

Pardon as a Specific Manner of Extinguishing Penalties

Prof. Dr. Azem Hajdari

ILIRIA College - Pristina, Kosovo
Azemh2002@yahoo.com.mk

Doi:10.5901/mjss.2015.v6n2s5p172

Abstract

Pardon is one of the manners of extinguishing penalties, respectively the creation of legal situations which impede the criminal prosecution as well as imposing and application of punishments against the perpetrators of criminal offences. It represents an act issued by the President (so is in Kosovo), respectively the Government. In fact, by means of pardon specifically designated persons listed by name are granted exemption from complete or partial exemption from the execution of a punishment, the substitution of punishment with a less severe punishment or a suspended sentence or the expunging of punishment. Pardon is an old institution of criminal law. It is known in Roman Law and Middle Ages Law. Also contemporary criminal laws recognize pardon as a criminal-law tool which precludes imposing the punishment, or the imposed punishment is pardoned as whole or partially. In Kosovo the pardon issue has been regulated by Law on Pardon entered into force in 2008. Pardon manifests a range of characteristics and its existence and granting is determined by special reasons. For granting pardon is conducted a special procedure. Such procedure shall be initiated according to official duty (ex-officio) and by the initiative of the convicted person or his family members. The pardon shall be granted for all criminal offences despite of their gravity, excluding criminal offences against the constitutional order and security of the Republic of Kosovo and criminal offences against humanity and values protected by international law. In this short scientific paper is dealt with the meaning, characteristics, importance and the procedure of pardon implementation as well as some of the basic issues of theory-practice nature referring to this criminal-law institution. By preparing this article I have used historical-legal, comparative, dogmatic, statistical methods etc.

Keywords: The President, pardon, punishment, imprisonment, convicted person.

1. Introduction

Pardon of punishments represents an institution of criminal law through which penalties are extinguished. This institution is the instrument of the President through which specifically designated persons listed by name are granted exemption from complete or partial exemption from the execution of a punishment, the substitution of punishment with a less severe punishment or a suspended sentence or the expunging of punishment. Pardon is based in the principle of reward, rehabilitation, universality, the personal effectiveness and ignoring of financial compensation. Through pardon shall be followed political and social changes in the criminal field, it is influenced in the good behavior of convicted persons, shall be performed certain humanitarian repercussions and it is expressed state and political wisdom. When deciding on applications for pardon it must be considered the severity of criminal offence, the risk of recidivism, repentance, the appearance of respected character and behavior etc. For granting pardon is conducted a special procedure. It precedes the submission of applications for pardon, and it continues by its reviewing from respective commission which prepares a report with concrete proposals for each application and sends it to the President as the sole authority to make decisions. According to data made public only through years 2002-2012 were filed 2885 applications for pardon, of which were approved 885.

During the decision-making process concerning pardon were indicated cases of granting pardon for criminal offences for which the legislator had forbidden granting pardon such as those concerning trafficking in persons, cases of granting pardon for very severe criminal offences and contrary with the pardon's goals, such are cases of murders from blood feud as well cases for granting pardon for applications for which the commission on pardon had recommended its refusal.

2. The Meaning of Pardon

In general pardon is an act issued by the President or state government. In Kosovo case pardon is granted by the President. "Pardon is issued in the form of a decision by which specifically designated persons listed by name are

granted exemption from complete or partial exemption from the execution of a punishment, the substitution of punishment with a less severe punishment or a suspended sentence or the expunging of punishment. ¹ In accordance with the article 3, paragraph 3 of the Law on Pardon a pardon relieves the convicted person from protective measures, fines and any other punishments included in the sentence imposed by the court. ²

In fact, pardon implies the extraordinary executive power of the President to pardon the convicted persons for criminal offences, by releasing them from imposed punishment by the court. It is granted through an extraordinary and seldom-used tool to reward extraordinary displays of character and conduct or to address serious humanitarian concerns characterizing the accused or convicted persons for commission of criminal offence.

By the definition abovementioned it turns out that the pardon in volume terms represents a broad act because by pardon shall be extinguished a large number of criminal sanctions. ³ Consequently, according to the article 112, paragraph 2 of Criminal Code of the Republic of Kosovo a perpetrator cannot be pardoned for any punishment for which the Conditional Release Panel has refused that person conditional release. ⁴

3. Some of the Principles in which is Based the Pardon

The pardon is based in some principles. Seen in the context of solutions specified in the article 3 of the Law on Pardon this institution of criminal offence is based on these principles: the principle of reward, rehabilitation, universality, the personal effectiveness and ignoring of financial compensation. In the following of this scientific paper briefly will be discussed for each of these principles.

3.1 The principle of reward

In general reward is the assessment done to someone for a performed service or good behavior. ⁵ Observed in this regard, pardon shall be implied as an evaluation character institution through which are rewarded persons for the commission of criminal offences for their extraordinary behaviors and characters. As extraordinary behaviors even though the Law on Pardon does not specify it must be implied actions such: apology, repentance, willingness to compensate the caused damage etc. Whereas by the expression extraordinary characters shall be implied psychological and moral attributes such as: insistence, determination, strong will, sustainability etc. In these cases it is about actions and attributes referring to the accused person, respectively to the convicted person for commission of criminal offence. This principle is interfered also by the so-called extraordinary humanitarian concerns. Here it is about mainly for concerns relating to politically motivated prosecutions of individuals and particular ethnic groups which dedicate for more freedom and rights of communities they belong to. In all these situations reward consists in the complete or partial release of the convicted person from prosecution, the execution of punishment, protective measures, fines and any other punishments included in the judgment imposed by the court. Seen on this basis, it may be said freely that the principle of reward it affects in the engagement of convicted persons in work and other activities within penitentiary institutions which shall be in function of their rehabilitation.

3.2 The principle of rehabilitation

Observing in criminal-law general context the principle of rehabilitation enables to persons which are prosecuted or convicted unlawfully to return the rights they have lost based on these unlawful prosecutions. ⁶ In meantime observing in terms of pardon the principle of rehabilitation means the return of all civil rights to the persons against whom was awarded this important institution of criminal law. This is about his return to work, the return of social security rights, the right to be elected in public functions etc. These rights, duly, are returned immediately, respectively by the issuance of act stating pardon. In these cases the acts which have been served for the removal of such rights shall be abrogated.

¹ Salihu, Ismet, *Criminal Law, Special Part, Pristina, 2012, pg. 568.*

² *Law on Pardon, Law No. 03/L-101, has been adopted in Assembly of the Republic of Kosovo on 12 December 2008.*

³ *In fact pardon cannot be granted for criminal offences against constitutional order and security of the Republic of Kosovo (Chapter XIV) and criminal offences against humanity and values protected by international law (Chapter XV).*

⁴ *Criminal Code of the Republic of Kosovo, Code No. 04/L-082 entered into force on January 1, 2013.*

⁵ *The dictionary of today Albanian, Tirana, 2002, pg. 1276.*

⁶ *Hajdari, Azem, Criminal Procedure Law, General Part, Pristina, 2014, pg. 78.*

3.3 The principle of universality

Pardon is an institution of universal character. It is considered such because it may be granted for all types of criminal sanctions and almost for all types of criminal offences. As it turns out pardon shall be granted for punishments of imprisonment, protective measures, fines and any other punishments imposed by the court. Also, excluding the criminal offences against constitutional order and security of the Republic of Kosovo and criminal offences against humanity and values protected by international law pardon shall be granted for any other type of criminal offence foreseen by the legislation in force.⁷ Consequently, this principle provides broad opportunities of pardon due to the fact that through this institution is enabled complete or partial pardon, meaning that gives a positive energy to the prisoners to behave and be fully subordinated to the re-socialization process.

3.4 The principle of personal effectiveness

Pardon has a personal effect. This means that through this institution shall not be violated the interests, respectively the rights of other persons determined by the same court decision which is affected by pardon. Therefore, "all persons damaged from the criminal offence, even in cases when pardon is granted have the right to seek for compensation of damage. Likewise when abolition is granted,⁸ even though is not imposed the punishment for criminal offence, the injured parties by a criminal offence have the right to seek for compensation of damage."⁹

3.5 The principle of ignoring financial compensation

Pardon does not prejudice in the innocence of accused or convicted persons. As such it does not manifest any possible effect in legality and fairness of proceeding and solving a criminal case. Through pardon, as abovementioned, a concrete person is released from the criminal prosecution, the execution of imprisonment punishment (even the long-term imprisonment), protective measures, fines and any other punishments included in the judgment of court. Observing in this regard, granting pardon does not provide any possibility to the pardoned person concerning the right to financial compensation. Therefore, the pardoned person has no right to request for a financial compensation for the time of its stay in prison or deprivation from liberty. The effect of this limitation is comprehensive and it manifests the scope concerning public institutions as well as private ones.

4. The Characteristics of Pardon

Pardon as a criminal-law institution has a long history. It is appeared in Roman Law, by continuing in The Middle Ages Law, until nowadays. As an institution pardon manifests these characteristics:

1. Pardon represents an appropriate tool for monitoring of political and social changes in criminal-law terms. As is known, contemporary society is in an intensive process of changing political and social circumstances, changes affecting that several criminal offences to lose that degree of social dangerousness they had in the moment of issuance of criminal law. "Due to this cause, the type and measure of earlier imposed punishment is considered to be very aggravating. Therefore, through pardon, without changing the judgment by which is imposed this punishment, the imposed punishment is mitigated or is entirely abolished."¹⁰
2. Pardon affects to the convicted persons during the serving sentence to behave. Respectively, the fact itself through pardon the convicted persons are informed that shall be pardoned partially the punishment, this affect positively, it represents stimulation for them to behave in order to deserve this act of state mercy.

⁷ In Kosovo were indicated cases when pardon is granted also for criminal offences for which according to the Law on Pardon it could not be granted. Thus, in 2011 a pardon is granted also to a person convicted for trafficking in persons, which was part in the chapter of criminal offences for which the Law on Pardon expressly prohibited the awarding of pardon. See: Kosovo Institute for Justice analyzes the implementation of pardon institution and conditional release, <http://kli-ks.org/instituti-i-kosoves-per-drejttesi-analizon-zbatimin-e-institutit-te-faljes-dhe-lirimit-me-kusht/> Betim Musliu and Adem Gashi, Analysis, <http://kli-ks.org/falja-ne-kosove-analize-e-zbatimit-te-institutit-te-faljes-dhe-lirimit-me-kusht-2/>.

⁸ Abolition is the widest form of pardon. It has to deal with the pardon of person from criminal prosecution. By granting abolition the procedure cannot be commenced. If procedure is commenced, it stops. Abolition may be granted at all criminal proceedings phases until is not issued the final judgment.

⁹ Salihi, Ismet, *op. cit.*, pg. 565.

¹⁰ *Ibid.* pg. 565.

3. Pardon represents an act that in certain cases is granted for human causes and for political and state particular interests. This institution is applied for human causes in cases when a person who commits a criminal offence has an extraordinary merit for liberation and country building. Whereas in cases when it comes to political and state interests pardon shall be granted if prosecution, the punishment or further punishment of a particular person violates seriously state authority or the relations of that state to the other state, or relations of that state with international organizations for instance: United Nations Organization, European Union, The Council of Europe etc.¹¹ and
4. Pardon is an expression of political and state wisdom. It is so because by this institution it becomes possible the opportunity to consider legal, social and political circumstances which dictate and justify its application.

Through pardon is not canceled the verdict. The verdict still remains lawful, but due to the causes abovementioned the pardon is granted.

5. Criteria for Granting Pardon

Like any other institution of criminal-law also pardon is based in criteria specified by law. Such criteria according to the article 5 of the Law on Pardon and the article 2 of the President decree for Criteria and Procedures for Pardon of Convicted Persons¹² shall be considered: the gravity of crime, the risk of recidivism, the sincere repentance, the appearance of behavior and respected character, the influence of pardon to the injured persons, the time spent in serving the sentence, meeting the requirements of Correctional Service and humanitarian specific reasons for pardon. Solutions given in these provisions made clear the fact that the President in the occasion of awarding pardon shall be based also in other criteria, but they are required to be in compliance with the Constitution and Law in force. For some of such criteria will be discussed in the following of this scientific paper.

5.1 The gravity of crime

The gravity of crime is one of the main criteria that is required to be considered on the occasion of granting pardon. This due to the fact, that granting pardon without limitations regarding the gravity of criminal offence it may have a negative impact in the public opinion and in the President's authority itself. In functioning of this prohibition I consider that should be seen the solution given in article 4, paragraph 5 of the Law on Pardon. Pursuant to this provision the convicted person for criminal offences against the constitutional order and the security of the Republic of Kosovo (Chapter XIV) and criminal offences against humanity and values protected by international law (Chapter XV) has no right to request for pardon. Of course, it is desirable that for abovementioned goals and not only for them, on the occasion of regarding decision-making process of granting pardon the President shall be reserved by awarding this institution for the accused and punished persons also for a considerable number of criminal offences such as those linked with murders of blood feud, rape, organized crime, corruption etc.¹³

5.2 The risk of recidivism

On the occasion of awarding pardon shall be avoided situations from pardon to benefit persons that just started with the sentence and those indicating signs of possible repetition of criminal offences. Of course, shall be avoided strictly the situations of awarding pardon for persons who have committed more than one criminal offence. When this approach and the pardon criteria shall not be respected strictly, it may be appear the risk of recidivism, a situation that strikes in a substance the pardon mission as an institution rewarding good behaviors of the accused or punished persons and announces their functioning re-socialization.

5.3 The sincere repentance

The repentance represents the feeling of remorse expressed by the perpetrator for the committed criminal offence. This

¹¹ Ibid. pg. 565.

¹² See the decree of the President No. DF-001-2012 for Criteria and Procedures for pardon of the convicted persons of 13 January 2012.

¹³ The experience of these years prove the fact of granting pardon also for persons punished regarding corruption, severe murders, including bleeding feud murder, rapes etc.

feeling of remorse in order to be considered as fulfilled criteria, shall be given in the sincere manner, meaning directly, opened and without pretension. Even though the evaluation parameters of the sincere repentance shall be considered difficult to measure, I consider that in this regard, there are some issues facilitating the assessment. Such may be the apology to the injured party, willingness to compensate the damage etc.

5.4 *The appearance of behavior and respected character*

In order to award pardon it is required that the accused or convicted person to have manifested character and respected behavior. Here it seems to be about persons which throughout their entire life dealt with useful activities, effects of which could have been of personal character with benefits by a group of persons or with a broad socially basis. In fact, it is about persons dealing with humanitarian, cultural, educational activities etc. and which had committed the criminal offence by negligence (such as may be the case of commission the criminal offence of endangering public traffic) or in a situation of rage, in exceeding the limits of the necessary defense, extreme necessity etc.

5.5 *The influence of pardon to the injured persons*

In order to award pardon when it comes to criminal offences with the commission of which to particular persons is caused any damage (material, moral or as a lost profit), it is required to manifest a concrete effects to them. These effects, duly, shall be resulted with the benefit of the injured party from the compensation of caused damage, abandonment from the application for compensation of damage, its reconciliation with the perpetrator etc. Of course this represents measurable criteria, because it shall be based in undertaking concrete actions by the injured party, among other things abovementioned.

5.6 *The time spent in serving the sentence*

For granting pardon in the case of persons sentenced to imprisonment duly is required that the convicted person to serve a particular time in prison. Although the Law on Pardon nor the President decree for Criteria and Procedures of Pardon concerning Convicted Persons does not specify the time that convicted person shall spend in the penitentiary institution, I consider that time, excluding specific cases, should be matched at least with the half of duration of punishment of imprisonment imposed by the court. All this based in applications related to the re-socialization of those persons, the reaction of public opinion, maintaining the authority of court etc.

5.7 *Fulfilling the requirements of the Correctional Service*

By legislation in force to Probation Service are granted a numerous of responsibilities concerning the convicted persons. These responsibilities, although multidimensional, they mostly have to deal with monitoring and assistance to the convicted persons during the time of serving alternative punishments.¹⁴ In fact, the Probation Service is obliged to monitor the fulfillment of obligations of persons punished by suspended sentence, to those imposed semi-liberty or is issued an order for community service work. Also, the Probation Service has the authority to determine specific applications for persons punished by alternative punishments. Therefore, it is considered to be fulfilled this criteria when the relations of this service prove for fulfillment of all particular applications by the court and personnel of this service. Therefore, eventual defects that shall be expressed in fulfillment of specified applications should be serious obstacles for approval of filed application for pardon.

5.8 *Humanitarian specific reasons for pardon*

As a special criteria which may effect in awarding pardon is the one related to the existence of humanitarian specific reasons. Such reasons, in most of the cases, shall be referred to the cases when the criminal offence is committed by a person who has extraordinary merit for liberation and building country. It is about for persons who have made their name in liberation war, have served many years imprisonment due to their patriotic activities etc. Of course, even in a concrete case it is discussed about measurable criteria due to the fact that cases of such persons are well known for public opinion.

¹⁴ See <http://www.md-ks.net/?page=1,31>.

6. Procedure for Pardon

Concerning pardon the Law on Pardon and the President Decree for Criteria and Procedures of Pardon concerning Convicted Persons foresee special procedure rules. According to these rules in order to proceed the question of pardon it is required the submission of application for pardon. After submission, the application in question is a subject to detailed review in order to verify the question of meeting the criteria for pardon. And then this is followed by a decision-making process concerning the application in question.

6.1 The submission for application

The application for pardon is submitted in writing. It is addressed to the President and submitted directly to the Office of the Presidency or through Correctional Service in cases when the convicted person is serving the sentence. The application in question, duly, is submitted by the convicted person. Such application on behalf of the convicted person may be submitted also by the spouse, child, brother, sister or any other person authorized from the convicted person. The application for pardon shall contain a brief description of the case, the statement of facts, circumstances and reasons supporting the application for pardon any other information deemed to be necessary. The application shall be withdrawn at any time by its applicant.

6.2 Reviewing the application

The reviewing of application is made by the Commission on Reviewing and Evaluating of Applications on Pardon.¹⁵ This Commission which is of ad-hoc character is formed by the President. When it is considered necessary for reviewing the application, based on the recommendations of the Commission the President requires from the Ministry of Justice to provide the relevant documents in which shall be reflected personal data of the convicted person, the copy of court final judgment or its verdict, data on work and education of the convicted person, data on family situation (the number of minor children, the obligation for maintenance etc.) data on the execution of punishment (the place of execution of punishment, timelines for starting the sentence), including data on conditional release, data on reduction or change the punishment (by extraordinary mitigation of sentence or pardon etc.), data if it is submitted and implemented the application for extraordinary mitigation of sentence, data on previous sentences (the type of criminal offence, the type and height of punishment including serving the sentence), data on compensation of damage caused by criminal offence, data on professional evaluation concerning personal attributes of the convicted person including evaluation for recidivism expectations and the effect of punishment to the convicted person and data on behavior of the convicted person during the time he is serving the sentence.

Duly, the Commission is convened in a special meeting in order to specify the agenda on reviewing applications for pardon. After reviewing the submitted applications the Commission drafts a report in writing regarding their reviewing and submits to the President a justified proposal for each of the reviewed applications.

6.3 Decision-making regarding the application

After receiving the report and justified proposal of the Commission on Reviewing and Evaluating of Applications on Pardon the President undertakes the relevant decision-making actions. When the President grants pardon, he does this with a special decree which is published in the Official Gazette of the Republic of Kosovo. For granting pardon is notified the person who made the application, the person who is pardoned and the Ministry of Justice. Such persons shall be notified even in cases when the application for pardon is refused. According to Kosovo Institute for Justice during the period of time 2002-2012 were filed 2885 applications for pardon. From them were approved 885 applications. According to these data were indicated cases of granting pardon by Kosovo Presidents even for applications for which the Commission on Reviewing and Evaluating of Applications on Pardon had recommended their refusal.

¹⁵ This commission consists of at least five members. The members of this commission shall be elected by the Office of the President (Legal Department), the academic community in the field of justice, social society and judiciary. Composition and work of this commission is confidential.

7. Conclusion

During the preparation of this scientific paper I have come to these conclusions:

Pardon is an institution of criminal law which is issued by the President in the form of a decision by which specifically designated persons listed by name are granted exemption from complete or partial exemption from the execution of a punishment, the substitution of punishment with a less severe punishment or a suspended sentence or the expunging of punishment.

Pardon is based on the principle of reward, rehabilitation, universality, the personal effectiveness and ignoring of financial compensation.

Pardon represents an appropriate tool for monitoring of political and social changes in criminal-law terms. Pardon affects to the convicted persons during the serving sentence to behave. Pardon represents an act that in certain cases is granted for human causes and for political and state particular interests and it is an expression of state and political wisdom.

Criteria at which pardon is based are: the gravity of crime, the risk of recidivism, the sincere repentance, the appearance of behavior and respected character, the influence of pardon to the injured persons, the time spent in serving the sentence, meeting the requirements of Correctional Service and humanitarian specific reasons for pardon.

Concerning pardon the Law on Pardon and the President decree for Criteria and Procedures of Pardon for Convicted Persons foresee special procedure rules. According to these rules in order to proceed the question of pardon it is required the submission of application for pardon. After submission, the application in question is a subject to detailed review in order to verify the question of meeting the criteria for pardon.

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