

# ELEMENTS OF COMPARATIVE LAW ON THE INDIVIDUAL PARDON, BETWEEN CONSTITUTIONAL CONSTRAINT AND DISCRETIONARY PREROGATIVE OF THE HEAD OF STATE

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## Abstract

*In the following study the author analyses, from the comparative law point of view, the legal institution of the individual pardon, at a Constitutional provision level, as a Head of State prerogative. Browsing this analysis, the author concludes that the act of the individual pardon is a discretionary and sovereign attribution, encountered, in the most cases, as a prerogative of the Executive power, the one exercising it having, usually, the right to pardon without any justifications, any individual, disregarding the offences committed, provided that the person was final sentenced.*

**Keywords:** *individual pardon, collective pardon, Head of State prerogative, Constitution, amnesty.*

## 1. Introduction. Terminology

Originally, the pardon was a royal and even a divine right, because the monarch was the embodiment of the divine will, which gave him the right of life and death on his subjects. This task, granted to the Heads of States<sup>1)</sup> has been exercised for centuries. Throughout the history, this attribution has been used by the Chiefs of States to gain political benefits, but not solely for that purpose. Today, the act of clemency has a legal Constitutional nature and it represents the will of the political sovereignty. The pardon act can be encountered both in the democratic and in the totalitarian regimes. For example, according to the Romanian Constitution in 1965<sup>2)</sup>, the Republic's President had, among others, the attribution of granting pardons.

The pardon prerogative is provided in almost all the written Constitutions. Besides this task, some states establish at constitutional level, also as prerogatives of the Head of State: the commutation of sentences, the reduction of sentences pronounced by courts and the revocation of all the legal consequences (e.g.: Greece, Portugal, Italy, the U.S.).

The pardon task is usually on the Executive power, but can also be exercised by the Legislative power too. In this context, the pardon can be individual or collective<sup>3)</sup>. Both the individual and the

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<sup>1)</sup> The Head of State institution embraced, throughout the history, many forms and structures. Holding this function in the State was and is still achieved under different titles: kings, emirs, princes, emperors, presidents (see the same sense I. Muraru, E.S. Tănăsescu *Constitutional Law and Political Institutions*, 2<sup>nd</sup> Volume, C.H. Beck Publishing, Bucharest, 2009, p. 244).

<sup>2)</sup> Republished in “The Official Journal of Romania”, no. 65 dated 29<sup>th</sup> of October 1986. The 75<sup>th</sup> Article provided: „The President of the Socialist Republic of Romania fulfils, according to the Constitution and the laws, the following main tasks: ...8. Grants the pardon; ...”.

<sup>3)</sup> See the Constitutional Court Dec. no. 104/2006 on the exception of unconstitutionality of the provisions of the 7<sup>th</sup> Art. of the Law no. 543 of 2002 on the pardoning of some punishments and the removal of some measures and sanctions, published in “The Official Gazette of Romania”, Part I, no. 166 dated 21<sup>st</sup> of February 2006. The Constitutional litigation court has clarified, through this decision, the term of collective pardon, establishing that “it is an act of clemency exercised by the Parliament under its constitutional prerogatives and according to the State’s criminal politics” and that “in the exercise of its competence, the legislator has the full freedom to establish the pardoning conditions on any of the legal liability’s elements, respectively the categories of antisocial deeds (criminal or contravention offences) against sentences or other sanctions were applied for, the categories of sanctions applied to the

collective pardon can be full or partial. A pardon is full when it regards the main sentence as a whole, but when it refers to a determined part of the sentence, the pardon is partial. While the individual pardon is granted to one convicted person, the collective pardon is granted to a number of individuals for convictions, determined by the amount of the sentences or by the crimes they committed. According to the 17<sup>th</sup> Article of the *Law no. 546/2002 on the pardon and the procedure of pardon granting*<sup>4)</sup>, the collective pardon can be granted under condition, the legislator having the option to determine, within the pardon act, the consequences applicable in the case of a subsequent relapse. Regarding the individual pardon, according to the same legal text, the one granting this clemency act shall not condition in any way the exercise of the prerogative.

The terms of “pardon” and “amnesty” often create confusion. That is why we have to clarify the meaning of these two notions. From a constitutional point of view is difficult to make a comparison between pardon and amnesty, considering the distribution of tasks in this area. Usually, the amnesty is a task of the Legislative power. In Romania, according to the Criminal Code in force<sup>5)</sup>, the amnesty removes the criminal liability for the offense committed and, according to the Constitutional provisions<sup>6)</sup>, the Parliament grants it by law. In other States, such as Indonesia<sup>7)</sup>, the President grants the amnesty, while in Denmark<sup>8)</sup>, this prerogative belongs to the King. Unlike the individual pardon, the amnesty not terms the person, actually being equivalent with a “*general pardon*” granted by the Parliament. While the individual pardon may be initiated either *ex officio*, or by the convicted, or his lawyer, his relatives or his husband, the amnesty is always started *ex officio* and is applicable to a group of persons who meet the conditions, under the law. If the effect of the amnesty is the removal of the criminal liability for the offense committed, the pardon means the removal of the sentences for that individual. So, the pardon granted by the Head of State is an individual measure, its effects being focused on the sentence execution. While the amnesty removes the execution of the sentence along with its other effects, such as interdictions, incapacities, legal decays, provided by criminal or extra-criminal laws, if it occurs after the conviction, the pardon does not erase the conviction of the person. Therefore, the individual pardon is an institution regarding the convicted individual, the collective pardon refers to the sentence and the amnesty is the removal of the criminal liability for certain committed acts.

## 2. The procedure of pardon granting

In the following, we consider the analysis of the individual pardon. The task of granting individual pardon is usually regulated at a constitutional level. For example, the French Constitution, in its 17<sup>th</sup> Article establishes that: “The President of the Republic is entrusted with the power to grant the individual pardon.” The 60<sup>th</sup> Article of the German Constitution gives the German President the exercise of the right to pardon in individual cases, in the name of the Federation, while the President of Italy has, according to the Italian constitutional provisions, the right to pardon and to commute sentences.

In the most cases, the Head of State (disregarding his entitlement – president, emir, monarch etc.) is the pardon granting privilege holder, but some countries provide at a constitutional level that,

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offenders, the persons of the offenders and the form of their guilt, their incrimination (intention or fault), any elements regarding the limits of the pardon (full or partial) and the consequences of the future crimes to be committed by the beneficiaries of the clemency act.”

<sup>4)</sup> Published in „The Official Gazette of Romania”, Part I, no. 755 dated 16<sup>th</sup> of October 2002.

<sup>5)</sup> The 119<sup>th</sup> Art. of the Cr. Code: “(1) the amnesty removes the criminal liability for the offense committed. If it occurs after the conviction, it also removes the execution of the sentence and any other consequences of the conviction. The fines imposed shall not be reimbursed.

(2) The amnesty has no effects upon the safety measures, educational measures and the rights of the victim”.

<sup>6)</sup> The 3<sup>rd</sup> Par. of the 73<sup>rd</sup> Art. of the republished Romanian Constitution states: “The following will be regulated by organic law: (...) i) the granting of the amnesty or of the legal pardon...”

<sup>7)</sup> The 1<sup>st</sup> Par. of the 14<sup>th</sup> Art. of the Indonesian Constitution orders: “The President may grant the clemency and the resettlement in rights, having in this respect the notice of the Supreme Court”.

<sup>8)</sup> The 24<sup>th</sup> Section of the Constitution of Denmark (The Prerogative of Pardon and Amnesty) provides: “The King shall have the prerogative of mercy and of granting amnesty. The King may grant Ministers a pardon for sentences passed upon them by the High Court of the Realm, subject to the consent of the Folketing”.

in the exercise of this task, other state authorities are involved. For instance, the 60<sup>th</sup> Article of the Constitution of Germany gives the Federative President the right to delegate this task to other authorities and, according to the 173<sup>rd</sup> Article in the Swiss Constitution, the Federative Parliament decides upon the requests for pardon; Greece ties the President of the Republic, in granting the pardon, to the Justice Minister's recommendation and to the consult of a council mainly composed of judges, while in the case of pardoning a Minister, to the consent of the Parliament. In Denmark, the pardoning of the Ministers needs the Parliament's consent. Other states condition the act of pardoning by the Government's or (in countries like Portugal, Finland or Indonesia) by the Supreme Court's opinion.

According to the d) Letter of the 94<sup>th</sup> Article of the republished Romanian Constitution, the President of Romania grants the individual pardon. A particularization of this constitutional task is found in the provisions of the Law no. 546/2002, which provide that the individual pardon is granted on demand or ex officio, only after the court's decision on the conviction is final. Neither the constitutional text nor the law do not establish any restriction regarding the recipient of the pardon, but they impose conditions regarding the sentence. In this respect, the individual pardon is granted only for custodial sentences, which have not already been executed or of which execution has not started because the convicted evaded it. Therefore, the individual pardon must refer to performance penalties, being impossible to modify a situation that is not yet established. The pardon act has effects only upon the execution of the sentence, exempting the person, under the law, to execute the sentence he was sentenced. The individual pardon is one of the causes that remove or modify the execution of the sentence and does not have any effects upon the additional and accessory penalties. Therefore, the individuals convicted with the suspension of the sentence or with additional and accessory penalties cannot be pardoned. The Romanian President may not grant the pardon before the completion of the criminal trial and before the exhaustion of all the ordinary ways of appeal. But the Legislator makes the specification required to clarify the situation occurred when the pardoned one wants to prove his innocence, this one being able, under the law<sup>9)</sup>, to exercise the extraordinary reviews, after being granted the clemency act.

In the exercise of his prerogative to grant the pardon, the Romanian President (hereinafter referred to as the President) is entitled to request, whenever considers it necessary, consultative opinions from the Justice Minister, who must provide them within 30 days from the date of application<sup>10)</sup>. So, the President is not obliged to ask the opinion of the Ministry of Justice and if he did that, his decision to grant the pardon shall not be held by the Minister's recommendation, that being an advisory opinion and not an assent.

According to the first Paragraph of the 100<sup>th</sup> Article of the republished Romanian Constitution, the pardon granting is achieved by a Decree, countersigned by the Prime-minister. This countersigning "is a cooperative decision of the Chief of State and of the Head of the Government"<sup>11)</sup>, which attracts the legal liability of the counter signer, also being a measure against powers exceeding by the Head of State<sup>12)</sup>. The act of countersigning can also be encountered in other Constitutions. For example, according to the 19<sup>th</sup> Article related to the 17<sup>th</sup> Article of the Constitution of France, the French President's pardon decision is countersigned by the Prime-minister and is implemented by the responsible ministry. The same condition of countersigning the

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<sup>9)</sup> The 20<sup>th</sup> Art. of the Law no. 546/2002 states that: "The pardon does not prevent the convict's right to exercise the extraordinary reviews, under the law, and shall not constitute grounds for the rejection of those."

<sup>10)</sup> The 6<sup>th</sup> Art. of the Law no. 546/2002 provides that: "(1) In order to exercise the prerogative of pardon, The Romanian President may ask, whenever he feels is needed, consultative opinions from the Ministry of Justice, who is obliged to grant them within 30 days from the application date. (2) Also, whenever he considers it necessary, the Romanian President may request information to the local public administration bodies, to the detention supervisor, to the law enforcement and prosecution bodies, to the police authorities and to other public institutions, as well as to the unit commander, for the military convicts".

<sup>11)</sup> I. Muraru, E.S. Tănăsescu, *The Constitution of Romania: Comment on Articles*, C.H. Beck Publishing, Bucharest, 2008, p. 885.

<sup>12)</sup> See the same sense I. Muraru, E. S. Tănăsescu, *Constitutional Law and Political Institutions*, 2<sup>nd</sup> Volume, cited above, p. 258.

pardon act is established in the fundamental law of Hungary, which provides, in its 30<sup>th</sup> Article, at the second Paragraph, the necessity to countersign some of the measures or actions of the Republic's President, by the Prime-minister or by the responsible Minister. Contrary, the 144<sup>th</sup> Article of the Polish Constitution, at the third Paragraph, provides that the validity of the pardon granting act is not conditioned by the Prime-minister's countersigning.

Considering that the execution of sentences is a problem of general interest, being a matter of public policy, a prerequisite for the pardon to have consequences is that the recipient must accept the pardon act. The Constitution of Norway, for example, provides the possibility to refuse to accept the pardon, the convict having the option to accept it or to undergo the sentence. In our legislation, according to the 11<sup>th</sup> Article of the Law no. 546/2002, the individual pardon can be refused by its recipient, when the pardon request was made by another person, unless the recipient is an infant convict. Whether the convicted person is capable or not to make the pardon request, we notice that the legal text enables other people, such as the legal counsel, the legal representative, the spouse, the ancestors, the descendants, the brothers and the children, as well as the same relatives of the convict's spouse, to make the pardon request. We believe that the opportunity to make the pardon request by other persons than the convict seems to be justified only if the convict is not in his right mind or if there is a situation that leads him to a physical impossibility to personally write the pardon request. That is why the reason that made the legislator gave this possibility remains unjustified.

Because the pardon grant may be realised also ex officio, in such a case, the pardon recipient, who did not ask for such a favour, is not entitled to refuse the act of the Head of State without a reason, as indeed, the latter may not cancel his act<sup>13)</sup>, though in practice, some cases of presidential pardon revocation were notorious<sup>14)</sup>. Under these conditions, how can, from one case to another, the discretionary act of the Head of State to grant the individual pardon, be justified? It should be noted that even the cases of ex officio pardon granting do not necessarily indicate that the one granting the pardon has a certitude regarding the innocence of the pardoned one, those actions being simply clemency acts of exemption of penalty. Sometimes, the pardon can be a way of repairing miscarriages of justice, like in the well-known case of the French officer Alfred Dreyfus<sup>15)</sup>, falsely accused and convicted of treason in favour of Germany, subsequently pardoned by the French President, Emil Loubet. Regarding the Romanian Head of State's task to grant the pardon, the Constitutional Court's jurisprudence<sup>16)</sup> stated that "the President of Romania has in mind, most often, humanitarian reasons, arisen from special circumstances in which the convict is or in which the offence was committed" and that "it is a traditional attribute of the Head of State, who has no obligation of motivating his decision, so any explanation it gives, including the one that it was not convinced by the fairness of the penalties imposed, shall not be criticized". The establishment of any legal restrictions on the pardon prerogative would be an obvious violation of the fundamental law. Although, the presidential power to pardon is constrained by the mandatory requirement to respect the fundamental law and the laws of the country. The exercise of the individual pardon prerogative cannot be achieved outside the assertion of the constitutional role of the President,

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<sup>13)</sup> See the same sense I. Muraru, E. S. Tănăsescu, *The Constitution of Romania: Comment on Articles*, cited above, p. 886.

<sup>14)</sup> On the 24<sup>th</sup> of December 2008, the U.S. President, G.W. Bush cancelled the pardoning of Isaac Robert Toussie, only a day after he decided to grant him clemency, as a result of the information published in the media about the donation made by the convict's father to the National Republican Committee (<http://news.bbc.co.uk>).

Also, in Romania see the same sense Decree no. 1/2002, published in The Official Gazette of Romania, Part. I, no. 5 dated 8<sup>th</sup> of January 2002 and Decree no. 1173/2004, published in The Official Gazette of Romania, Part I, no. 1219 dated 17<sup>th</sup> of December 2004.

<sup>15)</sup> See this sense *Encyclopaedia Britannica*, 15th Edition(2008), published by Encyclopaedia Britannica Inc.

<sup>16)</sup> The Constitutional Court, Dec. no. 89/2003 regarding the exception of unconstitutionality of the provisions of the 8<sup>th</sup> Article of the Law no. 543/2002 on the pardoning of some sentences and the removal of some measures and penalties, published in The Official Gazette of Romania, Part I, no. 200 dated 27<sup>th</sup> of March 2003.

legitimated by the will of the people, through free elections<sup>17)</sup>. The public opinion may sanction or criticize the will of the Chief of State, but it cannot overthrow it.<sup>18)</sup>

### **3. The act of pardon recipients**

Regarding the act of pardon recipients, we evident that, observing the constitutional texts in some countries, the pardon is not restricted to certain convicted persons. Any entitled person may apply for the grant of the Head of State pardon. Some countries impose restrictions regarding the position of the convict or the offense committed. For example, the 36<sup>th</sup> Article of the Constitution of Argentina excludes from receiving the pardon people who commit acts against the constitutional order or against the democratic regime. Turkey expressly forbids, through the constitutional text, the possibility of granting pardon in the cases regarding the crimes of forest destruction or burning, while in Belgium, the King may cancel or diminish the sentences imposed by judges, except those imposed against the Ministers or against the members of the communitarian and regional Governments, while the King of Denmark has the prerogative to grant pardon to a Minister convicted by the High Court of the Realm, only with the approval of the Parliament. The Polish Constitution forbids pardoning of individuals convicted by the State Court, and the U.S. constitutional provisions limit the Head of State power to pardon offenses against the U.S., in impeachment cases, as a measure to prevent the situation in which the President might obstruct, through the pardon act, the parliamentary control on the Ministers of his Cabinet or even on himself. In other cases, the constituent legislature tied the Head of State right to pardon to the acceptance of another public power or authority (for example: the Constitution of Greece, the Constitution of Denmark, the Constitution of Portugal, the Constitution of Finland or the Constitution of Indonesia). Even the European Court of Human Rights (hereinafter referred to as ECHR) stated several times that “in cases that imply torture or ill-treatment” the legal investigation must not be limited in time (affected by the statute of limitation) nor prevented by the grant of amnesty or pardon.<sup>19)</sup>

Analyzing various constitutional texts, it follows that these do not impose conditions referring to the citizenship of the pardon recipient, therefore, a foreign citizen or a stateless could be recipients of the clemency act. The principle of territoriality finds its meaning also in the field of the pardon. It is unconceivable for the Head of State to modify, through the exercise of his right to pardon, the effects of a conviction from another country, unless the execution of the sentence takes place on the national territory after the convicted person's transfer, this being at the same time, a matter of state sovereignty issue. According to the Romanian Law, a foreign citizen or a stateless may be pardoned by the Romanian President, provided that the applicant meets the Romanian law requirements on the final conviction to imprisonment and on the sentence's execution on the Romanian territory.

### **4. Conclusions**

Usually, the individual pardon is established at a constitutional provision level, as a Head of State prerogative, its exercise being sometimes also regulated by law. In the present days, the pardon is exercised and associated with an act of clemency, but it remains geared to the political area.

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<sup>17)</sup> In the works of the Constituent Assembly in 1991, F.B. Vasilescu said about the Head of State that: “a) he personifies the Romanian State and is the symbol of the nation as a whole, through his direct election by the people and as a consequence of the exercise of presidential non-partisan character...”, “b) a second main prerogative accomplished by the Head of State is to ensure, through exercising his tasks, the balance and the smooth running of the activities of public authorities, according to the principle of separation of powers” [The Genesis of the Romanian Constitution 1991 (The Works of the Constituent Assembly), Regia Autonomă “Monitorul Oficial” Publishing, Bucharest, 1998, p. 489].

<sup>18)</sup> After the pardon granted by the U.S. President Gerald Ford to his predecessor, Richard Nixon, at the presidential election in 1976 he could not win a new term.

<sup>19)</sup> ECHR, court decision dated 2<sup>nd</sup> of November 2004, in the trial of Abdulsamet Yaman versus Turkey 38<sup>th</sup> Paragraph. See this sense: ECHR court decision dated 8<sup>th</sup> of April 2008, in the trial of Ali and Ayse Duran versus Turkey, 55-60<sup>th</sup> Par.; ECHR court decision dated 13<sup>th</sup> of January 2009, in the trial of Yeter versus Turkey, 70<sup>th</sup> Par., all published on [www.echr.coe.int](http://www.echr.coe.int)

The act of individual pardon is a discretionary and sovereign task, encountered, in most cases, as a prerogative of the Executive. Generally, the one exercising this prerogative may pardon, without any justifications, any individual, regardless of the offense, provided that it has been final sentenced by the court.

The grant of the pardon is a subjective decision, based on various reasons, among these the most common being the humanitarian ones or the need to fix mistrials.

Regarding the individual pardon recipient, anyone is allowed to be pardoned if meets the condition of final sentencing by the court. At a constitutional level, with a few exceptions, countries do not establish restrictions on the citizenship or on the position and the social place of the pardoned.

The consequences of the pardon impact on the execution of the sentence, by removing it completely or partially. The pardon has no effects on the criminal record of the recipient, because it does not have the effect of restoring the rights of the pardoned and does not restore the place in the society the person has had before committing the offense. Otherwise, the individual pardon does not have any consequences upon the civil trials, the convict not being exempt from the claims the court obliged him to.<sup>20)</sup>

Being a task of the Executive in its relation to the Justice<sup>21)</sup>, with implications in relation to a document issued by the judiciary, the individual pardon has no judicial consequences on the decision to declare a person guilty by the court. Therefore, granting of pardon is not a way to make a person innocent, but it is a way to exempt a person from the execution of sentence. So, the individual pardon regards the convict person and not the penalty imposed, this being the distinctive to the collective pardon and to the amnesty, which are aimed to the penalty, respectively to the offense committed.

Most of the times, in relation to the other tasks of the Head of State, the exercise of the pardon prerogative is an area where the Chief of State acts independently of the acts or the actions of the other political institutions, not being one of its competences that are related to the duties of other institutions.

## References

- Encyclopaedia Britannica*, 15<sup>th</sup> edition(2008), published by Encyclopaedia Britannica Inc;  
*Geneza Constituției României din 1991 - Lucrările Adunării Constituante*, (1998), Regia Autonomă Monitorul Oficial Publishing House, Bucharest;  
Iorgovan, A. (2001) *Administrative Law Treaty*, All Beck Publishing House, Bucharest;  
Muraru, I & E.S. Tănăsescu (2009) *Drept Constituțional și Instituții Politice, Volumul 2*, C.H. Beck Publishing House, Bucharest;  
Muraru, I & E.S. Tănăsescu (2008) *Constituția României: Comentarii pe articole*, C.H. Beck Publishing House, Bucharest;  
*Constituția României (1965)*, republished in “The Official Journal of Romania”, no. 65 from 29 October 1986;  
*Constituția României*, (2003), republished in “The Official Journal of Romania”, no. 767 from 31 October 2003;  
*Codul Penal al României* (1997), published in “The Official Journal of Romania”, no. 65 from 16 April 1997;  
*Decizia Curții Constituționale nr. 104/2006*, published in “The Official Journal of Romania”, no. 166 from 21 February 2006;

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<sup>20)</sup> See this sense the provisions of 133-7 Art. and 133-8 Art. of the French Criminal Code, referring to the pardon as a cause that removes the execution of the sentence, which has effects only upon the execution of the sentence and which does not prevent the victim to obtain compensation for the damage caused by the offense.

<sup>21)</sup> See this sense: A. Iorgovan *Administrative Law Treaty*, All Beck Publishing, Bucharest, 2001, p. 309.

*Decizia Curții Constituționale nr. 89/2003*, published in “The Official Journal of Romania”, nr. 200 from 27 Mars 2003

*ECHR Decisions and Judgements*, HUDOC Database, [www.echr.coe.int](http://www.echr.coe.int)

*Legea nr. 546/2002 privind grațierea și procedura acordării grațierii*, Monitorul Oficial al României, Partea I, no. 755 from 16 October 2002

*The Constitutional Act of Denmark* (1953), <http://www.eu-oplysningen.dk>

*The Constitution of the Republic of Indonesia* (1945) as amended by the First Amendment of 1999, the Second Amendment of 2000, the Third Amendment of 2001 and the Fourth Amendment of 2002, <http://www.embassyofindonesia.org>.