

2015 AMNESTY OR PARDON – OBJECTIVE NECESSITY IN ROMANIA

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Abstract: We defined, presented and motivated in this paper the objective necessity of adopting a law of amnesty and pardon in Romania, a country full of social, political and economic unrest. These two institutions of criminal law lie for 24 years in our legislation without finding their applicability and their use is avoided for reasons that are rather connected to the liability of the ruling political classes that replaced when it had to be a reaction caused by the principle of humanism.

There are coherent reasons that impugne to Romanian society such a law. There are also reasons that impugne its rejection. The proof of equilibrium must be given by the state institutions called to solve reconcilable issues. But, the state is also the one who is paying for years for unsanitary conditions of detention, judicial errors, the overcrowding prison system, lack of medical care, without a remedy for all these, but elaborating programs and strategies without finality.

I did not try to release "inmates and criminals" as media presented wrong each feeble attempt to develop a law of amnesty and pardon. I wanted to show that the chance must exist. For each of us. In every moment of our lives. I tried to show that we have a lack of education in what concerns civil society in this sense and with total unexpected reactions when there is a public debate on this theme.

Amnesty comes from the Greek amnesia, which means to let go, to forgive, it is a way to relieve from liability and criminal punishment. In this respect, amnesty is an act of leniency of the legislative power granted by an organic law on criminal offenses committed before the date specified in the law and has the effect of removing criminal liability, execution of the sentence, and other consequences of the conviction¹.

Amnesty is a waiver from the public authority on application of criminal liability and criminal punishment for restoring the rule of the infringed law, being both a political and a legal opinion, as prof. A. Ungureanu said².

Also, the amnesty does not remove the offending character and cannot be equated with the decriminalization of the offense, prof. Ion Neagu considers, and the acts committed after the act of amnesty are considered criminal offenses and attract criminal liability³.

However, amnesty can be used as a mean of criminal reassessment, repair of any acts of injustice or be based on the idea of identifying new resources and ways of social defences, as professor V. Dobrinioiu and others believe⁴.

According to Barac L., amnesty reflects the imperatives of humanism and state's trust towards people who committed crimes. Amnesty appears as a legal complex institution, which includes both rules of constitutional and criminal law⁵.

¹ Botnaru Stela, Șavga, Alina, Grosu, Vladimir, Grama, Mariana. Drept penal: partea generală. Chișinău: ed. Cartier juridic, 2005, vol.1, pag.553

² A.Ungureanu. Drept Penal român. Partea generală. București: ed. Lumina Lex, 1995. p.245

³ Neagu, I. Dreptul procesual penal. București: ed. Academiei R.S.România, 1988. p.180

⁴ Dobrinioiu, V. Pascu, I. Molnar, I. Nistoreanu, Gh. Boroii, A. Lazăr, V. Drept penal. Partea generală. București: ed. Europa Nova, 1999, pag.451

⁵ Barac, L. Răspunderea și sancțiunea juridică. București: ed. Lumina Lex, 1997. pag.194.

Ion Tanoviceanu, Professor at the Faculty of Law in Bucharest, who in 1912 published a valuable book of criminal law and criminal procedure in three volumes, with respect to the institution of amnesty and pardon said that: “Any leniency made to an offender is an exception of the law”. Tanovicenu denied the institutions of amnesty and pardon, considering them contrary to legal principles and being part of the paleontology. Through President’s exercise to the act of clemency in order to pardon, in his opinion, he will attract the danger of influencing the justice by political passions. For these reasons, his proposal was to avoid “in institutions everything that may give too much latitude to the arbitrary and the right of pardon is the personified arbitrary”.

Traian Pop, Professor at the Faculty of Law in Cluj, published between 1921 and 1924, in three volumes, the paper “Comparative Criminal Law, where he expressed his belief that “the right to grant clemency is itself legitimate”.

Iancu Mândru has an important work with complex approach in many respects related to the institutions of amnesty and pardon in the paper titled “Amnesty and Pardon”, published in 1998 at All Educational Publishing – Bucharest. In this last work can be found solid arguments on the position of the institutions leniency at the same level with other institutions of criminal law in terms of both legally and historical evolution.

In the following I will make a brief presentation on the regulation related to pardon and amnesty until 1989. Between 1953 and 1989, a number of 29 laws with respect to pardon and amnesty of some offences – on average, an act like this every year and a half - were adopted. The data were taken from the book “Amnesty and pardon, wrote by Professor Iancu Mandru, in 1989.

Decree no. 155/1953 (pardon); Law no. 4/1954 (pardon and amnesty); Decree no. 421/1955 (pardon and amnesty); Decree no. 727/1956 (amnesty); Law no. 8/1957 (pardon); Decree no. 20/1959 (pardon); Decree no. 20/1959 (pardon); Decree no. 315/1959 (pardon); Decree no. 211/1960 (pardon); Decree no. 5/1963 (pardon and amnesty); Decree no. 973/1967 (failure to punishment); Law no. 25/1967 (pardon and amnesty –19.255 people were released); Decree no. 591/1969 (pardon, amnesty –3468 inmates were released); Decree no. 543/1970 (pardon - 11,890 people beneficiated); Decree no. 521/1972 (pardon –6598 people were released); Decree no. 110/1974 (amnesty); Presidential decree no. 9/1974 (pardon –t 9952 people beneficiated); Decree no. 185/1976 (pardon and amnesty); Presidential decree no. 222/1976 (pardon –19.980 people beneficiated); Decree no. 115/1977 (pardon and amnesty –19.294 people beneficiated, of which 17.794 inmates); Decree no. 147/1977 (amnesty –2836 persons released); Decree no. 331/1977 (amnesty); Presidential decree no. 189/1981 (pardon –14.396 persons released); Presidential decredd no. 349/1982 (pardon – 31.545 people beneficiated); Decree no. 290/1984 (pardon and amnesty –55.437 beneficiated); Decree no.185/1986 (gratiere si amnistie – au beneficiat 42.166 persoane); Decree no. 255/1987 (pardon and amnesty –36.784 people beneficiated); Decree no. 11/1988 (amnesty – 41.184 beneficiated).

For the period 1967 – 1988, the number of those who benefited by the provisions of these laws was of 313,785.

În 1988, Nicolae Ceaușescu issued the Decree no.11, through which he gave a collective pardon. According to the decree, were amnestied all the offence for which was applied imprisonment up to 10 years, the prison sentences higher than 10 years imposed by the trial court were reduced to half and the death sentences imposed by the courts were commuted to 20 years.

1990-*Granting Amnesty and collective or individual pardon by the Council of the National Salvation Front*, established by Decree – Law no. 2/1989 in organ of supreme state power. The Decree – Law no. 3/1990 regulated the following: the amnesty of political crimes committed after December 30, 1947, amnesty for crimes punishable by law with imprisonment up to three years, conditional pardon for fines and imprisonment punishable up to three years.

The Decree –Law no. 23/ 1990 established the following: conditional pardon of the sentences imposed by courts and for the measure of sending in special school for work and rehabilitation. From the 33.970 of people in prisons and special schools of work and rehabilitation on 22 December 1989, after applying the two decrees – laws only 12.292 people remained.

Giving collective pardon by organic law. Through Law no. 137/1997 was given conditional pardon entirely for the prison punishments up to 2 years and also fines up to 10.000.000 Lei including, imposed by courts, entirely pardon of the punishments up to 5 years including, applied to those who are 60, pregnant women or to those who have kids no older than 2, conditional pardon, with ½ of the prison punishment imposed by courts, but which are not bigger than 5 years and total pardon for the measure of admission in a rehabilitation center, imposed towards minors by courts.

Giving clemency by the Provisional Council of National Union, established by Decree-Law no. 81/ 1990. This body adopted a single act of clemency or pardon, namely the decree of individual amnesty no. 197/ 1990, by which benefited 276 people. Pardon was conditional and applied for sentences from one to 10 years in prison.

In 2002, was promulgated Law 543 through which were pardoned punishments up to 5 years and the fine penalties imposed by courts. Through this law, were exempted from pardon all offences of corruption: giving and taking bribes, influence peddling, extortion etc.. Also, all violent crimes. Through this 2002 law, more than 200 criminals were set free.

I first foray into the world of these two institutions of constitutional and criminal law - amnesty and pardon – by presenting opinions issued by important specialists in the field in order to illustrate the importance and necessity of their analysis.

Also, I presented from both statistically and chronological point of view the adoption, in the last decades, of such laws in Romania in order to have an element of comparison in this work.

The new Criminal Code, which entered into force on February 1st 2014, regulates amnesty or pardon as it follows:

-in Title VII “Cases of criminal liability” Article 152 Amnesty’s Effects. Amnesty removes criminal liability if the offence is committed after the conviction. It also removes the execution of the sentence pronounced and other consequences of conviction. The fine collected before amnesty will not be returned. Amnesty has no effect on safety measure and the rights of the convicted person.

The most important legal consequence of the act of amnesty is the exclusion of liability for criminal offences that fall within its scope⁶.

As a definition, amnesty is a legal act of clemency, of releasing criminal liability and punishment that is based on social and political motivations and reasons of criminal policy. It has a normative, exceptional character; it addresses to a group of people that are no individual definite and the procedural stage where they are is not important. Important is that the institution of amnesty does not cancel or alter the criminal law in terms of the punishment for the crimes committed, but it only comes and creates a legal lever to release the person.

⁶ New Penal Code commented. General part. Universul juridic Publishing, 2nd Edition, M.A. Hotca

In Title VIII “Causes that remove or modify the execution of punishment” are regulated in art. 160 the Effects of pardon.

(1) Pardon has the effect of removing the whole or in part the execution of the sentence or its commutation to another one easier.

(2) Pardon does not affect the additional punishment and custodial educational measures, unless it is otherwise provided by the act of pardon.

(3) Pardon has no effect on safety measures and on the rights of the injured party.

(4) Pardon has no effect on the punishments of which execution is suspended under supervision, unless it is otherwise regulated by the act of pardon.

Therefore, pardon is a measure of clemency which consists in removing, all or in part, the execution of the punishment imposed by the court in commuting it in an easier one. In this way, the state gives up, as evidenced by the legal definition of the institution of pardon, to the claim addressed to the offender of serving the sentence of the court, or it switches is in an easier one.

Ilie Pascu in the new Penal Code commented, is raising the question if such a waiver or switching is possible or grounded legally, because the offence was committed and the court pronounced a punishment according to the criminal law. He says that the answer can be only yes, because the institution of pardon is consecrated by Constitution and it is regulated by the criminal law and is given also through an act of the state power, so removing or changing the length of the sentence is performed in the virtue of the law.

The justification above or the affirmative answer given by Ilie Pascu seems, at least from my point of view, to be incredible logical and coherent. It represents the perfect answer to this type of questions that some people will continue to raise it in the public space.

I will insist on notions, concepts, definitions or theories in what concerns the act of amnesty and/ or pardon. They are well known. They were subjects of public debate, of controversies and almost went to ridiculous.

I will return to the purpose of this paper. Namely, the objective necessity of the year 2015, or why not 2014, for the months that remained from this year, of adopting a law for the amnesty and pardon of some offences.

I would like to say that I have not committed to advocate for the release through and act of clemency of “criminals and inmates”, as the media wrongly promoted lately the frail attempts to develop such bills. The reactions of the public opinion were almost the same as media’s. In a society that pretends to be democratic, the rule is to look for solutions and not to throw stones.

There are good reasons that advertise for a law of amnesty and/ or pardon. Also, there are reasons against it. There are offences that are eligible for clemency, just like there are offences that is imperative to be exempted.

Far from giving importance to the order of the factors that should determine the legislature to rethink a law in this regard, I will briefly analyze the real reasons, the context, the perspectives of a normative act of clemency.

At this moment, in Romania are 42 units of detention, more or less modern, with poor conditions of “accommodation”, small budgets and big problems.

From December 1989 until now the Romanian prison system did not suffered major improvements to be closer by the conditions from the European Union countries. Nothing new over here.

The most serious problems faced by the Romanian prison system, excepting the fact that in the year of grace 2014 we still have aspects that do not meet the requirements of the European Prison Rules from 1986 (!), are related to the fact that Romania still lacks preventive prisons, even if the government approved the construction of 15 prison since 1990!

It must be difficult for the criminal investigator to explain how does he has the custody of the subject of the criminal proceedings as long as the law forbids this. We do not have other option but to understand that after 7 years after joining the European Union, it is still the way used to secure the defense.

Looking for study material, I have identified an extremely concise and objective work: “Considerations on the Romanian prison system in the year 2014”, written by Col. (R) Marin Bucur and I will present some passages that do not need to be commented.

European Prison Rules, adopted by the Committee of Minister of the Council of Europe on 12 February 1987, recommend in Rule no. 11 the separation of “first offenders by habitual offenders” and in Rule no. 12 is said that “the separation of prisoners should be made by reasons of their criminal records or their personality, and by those who are likely to benefit from that or who may exercise a bad influence”.

For every inmate are allocated 4RON/ day for three food, but the sum of money is too small. So, the inmates feed on food brought by family or purchased from their personal money from the existing kiosks in prison.

Accommodation for an adult, with a defined personality, not fewer with behavioral problems in such room, with bunk beds on at least two rows, with insufficient toilets (2-4 toilets for 50-70 people), with no possibilities to serve food (they are usually eating on their knees down on the bed, only leaders have access to a sigle table), has devastating effects on the psyche of prisoners, most often irreversible.

This is one of the reasons invoked by the European Court from Strasbourg in the 600 cases in which Romania was convicted to pay enormous financial damage in trials filed by inmates.

APADOR-CH, a respected institution, monitors the Romanian prisons for a long period of time. Reports made only in the past two –three years, following the visits made by representatives in Romanian prisons, indicates a considerable degree of overcrowding, extremely poor conditions of detention, poor healthcare and many other shortcomings of the system.

Also, as a comparative element, our country spends less than the European average per day with an inmate. Meaning 20 euro/ day compared with 90 euro/ day, the European average. More than two-thirds of this money is going to administration and personnel costs, leaving less than a third for feeding and caring for a prisoner.

Meanwhile, the national sport of detainees is to sue the Romanian state, claiming prison conditions, and this because they know from the very begging that it is a fight that they will definitively win. Almost every person who arrives in prison has the chance to receive compensation of a several thousand euro, if they sue Romania at ECHR for how they are incarcerated. That is why the Romanian state lost million of euro for the compensations to the inmates, and this happened because of the lack of initiative of the authorities, as stipulates the journalist Elena Dumitrache in the article “Paradise of the Western Prison”.

The head of the National Administration of Penitentiaries (NAP) said, during a debate organized by the Legal Committee of the Chamber of Deputies and Minister of Foreign Affairs, that until 2011 the Romanian state had 33 ECHR judgements of conviction because of the detention conditions and the payment was around 230.000 euro and 10.000 Swiss francs. In 2012 there were 20 sentences against Romania for the same reason and the state had to pay 10.000 Euro and in 2013 – 32 sentences and 221.000 euro. In 2014, until this moment, there are already 11 resolutions condemning and the payment of compensation is around 64.000 euro.

The trend in upward and the number of inmates who sue Romania at ECHR for detention conditions offered by our state is increasing. The MAF’s statistics show that the

trend is increasing and it will continue to increase, at least in terms of ensuring the minimum space of detention – 4 square meters – for each imprisoned person. It's a trend, whether we are referring to complaints or compensation, said Bejan.

He also stated that he complains at ECHR because of breach of minimum detention are of 4 square meters, non-differentiation between smokers and nonsmokers, transport conditions, measures related to the minimum of hygiene standard in the room and of the persons deprived of liberty, maintenance of the detention room, the food, the quality of the drinking water, frequency of showers, changing bed linens, granting private visits, envelopes and stamps, telephone privacy.

I stop here with the presentation of the Romanian prison system, even if there are a lot to say, we could glimpse a solution to take the first step to decongest prisons. At least for now. Until policymakers identify ways to solve this phenomenon. Or not...

Another plea for the adoption of a law of amnesty and/ or pardon would cover the large number of sentences in small amounts, acts with reduced social risk, cases in which the punishment has already served its purpose, any act of clemency comes as an encouragement for criminal law, like a chance given to the individual who violated the social norm and understood before "jail" professionalized him and to offer him a new orientation, that he was forgiven and he can return to society.

Obviously, if we ask the population with lack of culture in this regard they will all respond that is not the case. Of course that nobody wants to have the home broken, the car stolen, to have his wallet or the mobile phone stolen. Only from this perspective will never be the case. And the idea of clemency also won't work anymore. Guilt belongs to all the state that proves impotence because it fails to devise a coherent program of social reintegration or to make functional the probation system.

Some will say that in times of turmoil policy, economic crisis does not require the release a big number of inmates. They forget that a large number of criminals are actually the product of the economic crisis. And we have a plenty of examples.

Moreover, the mechanism of pardon and amnesty belong to the states with consolidated democracies. It is a mechanism that gives a chance to some people to return to society and who need to understand that the gesture of clemency made by the state in order to help them recover and social reintegrate, because the emergence of primary criminals, most time, is state's fault or its lack of concern to its citizens.

The opportunity of such a law may be given by the understanding of those who, in a certain moment, lead the state and want to change eventually the image of the judicial system from Romania, especially since in recent years, people's confidence in justice has seen a dramatic decrease, reaching only 20% reliability, which is "a judicial slap", as a living contemporary said. (Professor PhD Ion Marin).

Between 2009 and 2013, all the member countries of the Union, applied amnesty. Bulgaria applied even two such projects, Italy also. In the United States of America, in California in 2009, 2010 and 2011 were applied decrees of amnesty for penalties up to seven years in prison. Neither Italy or Belgium, nor Spain or Greece suffered image damages for amnesty, especially when it was for 10 years.

In the USA, for example, individual pardon may be granted and may take effect even before the completion of research and prosecution, and the result is the cessation of all acts of criminal prosecution for accusations that are provided in the act of clemency. Well-known examples are the one in which the freshly installed US President, Gerald Ford granted his predecessor, Richard Nixon, of all charges on the „Watergate” scandal, or the one in which President William Jefferson (Bill) Clinton did to stop any criminal investigation of his brother

on the possession and consumption of drugs, where the presidential pardon occurred just before the start of the formal prosecution⁷.

In Romania, such an event is imperative, because we moved from a Soviet penal code to an European one, and the errors of the old code must be directed.

It can be concluded, taking into account the issues raised, that we are in one of those situations, circumstances or conditions that can bring in 2015, 24 years after the events from 1989, a proof of political maturity of the legislature – an act of clemency embodied in the organic law of amnesty or/ and pardon of certain categories of punishment.

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