalty is aimed at the perpetrators of those criminal offences "which do not produce a more aggravating effect and whose personality profile shows that, in order to achieve the goal of punishment, it is not necessary to punish the offender by a sentence of imprisonment or a fine."¹⁷ The question is whether the competent body of authority should comply with the imposed limitations during the decision-making process, or whether it should be vested with absolute decision-making powers. Considering the nature of community service and the purpose it has been assigned by the legislator, it seems unjustifiable to simply substitute one for another without observing the given requirements. This illustration, again, supports the need to supplement the Pardoning Act with a legal provision which would oblige the competent authority to observe the general rules envisaged in the Criminal Code in the course of a punishment commutation. Such a provision would clarify prospective dilemmas in interpreting and applying the institute of pardon. Regrettably, this is not the only problem arising from the potential commutation of punishments. We should bear in mind that community service is granted only upon full consent of the offender, which is a provision directly stemming from the prohibition of forced labour.¹⁸ Accordingly, in case of a pending commutation, the competent authority is required to seek the consent of the person involved, which is contrary to the fundamental rule that the act of pardoning does not depend on the free will of the person to be pardoned. On the other hand, the commutation of punishments without obtaining the required consent would make the act of pardoning unconstitutional. Even if the rule on obtaining consent were allowed, the problem would not be solved because it would trigger the next question: what would happen if the pardoned person chose not to perform the community service? In that case, would the granted pardon be revoked despite the common standpoint (shared by all national legal scholars) that pardon is irrevocable?

The former legislation did not recognize the withdrawal of the driving licence as a form of punishment. In the normative framework of current legislation, it is envisaged as a second (additional) penalty which may substitute the punishment of two years' imprisonment. The provision is based on the principle that a single criminal act cannot be penalized by more than one principal punishment. For illustration, let us briefly examine a case of a criminal offence involving the use of a motor vehicle in the course of the prepa-

¹⁷ Lj. Lazarević: *Komentar Krivičnog zakonika Republike Srbije*, Belgrade, 2006, p 329 (*A Commentary to the Criminal Code of the Republic of Serbia*)

¹⁸ Forced labour is strictly prohibited under the Serbian Constitution (Art. 2), Official Gazette of the RS, no 98/06, as well as under the European Convention on the Protection of Human Rights and Civil Freedoms (Art. 4), Official Gazette of Serbia and Montenegro, International treaties, no 9/03.

ration or commission of a criminal act. If the court has decided to pass a sentence of short-term imprisonment as the principal punishment, is it likely to expect that the punishment awarded by the act of pardoning might be substituted by the withdrawal of the driving licence (as a more lenient one)? In addition to the affirmative reply to this question, it is important to notice that in the commutation process the competent authority has to observe the prescribed minimum and maximum terms for this type of penalty, which may not be shorter than one or longer than three years. Even if we assume that the commutation is not disputable, another problem may emerge later in the implementation of the act of pardoning, for example, if the person whose punishment has been substituted by the withdrawal of the driving licence is found driving a vehicle while the term of punishment is underway. In such a case, would the new penalty (under the general rule in Art. 53, Section 4 of the Criminal Code) be commuted to a punishment of imprisonment, which would directly revoke the granted pardon? *Circulus vitiosus*, as it exists in case of substituting a punishment by a community service or conditional conviction, calls for a more detailed reassessment of the legislative solutions which diverge from the traditional concept of pardon. It must be said that the solution to these problems primarily depends on re-examining the legislation on the aforesaid sanctions rather than the legislation on pardoning itself. Due to their specific nature, it may be more justifiable to classify these sanctions as para-penal measures instead of giving them the status of punishment, as regulated in the Criminal Code of 2005. Such a classification would discard all the dilemmas and inconsistencies in case when a punishment is substituted by one of these sanctions.

Another highly relevant question, which has hardly been discussed in the legal theory, is the so-called general domain of applying the institute of pardon. In positive law, the scope of its applicability is defined in general terms, as follows: "for criminal offences prescribed in the statutory legislation of Serbia". Thus, the subject matter of pardoning is determined on the criterion whether the criminal act is prescribed in the national legislation or not. Some legal systems (containing the same substantive scope on pardoning) include additional rules, under which pardon is granted even for criminal offences prescribed in foreign legislations, providing that the offender is a domicile citizen and that such an option is envisaged in international treaties, except for the persons convicted by the International Court of Justice.¹⁹ However, comparative law offers some examples of a different nature. The scope of its applicability may be determined on the ground of a criminal sanction, which is either imposed by the national court or being executed in the country (including the legal consequences arising from these sanctions).²⁰ In that way, pardon would apply to all the persons serving their sentences in the Republic of Serbia, regardless of the fact which court and on what grounds has reached the first instance decision. In addition, such a provision would concurrently be a statutory ground for pardoning

¹⁹ It is the case, for example, in the criminal legislature of Slovenia (Pardoning Act, Art. 1, Sections 2 and 3). The exclusion of persons convicted by the International Court of Justice derives from the statute of the Permanent International Criminal Court, regulating that the states where the sentence is being served are explicitly prohibited to release the convicted person before the expiry of the term of punishment (Art.110, Sec.3)

²⁰ See: Art. 2, Section 2 of the Pardoning Act of the Republic of Serbia.

the perpetrators of those criminal offences used to be prescribed in the earlier legislative acts but have been cancelled in the meanwhile.

Finally, we should mention some other proposals in the national legal theory for reforming the institute of pardon. In the opinion of some authors, the logical connection between punishment and pardoning (mercy) inevitably gives rise to another dilemma. As an aspect of formal social reaction, punishment is prescribed not only for criminal acts but also for public delicts, such as: economic offences and infractions. Does it imply that the institute of pardoning should apply to other public delicts as well? There are several reasons in support of this theory.²¹ First of all, it is certainly more likely that a more serious punishment is to be imposed for an economic offence or an infraction rather than for a minor criminal offence, for example. Is there any justification that the pardoning privilege can be enjoyed by the perpetrator of a minor criminal offence whereas it cannot pertain to the perpetrator of a more serious offence? Second, it is absurd that a perpetrator of a criminal offence involving some elements of an economic offence or an infraction could be in a more favorable position (considering the possibility of being pardoned) than a perpetrator of the "clear-cut" economic offence or infraction. Third, the same set of circumstances that justify the pardoning of a criminal act may also arise during the perpetration of public delicts. However, despite these fairly reasonable arguments speaking in favour of applying the institutes of criminal law into the law of public delicts, we should not abandon the generally accepted solution (that the privilege may be enjoyed only by the perpetrators of criminal offences). Otherwise, the intricate concept of pardoning would be made even more complicated and unnecessarily congested.

There are proponents of the standpoint that the subject matter of pardoning should be supplemented by provisions specifying the conditions for its application. These suggestions are contrary to the nature of this institute; they would undermine and restrict the necessary flexibility this institute must preserve in order to achieve the goals and justify the function it has been given in criminal justice. In terms of disadvantages, not only can this solution lead to the restrictive application of the pardoning institute but it can also be easily identified with and overlap with some other criminal law institutes.

The group of unacceptable suggestions includes a request to re-examine the rule on the (subjective) universal nature of the institute, implying that it may apply to all categories of criminal offenders including multiple recidivists or perpetrators of some serious criminal acts. Restrictions of this kind have been part of the legal history of pardoning for years now. However, even if a person may be deprived of the pardoning privilege on the national level for the perpetration of a criminal offence against international law, it does not mean that the person is actually denied the privilege; the person still enjoys the pardoning privilege but it is to be exercised on a completely different (supranational) level.²²

In view of reforming the institute of pardoning, the national legal theory has promoted an idea that the scope of its applicability should be extended to include conditional conviction. If pardoning is perceived as an instrument aimed at quashing a punishment, then there is no reason why it should include only the imposed punishment and exclude the

²¹ For more details, R. Svilar, *Ograničenje prava na pomilovanje na privredne prestupe i prekršaje*, Pravni život, br. 2, 1982. p 243 (*Limiting the Right to Pardon to the Scope of Economic Offences and Infractions*)

²² For more details, D. Miladinović, *Pomilovanje u krivičnom zakonodavstvu Srbije*, Magistarska teza, Novi Sad, 2007. p 62 et seq. (*Pardoning in the Serbian Criminal Legislation, Master's thesis*),

punishment determined by conditional conviction. However, we cannot help noticing that such an extension of the substantive contents of pardon would be just another of many redundant experiments. It is unjustifiable to compare an imposed punishment with a punishment determined by conditional conviction; for, the former is an actual reality and it is executed in the course of a regular criminal procedure whereas the latter is only a possible prospective reality, which may or may not be put into effect. Considering the standpoint that one of the aims of pardoning is to mitigate the punishment, we might wonder if the request for introducing conditional release into the framework of pardon could be, metaphorically speaking, compared to a request of a hypochondriac to receive therapy even though there are no symptoms of a respective illness or disease. From the aspect of jurisprudence, the execution of a conditional conviction does not produce any malice, harm or anguish that has to be mitigated, nor does it justify the need for mercy.²³

III AN ANALYSIS OF THE PROCEDURAL ASPECT OF THE INSTITUTE OF PARDON

The pardoning procedure also provides some space for a further development of this institute. The most significant change in the procedural matter would be the role of the competent court, whose present position in the positive law solutions is fairly intricate. After the first instance court has reached a judicial decision, in the pardoning procedure the same court is required to collect and verify the facts relevant for the process of reaching a competent pardoning decision. At this point, we may wonder whether it is justifiable to give the same court such a role in administering the documents necessary to reach a pardoning decision, thus making the court a "service" of the administrative bodies of authority. In a way, such a role might be said to be leading to the degradation of the judiciary.

On the other hand, the court is also obliged to give a reasoned opinion on whether the act of pardoning is justifiable. In this context, we can discern a number of disputable issues. First, the court is impelled to consider the same issue twice, yet from diametrically opposite starting points of view. Whereas the court has reached the first instance decision by observing the principle of legality, its reasoned opinion on whether the pardoning petition is justifiable must be based on the principle of reasonableness. In doing so, the court certainly does not alter its own first instance decision but estimates whether the decision is opportune for its further application; in doing so, the court acts as an administrative authority, i.e. as if having a discretionary power of its own. *Inter alia*, it is quite plausible that the court's opinion and the decision on pardoning may be rather incompatible, which further aggravates the uneasy position of the court. If a pardon is granted in spite of the negative opinion of the court (or *vice versa*), we cannot rule out the possibility that the court may perceive the pardoning decision as some sort of an administrative correction of

²³ The same reason applies in case of depriving a person of the possibility to initiate a pardoning procedure while the term of conditional conviction is still underway. The need for such a rule stems from the need to achieve full consistency and clarity of the pardoning legislation. The Code of Federal Regulation (CFR), the act regulating the pardoning procedure in the USA, excludes the possibility of initiating the pardoning proceeding while the convicted person is subject to conditional release or probation, as well as in all cases when some other form of administrative or judicial review of the imposed punishment is available to the convicted person. (§ 1.2. CFR).

Source: <http://www.usdoj.gov/pardon/clemencyregulations.htm>

the court's prior judicial decision. It may reasonably raise some doubt in the quality of the judicial opinion on the matter at issue, which has already been adjudicated in the first instance court. It may also give rise to a logical question on the court's actual capacity to be objective and impartial in circumstances where the court is practically required to assess its own work, the more so as the pardoning opinion is based on more or less similar facts which have already been a matter of consideration in the criminal proceeding.

The role of the court in the pardoning procedure *de lege ferenda* may be reframed in different ways. The basic change in the legislative framework might be to exclude the court's obligation to determine whether the act of pardoning is justifiable; however, the court should still remain eligible to give its reasoned opinion on the pardoning petition, when it is considered necessary.²⁴ By excluding the court from the preliminary administrative proceeding, the position remains vacant and there is a further question who is to be vested the duty of administering the decision. There are two options here, pointed out in the comparative law solutions. In the first option, the preliminary proceeding could be vested with a specifically appointed body of the Ministry of Justice (such as, the Office of Pardon Attorney in the US law), which would be authorized to collect and check all the relevant facts, draw a proposal of the pardoning decision and send it to the President. In the second option, the duty could be passed from the court onto the state prosecution, in analogy with the French legal solution where the Ministry of Justice always forwards the petition *ex officio* to the prosecution office of a competent court; thereupon, the court opens a case file, collects relevant documents and delivers a reasoned opinion on whether it is justifiable to grant a pardon.²⁵ The changes in the position and the role of the court seem to be really necessary. The act of pardoning should not be directly related to the judiciary, not only because a pardon is granted for reasons that are rather different from those considered in the procedure on appeal but also because it is granted in a different kind of proceeding, aimed at obtaining a more logical and practicable solution.

A change in the substantive matter, such as a provision on removing the release from criminal prosecution from the contents of pardon, certainly implies a change in the procedure as well. Namely, abolition is the only form of pardoning where the proceeding is instigated *ex officio*. If *ex officio* proceeding were banned, the proceeding would have to be initiated only by filing a petition. Yet, there is an idea that the *ex officio* proceeding should be preserved but linked to some other form of pardoning. In the earlier legislation, the pardoning proceeding was always initiated *ex officio* in case of the capital punishment. However, as the capital punishment was abolished, there is now an issue whether the initiation of proceedings *ex officio* should be preserved in respect of its substitute punishment of 40 years' imprisonment, or the punishment of 30 to 40 years' imprisonment which is currently the maximum sentence in our legal system. However, it seems unjustifiable that the punishment of imprisonments should be equaled with the capital punishment, especially as there are no impediments preventing the convicted person or any other

²⁴ In the US system, the role of the competent authority (such as a Governor or the President) is only to inform the first instance court that the pardoning petition has been filed. If it is deemed necessary, the court may deliver its opinion or give some other information on the case at issue.

²⁵ For more details on the pardoning procedure in France, see: P. Conte, P. M. Chambon: *Droit Penal Général*, Paris, 2002, p 349, M. L. Rassat: *Droit Pénal*, Paris, 1987, p. 369, and A. Chavanne: *Le Droit Français-extinction des peines*, *Revue Internationale de Droit Pénal*, no. 3-4, vol. 61, 1990, p 552.

competent person to file a pardoning petition and, thus, exercise the right to modify the punishment in the process of its execution. The impossibility to initiate a proceeding *ex officio* would concurrently resolve an earlier dispute on the authority which is *ex officio* eligible to start an initiative or file a pardoning proposal. From all the above, it may be logically construed that in the future the pardoning petition might be filed only after the judgment has become enforceable.

Regarding the instigation of the pardoning procedure, the legal theory has observed a gap in the positive legislation concerning the persons authorized to file a pardoning petition. It may most logically be deduced that all persons who are eligible to file an appeal on behalf of a convicted person are also entitled to file a pardoning petition. In analogy with the given standpoint, the scope of eligible persons should include the defence counsel. His exclusion from the list of authorized persons is hardly logical because the defence counsel is eligible to file an appeal on behalf of the convicted person even without his explicit authorization (yet not against his will). Moreover, there is an exception from the general rule in case the defendant has been awarded the sentence of 40 years' imprisonment, when the defendant can neither renounce his right to appeal nor abandon the filed appeal (Art. 364, Sec. 6 of the Criminal Procedure Code). A defence counsel of a juvenile offender also has the authority to file an appeal even against the minor's will; this rule stems from a special procedural position enjoyed by minors, which is envisaged to provide for the best protection of juvenile offenders. In our legal practice, pardoning petitions filed by defence counsels are generally accepted but only providing that they were supported by a special authorization (power of attorney) of the convicted person.²⁶ There is no doubt that giving a power of attorney to the defence counsel would simplify the initiation of the pardoning procedure but, at the same time, it would have an indirect impact on the efficiency of the procedure. If the defence counsel has filed a petition on behalf of the convicted person (with or without the special authorization), the court will consider it inadmissible but such a petition will not be immediately dismissed; the court will give the defence counsel a reasonable period of time to obtain the authorization. Moreover, there is a rule in legal practice under which the defence counsel may request an extension of the given term if, for a good reason, the counsel could not obtain the authorization.²⁷

In addition, there are ideas that the list of persons eligible to initiate the pardoning procedure should also include an unmarried partner of the convicted person, which is in compliance with the intention of the legislator to equate the legal position of the matrimonial and non-matrimonial community.

A detailed analysis of the procedural provisions indicates that there is a legal void regarding the discontinuation of the pardoning procedure. There are no rules whatsoever in all those cases when, after the request has been filed, there cease to exist procedural presumptions for a continuation of the proceeding. Therefore, all the circumstances which make further continuation of the proceeding meaningless or pointless should be included among the legal grounds for the termination of proceeding. The list should certainly include the following circumstances: death of the convicted person, withdrawal of the peti-

²⁶ D. Jovašević, *Amnestija i pomilovanje*, Beograd, 2001, p 49, (*Amnesty and Pardon*); and M. Petrović, S. Batričević: *Komentar Zakona o pomilovanju u SFRJ i Komentar Zakona o pomilovanju SRS*, Beograd, 1986, p.7 (*A Comentary on the Pardoning Act of SFRY and A Commentary on the Pardoning Act of SRS*)

²⁷ M. Petrović, S. Batričević: *op. cit.*, p 11

tion, the expiry of the term of punishment (as the criminal sanction has already taken effect) or the expiry of the legal consequence.

The greatest difference between the subject matter of pardon in the Serbian legal system and the legal systems of other foreign countries probably lies in the field of control. The national positive law does not prescribe a single mechanism of control, which is completely unjustifiable. Many theoreticians have noticed that the institute of pardon is rather "convenient" for different forms of abuse: first, because it does not rest on specific substantive requirements and, second, because the pardoning decision does not contain any elaboration on the rationale which has governed the decision-making process of the competent body of authority.²⁸ In the legal practice, the data on pardoning is rather scarce, and the pardoning decisions are for the most part covered by a veil of confidentiality, as if they were a matter of private rather than public proceedings. Although we may reasonably expect that the official statistics may contain at least some basic information on the application of the institute of pardoning, it is not the case in our country. The inaccessibility of this information may be slightly curious and puzzling considering the fact that Serbia is among the countries with a fairly open information system, particularly in terms of the data recorded in court statistics. However, this should not lead us to a hasty conclusion that the application of the institute of pardon is not a matter of consideration and study, which is probably done within the respective ministerial departments. Unfortunately, this kind of information is hardly available either to the professional or to the general public. The only accessible information is, occasionally and rather briefly, given in mass media.²⁹

On the other hand, the very nature of pardoning does not allow for excessive legal framing which could hinder, restrain and stifle its primary goals. This makes the dilemma on adopting a relevant mechanism of control even more complicated. The mechanism should reconcile diverse legal requirements and leave sufficient space for the decision-making process but, concurrently, it should prevent arbitrariness in exercising this presidential prerogative. These goals speak in favour of introducing publicity as a mechanism of control, which would impose an obligation that all future decisions on pardoning should be published in the Official Gazette. It would establish a political control over the act of pardoning, which could not be exercised in the past period for a number of objective reasons. Currently, it is only an issue under debate.

²⁸ The abuses observed in the course of applying the institute of pardon have made it necessary to establish relevant mechanisms of control. Comparative law points to the four possible ways of imposing statutory limitations on pardoning, which are exercised through the activities of the legislative, the executive and the judicial branch of government whereas the fourth mechanism of control may be the impact of the general public; publicity is primarily important for political purposes, presuming that there are highly developed democratic mechanisms and public sensibility towards such abuses.

²⁹ A newspaper article includes the statistics that President Tadić has pardoned the total number of 97 people from the outset of his previous term of office. Out of the total number of 720 submitted pardoning petitions, 590 petitions were refused, and 33 petitions were not taken into consideration because the convicted persons had served their full terms of punishment in the meantime. The same source clarifies the circumstances which are considered justifiable for granting a pardon. The Chairman of the Pardoning Committee at the time pointed that the Committee generally recognizes the following reasons: the criminal act has been committed as a result of reckless or negligent behaviour; the convicted person has served most of the sentence; the act does not exist in the new criminal legislation; the social harm has in time been reduced; the convicted person has inflicted an incurable disease in the meantime; there are petitions of citizens and organizations for the release of the convicted person.

Source: <http://www.blic.co.yu/arhiva/2006-02-06/strane/politika.htm>

Considering the chronology of the pardoning procedure, there is another important issue which perhaps we should have discussed first. In the pardoning procedure, rather than a lack of control mechanisms, we can observe an absence of any regulation on the Pardoning Committee. In comparative law, the legal framework on advisory or consultative bodies usually specifies their formation, membership and duties in the pardoning procedure. There is not a single legal provision on the Pardoning Committee either in the Pardoning Act³⁰ or in the Guidelines on the activities of courts and penal institutions in the pardoning procedure.³¹ Thus, the Committee turns into almost a "phantom" body in the pardoning procedure.³² Considering the assumption that the opinion of the Committee is highly relevant - if not decisive - in practice, it is difficult to find justification for such a legal gap. Under these circumstances, should such a Committee be allowed to practically have the last word in the pardoning procedure? For, it is most likely that the competent body of authority, which is eligible to make the pardoning decision but also obliged to perform a wide range of other (presidential) activities, may not have enough time to consider all the details of the Committee's proposal or the legal grounds it is based on.

The former normative framework contained a provision on the urgency of the pardoning procedure. Positive law does not include a general rule on this issue, nor does it determine specific terms for most of the procedural activities involved. However, in some provisions (by which these activities are regulated) there is a specification that the activities have to be performed "without delay". Such a general remark on the urgency of the pardoning petition might be taken into account in cases when a pardon is to be granted for short-term imprisonment sentence or for the remaining part of a sentence. The urgency remark has to preclude the unnecessary prolongation of the procedure or situations which could undermine or prevent the use of the pardoning institute, due to the fact that the convicted person has already served the full term of punishment.

IV CONCLUSION

In this analysis, we have considered some of the drawbacks and possible solutions for the development of the institute of pardon. The list of objections specified in this paper is certainly not all-inclusive, nor do the proposed solutions tend to be the exclusive or the only ones. There is no doubt, however, that the concept of pardoning in the positive law of the Republic of Serbia has been burdened by certain problems and doubts, which impose the need to fundamentally reconsider the existing solutions.

³⁰ The Official Gazette of RS, no 49/95 and 50/95

³¹ The Official Gazette of RS, no 6/98 and 7/98

³² However, by no means does it imply that its inclusion into the procedure is contrary to the law; it is constitutionally grounded in the power of the President of the Republic to organize professional and other services to perform the activities pertaining to his constitutional powers. (*Author's remark*)

PREGLED KONCEPTA POMILOVANJA U SRPSKIM KRIVIČNIM ZAKONIMA

Dušica Miladinović

Pomilovanje je krivičnopravni institut sa dugom tradicijom i bogatim istorijskim razvojem koji se može pratiti nazad čak do najranijih izvora srpskog prava. Najranije srpsko zakonodavstvo o pomilovanju datira iz srednjeg vijeka o čemu mogu svedočiti neki od najznačajnijih pravnih dokumenata tog vremena, uključujući ne samo poznati Dušanov zakonik već i ugledni Vizantijski Kodeks iz 1335, koji je preveo i prilagodio sveštenik Matija Vlastar. Stalni istorijski razvoj ovog instituta donosi pitanje da li su antičko poreklo i aktivni prisustvo ovog instituta u nacionalnim pravnim sistemima u krajnjem generisali dobra pravna rešenja ili postoje, ipak, neki nedostaci koji traže daljnje poboljšanje i razvoj odgovarajućeg i logičnijeg koncepta pomilovanja.

Ključne reči: *Pojam pomilovanja, srpsko krivičnopravno zakonodavstvo.*