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THE LEGAL REASONING OF THE PRESIDENT'S RIGHT TO ISSUE PARDONS

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Abstract

Presidential pardon has always existed in criminal law and continues to constitute a very important competence of the head of state in many modern day countries. In the past, the clemency given by the sovereign (usually the king/queen or the emperor/empress) represented an act which showed his/her mercy upon their subjects. It was often used as a tool to show the arbitrary will of the sovereign that constituted the law, rather than the law itself. Therefore, the classical school of criminal law that appeared in the 18th century and emphasized the importance of the principle of legality, opposed harshly every kind of arbitrary deciding that excluded the law at the interest of the sovereign. This school is among the only interpretations of criminal law that engages for a complete abandonment of institutes such as pardon or amnesty. The

revolutionary French Penal Code of 1791, which was strongly influenced by the classical school, excluded clemency for the proved wrongs that were severely punished. However, due to imperfections of the criminal justice system, amnesty (given by the parliament) and pardon or clemency (given by the head of the state), continue to exist and to be used in modern day criminal law. They are no longer considered acts of arbitrary decisions of the sovereign, instead they should represent important instruments of criminal law, used rarely and wisely with specifically designed goals that aim to bring justice rather than deny it. However, there are many cases when these institutes have been inappropriately used in a very arrogant way which shows that the *ancien regime* is not yet over for some countries in which the highest institutions continue to act as old and middle age despots.

This article will analyze the legal reasoning of the institution of presidential pardon. It will try to establish why the classical school was so strictly opposed to this institute making use of the studies and interpretations found in the writings of *Cesare Beccaria*. It will explain the philosophy of modern day institutions of amnesty and pardon and the way in which they are regulated in the legal theory and practice. The article will explain the recent developments in Macedonia in regard to the use of presidential pardon. The methods to be used consist of desk research, historical and comparative methods and analysis of legal texts, laws and judicial decisions.

Introduction

Every country has encountered several turbulent times in its history, facing days, events and persons to be remembered. April 12, 2016 was a day never seen before in the legal history of the Republic of Macedonia. The President of the country decided to issue 41 pardons in a single day involving a total of 56 persons who were pardoned without any prior procedure for crimes that were still under investigation. There were multiple pardons issued for high-ranking state officials such as the former prime-minister who was pardoned five times for different alleged crimes, the former minister of interior affairs who was separately pardoned 11 times and the recorder, the former minister of transport and liaison who was separately pardoned 16 times. Most of the pardoned persons were accused of corruptive practices revealed through a wire-tapping scandal that led to a very deep political institutional, moral and legal crisis that emerged in the country in the last two years. The largest political parties of the country had previously signed an agreement (the so-called Pržino Agreement of June 2, 2015, later known as Pržino 1, due to the fact that on July 20, 2016 an additional agreement was signed in the same place, known as Pržino 2) to end the political crisis through organizing fair and democratic elections. The Pržino Agreement provided for the formation of a special institute called the Public Prosecution eligible to prosecute crimes that derive from illegally wire-tapped conversations which is popularly known as the Special Public Prosecution (SPP). The SPP began to investigate crimes related to the information gained from the wire-taped materials and came out with several cases that are still in the investigation phase. This institution

encountered and continues to encounter different obstructions by the official state institutions that refuse to provide documents and other kinds of assistance for the SPP as well as the competent criminal court Skopje I, that in most of the cases refuses to issue arrest warrants or other measures for persons under investigation.

On the other hand, in March 2016 the Constitutional Court of RM declared the 2009 Amendment to the Law on Pardoning as unconstitutional. Based on the decision of the Constitutional Court, the current President of the state (who has also served as a full-professor of law in the oldest Faculty of Law in RM), issued the abovementioned pardons, a decision that was harshly criticized and considered scandalous by many lawyers. Many compared it to the absolute power of absolute monarchs of the Middle Age. However, in a different study of the author of this article currently in publication, it was found that the arbitrary and discretionary way in which Ivanov had misused his right to pardon, overrules even the behavior of certain absolute monarchs of the classic medieval empires. The legal debate that was raised argued whether the President had the right to legally issue these pardons or not.

This act of the President who claimed that he aimed to bring peace to the nation, actually triggered massive protests and demonstrations in the streets. The citizens protested every day, against the decision of the President and in support of the SPP. The issued presidential pardons were considered unacceptable by the international representatives who had helped and mediated in the Pržino process. Another amendment of the Law on Pardon was issued in late May 2016 creating grounds for the President to withdraw the contested pardons which he did in June 2016.

The entire process was criticized for its lack of transparency and also for the major legal mistakes and failures that created a strong impression of lack of separation of powers and of a prevailing interference of the executive power on the work of the judiciary.

This article will try to provide a deeper analysis of the head of state's right to pardon considering a short comparative approach that will mainly explain some important differences and similarities regarding this right with countries of the region, with a special emphasis on Croatia. It will also tackle the regulation of this right in some other European Countries and the USA. Moreover, the article will draw a comparison with three other modern cases of unacceptable pardons in Egypt, Vanuatu and Peru.

The article also aims at analyzing the legal ground of the right to pardon, hence it will uncover some historical and philosophical background of this right, mostly seen in the classical school of criminal law and the writings of *Cesare Beccaria*. The final goal of this perspective is to explain the contemporary understanding of the right to pardon as an instrument of justice rather than a discretionary expression of the arbitrary will of the head of state.

Conclusions and recommendations will give an insight on the changes that are needed to create a better legislative regulation of this right.

Classical School of Criminal Law: Legality vs. Arbitrary of Criminal Law

In order to understand the main postulates of the Classical School of Criminal Law, one needs to understand the way the European law looked like before the appearance of this reformatory school of thought (first half of the 18th century), that inspired the legal reform as the entire enlightenment movement inspired the French Revolution and the major social changes in 18th and 19th century Europe. The law in general, and especially the criminal law of that time, was a true disarray of many different norms, all of which applied simultaneously. Thus, the sources of law included: Roman Law that was in use from the Roman Empire and beyond since it was the only written law for long centuries, Cannon Law that came into importance with the rise of the church as the major and most influential institution of the middle age, and the Customary Law, which helped to fill the empty spots of the first two sources and also to meet practical needs. Furthermore, the criminal law of that time was particularly cruel and inhumane, taking into consideration the broad use of the death penalty and use of corporal penalties both applied with excessive brutality. In regard to the criminal procedure developed under the Inquisition, torture was a legal manner of obtaining confession to a crime, which was considered '*probatio plena*' (full proof) and '*regina probatorum*' (queen of all proofs). Moreover, the implementation of criminal law was entirely discretionary and arbitrary and depended very much from the status and personality of the offender and the victim. Not to forget that the sovereign ruler, as 'God's shadow on earth', was considered above the law and could use, misuse or abuse his privileges

as he pleased, arbitrary condemning one to death or sparing another one. As *Ancel* indicates, 'The result was a rather chaotic state of law, against which in 1744 the famous tract of Beccaria was to protest' (Ancel, 1958, p. 342).

Beccaria, as well as *Jeremy Bentham* and *Anselm von Feuerbach*, developed the principle of legality, that reflects into the maxim created by the latter '*nullum crimen, nulla poena, sine lege*' (There is no crime and hence there shall not be punishment if at the time no penal law existed). The principle of legality means that nobody can be held responsible for a crime which at the time committed is not included in a previously written, definite and strict law. (*Nullum crimen, nulla poena, sine lege praevia, scripta, certa et stricta*). This rather rigid form of the law clearly puts the judge in a position of only distributing justice rather than really creating it, however, it is an approach that was expected to end the continuous misuse of power and enable doing justice exclusively according to the law.

The Classical School notices that despite the cruelty of the old criminal law system, it has not been able to prevent crime, nor to decrease it. Therefore, it finds the solution in creating a criminal law system where the law prevails the state institutions, which need to abide by it. Here is what *Beccaria* has to say on preventing crimes:

"Do you want to prevent crimes? See to it that laws are clear and simple and that the entire force of a nation is united in their defense, and that no part of it is employed to destroy them. See to it that the laws favor not so much classes of men as men themselves. See to it that men fear the laws

and fear nothing else. For fear of the laws is salutary, but fatal and fertile for crimes is one man's fear of another." (Beccaria, (1784)1987, p. 94)

Beccaria argues against the death penalty and use of torture and other inhumane and cruel punishments and procedural measures, since he believes that it is the certainty rather than the cruelty of the punishment that restrains people from crime. 'The certainty of a punishment' he states, 'even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity' (Beccaria, (1784)1987, p. 58).

It is primarily important for this article to understand the Classical school of reasoning in regard to the sovereign's right to pardon. Namely, *Beccaria* explains that as the punishments become more mild, clemency and pardon become less necessary, therefore 'Happy the nation in which they might some day be considered pernicious' (Beccaria, (1784)1987, p. 58). He indicates that in a perfect legislation where the punishments are mild and the method of judgment regular and expeditious, pardon should be excluded. Let the legislator be humane and prescribe mild punishments, he suggests, but let the magistrate be strict in distributing justice.

This kind of reasoning is entirely expectable by representatives of a school that sought to reform barbaric and cruel systems of criminal law through using the elements of rationalism and enlightenment. Thus, reading '*On crimes and Punishments*', one can observe the way in which *Beccaria* links the criminal law reform with *Montesquieu*'s theory of separation of powers, *Rousseau*'s "*Social contract*" and the doctrine of natural human rights. Having in mind these values of modern

democracies, it becomes certain that representatives of the Classical school can unreservedly be called the founding fathers of the modern criminal law.

The ideas promoted by the Classical School were implemented in practice even before the official start of the French Revolution in 1789. Hence, the ruler of Tuscany, Leopold II, had funded a committee of experts that would draft a penal code based on the postulates of the Classical School, and *Beccaria* himself was appointed the leader of that committee. The Code that was popularly called the Leopoldina was adopted in 1786 and is the first European criminal code to abolish not only the death penalty (Langbein, 1976, p. 37), but also torture, mutilation and branding (Monballyu, 2014, p. 136). *Von Bar* explains that beside Leopold II, other 'Enlightened princes, sought to embody the new ideas in laws and ordinances' among them Catherine II of Russia and Frederic II of Prussia (Von Bar, 1916, p. 311). Obviously, the ideas were also fully accepted by the French revolution (Elliott, 2011) and were immediately reflected in the Revolutionary Criminal Code of 1791 (CODE PÉNAL Du 25 septembre – 6 octobre 1791 (Texte intégral original)). Which excluded the institute of pardon (reintroduced in the *Code Pénal* 1810 known as *Code Napoléon*).

There is a pure logic in *Beccaria*'s demand to abandon pardon and clemency, which goes beyond the legalistic view of the principles of legality and separation of powers, and reaches the political point. Namely, it was very well known that the new order suggested by the Enlightenment, was not going to come naturally and spontaneously, and that only a great civil turmoil would eventually put an end to the '*ancien*

regime'. In the turbulent times to come, the least that was needed was a possibility for sovereigns to pardon the crimes of the reactionary powers who would defend their position of absolutism under any circumstance. Therefore, the safest thing to do was to abandon any kind of pardoning altogether, at least until more peaceful times. It is an interesting and very efficient logic, especially from today's point of view and in accordance with recent developments related to the misuse of the institute of presidential pardon. This issue will be thoroughly analyzed in the last subtitles of this article.

Characteristics of modern-day institutes of amnesty, pardon and abolition

It has been evidently proved that despite the argumentation of the Classical school, amnesty (general act in the form of a law, passed by a legislative body that excludes the criminal responsibility of a larger group of persons, usually at the end of an armed conflict), pardon (individual pardon of a concrete convicted person, given by the head of state in a specific and justified legal procedure) and even abolition (individual pardon of a concrete person still under investigation or charges but not yet convicted, given by the head of state in a specific and justified legal procedure) have endured through the centuries and remain important institutes regulated by legislation. Even *Beccaria* as cited above, argues that they should be excluded 'in a perfect legislation where the punishments are mild and the method of judgment regular and expeditious' (Beccaria, (1784)1987, p. 58). Since perfect legislation is a mere utopia, it is evident that amnesty and pardon may become needed

in specific, yet very rare occasions, in order to give a humane characteristic to the justice system, despite the blindness of the rigid norms of criminal law (Марјановиќ, 1998, p. 389). Yet, the modern concept of amnesty and pardon differs both qualitatively and quantitatively from the pardon used at the time of absolutism in earlier centuries.

Firstly, it is important to understand that modern democracies function in harmony with the principles of rule of law, legality and separation of powers. Thus there is a specific system of checks and balances which prevents the separated powers to become oppressive. In the past, the pardon given by the sovereign was an institution not controlled by law nor was it checked by other institutions or separate powers of the state, since the power was concentrated in the hands of the absolute ruler instead of independently distributed in other state institutions. The modern day pardon should reflect the principles of checks and balances and rule of law, hence, it cannot be considered as a display of supreme will of an institution, rather, it should be considered an institution of check and balance among the legislative, the executive and the judicial powers, that benefits the rule of law, supports the reasonable implementation of justice and ensures a feeling of equity between the citizens rather than triggering uncertainty and disapproval.

Secondly, in a modern democracy, amnesty, pardon and abolition are institutes thoroughly regulated by detailed laws and comprehensive procedures. Moreover, because of their extreme importance, they are usually regulated in the Constitution of a country, the criminal code, and in certain cases, in specific laws on amnesty or pardon, whereas the

procedure itself involves numerous state institutions that control and assist each other.

Thirdly, as pardon has been frequently used, misused and abused in the past at the desire and arbitrary will of the absolute sovereigns, today it represents an institution used in exclusively rare occasions in situations where the damage caused by them is smaller than the benefit for a certain unjust circumstance, thus it becomes a mean to achieve equity and justice when a certain judicial procedure is not able to do so.

Fourthly, the decision of the head of state to issue a pardon, needs to be thoroughly explained and justified, in order to be different from the arbitrary and discretionary use of this right at the will of the earlier sovereigns, who did not need to explain any of their actions to their subjects. It should be very clear that in a democratic settlement, organized in harmony with the concept of the social contract theory, the sovereignty derives from the citizens, thus any part of the governmental power is obliged to report to the citizens on their actions, especially when these actions include such a controversial decision as that to pardon a crime. Hence, the principles of governmental responsibility and rule of law demand such an explanation. In this regard, many authors argue that this decision of the head of state needs to be mandatorily explained and justified in detail (Камбовски, Казнено право - општ дел, 2004, p. 1015).

Fifthly, the adopted laws and procedures prevent the misuse of amnesty and pardon, however the criminal law theory demands such a prevention of misuse even after amnesty or pardon is given. Hence, once granted, these institutes are considered irretrievable and final, despite the fact of

how the pardoned person makes use of them. As an example, if the pardoned person commits a new crime or behaves badly in any manner and shows no consideration for the confidence invested in him by pardoning, he will be charged again in a new procedure for the newly committed crime, but his old pardon will not be withdrawn. Amnesty or pardon are not parole releases, rather, they represent an unconditional termination of criminal prosecution and sentencing, and in order to prevent them from being misused or abused by the institution that issued them, they need to be certain, irretrievable and final (Марјановиќ, 1998, p. 391, Камбовски, 2004, p. 1016).

Sixthly, a prevailing approach argues that amnesty and pardon do not depend on the will of the person to accept them, since they represent acts of a public nature rather than a person's individual right. However, there is also a rising debate over the question what can be done when a person does not want to accept the given pardon and insists on a trial in order to prove his/her innocence, especially in cases of abolition, when the charges are dropped before the verdict, hence the guilt of the person continues to linger on his personality, not able to be proven in a completed criminal case (Kurtovic Misic, Dragicevic Prtenjaca, & Strinic, 2012, p. 739). Although some authors argue that the persons who do not agree with the given clemency can contest this right at the European Court of Human Rights under the consideration of their right to fair trial (Kambovski teaches Ivanov: the Euroepan Convention is stronger than your abolition, 2016), still, the prevailing theory is that pardon issued by the head of state is mandatory for the pardoned person.

Circumstances that justify the issue of a pardon or abolition

As explained in the previous subtitle, even the best legal systems are far from being perfect, therefore, amnesty or pardon may be useful at a certain point, when the justice system is not able to achieve equity and justice due to the rigid norms of the criminal law. As *Marjanovic* explains, citing *Radbruch*, 'our world is not exclusively a world of justice (under the maxim *Fiat justicia, pereat mundus!* - Let justice be done, though the world perish!), thus apart from the rule of law, there are other principles and values to be upheld and cultivated' (Марјановић, 1998, p. 390).

Therefore, considering the writings of the authors cited in this article, there are many reasons that justify the responsible use of amnesty and pardon in accordance with the legal provisions:

- There may be situations in a country in which the social, economic and political circumstances have drastically altered, thus, the implementation of certain verdicts that has become final and executive suddenly becomes unjust and even absurd (such as at times when a certain crime is decriminalized, thus, the society has decided not to treat such acts as a threat any longer). In such a situation, the judicial verdict that has previously become final cannot be withdrawn, because of the principle that in criminal law, the crimes are judged according to the criminal code that was in force when the crime was committed. However, logically, it is considered unjust for someone in that situation to continue to serve a sentence that has suddenly lost its meaning. Hence, in this case, the pardon is a scholar example of extrajudicial administration of justice that would

be accepted and understood by every citizen. Thus, pardon 'makes it possible for the justice system to correspond to the changing times and values' (Martin, 1983, p. 594, cited according to Kurtovic Misic, Dragicevic Prtenjaca, & Strinic, 2012, p. 740).

- Certain legislations provide that pardon can be issued exclusively on the grounds of chronic illness, disability and old age (Constitution of the Republic of Turkey, 1982), which tends to establish only the humane characteristic as the only ground on which pardon may be issued.
- Sometimes the issue of a pardon is justified by the fact that the sentence that seemed adequate given in a time of turmoil and general pressure by the opinion, in a later time, when the anger has decreased and the logic has increased, is found too harsh and not very meaningful, therefore, an extrajudicial intervention in accordance with the public opinion may be considered just (Kurtovic Misic, Dragicevic Prtenjaca, & Strinic, 2012, p. 741).
- In certain countries, the pardon is used as an adjuster or facet (Kurtovic Misic, Dragicevic Prtenjaca, & Strinic, 2012, p. 742) in relation to the criminal policy and incarceration rate. Hence, when the prisons become overpopulated, the executive pardons are used to decrease the prison population, using the pardon as an extraordinary legal remedy in cases where re-socialization programs have shown signs of success.

As in regard to the question whether there are any circumstances that justify the issue of abolition, hence, the termination of a prosecution or investigation for a suspect before a judicial verdict is reached, authors from countries that have experience with this institute explain that it is usually given on the grounds of the 'state interest', hence for political reasons such as the following:

- *Marjanovic* indicates a hypothetical case where a spy is caught *in flagranti* in espionage activities, yet the country does not want to put at risk the bilateral relations with the spy's country, thus it can drop the charges with an act of abolition and return the spy to his state.
- Furthermore, he explains that if the charged person has had great merits for the country in the passed, or the country has great hopes for its future in relation to a suspect (a great artist, sports person or similar) it can terminate the criminal procedure by an abolition in order not to 'stigmatize' them.

Authors agree that these represent exceptional circumstances that are linked to a certain person in order to issue him/her an abolition (Марјановиќ, 1998; Камбовски, 2004). Nevertheless, the entire concept of abolition is harshly criticized and often not accepted by many legislations, since it is considered a serious interference to the work of judiciary. The pardon on the other hand can be justified more easily having in mind that the guilt of the convict is already established by the judiciary, thus the pardon given by the executive influences only the length or the type of the sentence in accordance with reasonable causes.

The legislative regulation of the presidential pardon in the Republic of Macedonia as compared to other regional and international approaches

There are three basic sources that regulate the presidential pardon in Republic of Macedonia: The Constitution (Constitution of RM with amendements, 1991), the Criminal Law of 1996 with Ammendmens (Каневчев, 2015), and the specialized Law on Pardoning of 1993 with

Ammendments of 2009 ans 2016. The act of presidential pardon is promulgated as a constitutional right of the head of state, regulated by law. The Constitution clearly provides for the President's entitlement to issue pardons as regulated by law (Constitution of RM with amendements, 1991, art. 84, par. 1, p.9). Constitutions of other former Yugoslav republics establish this right of the president as a constitutional one, rather than regulated by a separate law (Slovenia, Croatia and Serbia). Hence, as *Kurtovic et al.* explain, there has been a debate among legal scholars in Croatia, whether the right to pardon can be regulated and limited by a law at all, providing that it is a constitutional right of the president. However, in all the three mentioned republics, the right to pardon is regulated by a specific law, despite being an exclusive constitutional right of the president, taking into consideration that the Constitution only promulgates this right, whereas the law regulates it in details especially considering the procedure to issue a pardon. In the case of Republic of Macedonia, such a debate is futile, given that the constitution of this state (different from all other ex-YU constitutions) clearly implicates the regulation of this right by a specific law. However, this fact was entirely disregarded in a recent ruling of the Constitutional Court of RM that declared the 2009 Amendments of the Law on Pardoning as unconstitutional.

The Law on Pardoning adopted early in 1993 (Закон за помилување, 1993) provided that the President can pardon a convicted person (upon his/her request or *ex officio*) or can pardon a person charged but not yet convicted (only *ex officio* upon the request of the Minister of Justice). Thus, the Law of 1993 recognizes both pardon and abolition given that

the pardon can be issued either at the request of the convict or *ex officio* upon the request of Ministry of Justice, whereas the abolition can be initiated exclusively *ex officio* by the Ministry of Justice and confirmed by the President. Thus, in regard to the procedure for issuing a pardon or abolition, it should be very clear that the procedure can only be initiated by the convict and the Minister of Justice (in case of pardon) or only by the Minister of Justice (in case of abolition). Hence in a regular procedure, the President simply decides upon a procedure initiated by the above mentioned eligible persons. The law of 1993 did not make any distinction on what crimes or charges may be pardoned. It also needs to be emphasized that differently from Macedonia, Serbia and Montenegro; Croatia does not recognize the institution of abolition (Kurtovic Misic, Dragicevic Prtenjaca, & Strinic, 2012, p. 738). Moreover, in an international perspective, a difference needs to be established among the USA as a presidential democracy, where the executive pardon is limited only to convicted persons, however, abolition for crimes against the USA is also recognized as a constitutional right of the President; and the European countries which recognize only pardon and not abolition, even making suggestions for constitutional monarchies to exclude such a possibility from their legislation (the 2011 GRECO Evaluation Report on Liechtenstein 'recommends to review the powers of the Prince, as enshrined in article 12 of the Constitution and other pieces of legislation, to block or discontinue criminal investigations and proceedings') (Kurtovic Misic, Dragicevic Prtenjaca, & Strinic, 2012).

The Macedonian Law on Pardoning 1993 contained a particular article (the notorious article 11) that specified that in exceptional cases, when

the state's interest is at stake, or special circumstances related to the personality of the pardoned person or to the criminal act justify the act of pardon or abolition, the President can pardon both convicted or charged persons without any of the prior procedures required for regular pardons. Thus, in this case, it was the President who directly decided to issue either a pardon or an abolition on his initiative, rather then the regularly initiated procedure by the convict or the Minister of Justice. The most eligible criminal law theoreticians in Macedonia explained in their university textbooks what exactly is meant under 'state interest' or 'special circumstances related to the personality of the pardoned person or to the criminal act' (see explanation given on pages 10 and 11).

The Amendments to the Law on Pardoning adopted in 2009 (Закон за изменување и дополнување на законот за помилување, 2009) established that a presidential pardon cannot be issued for certain crimes, such as electoral fraud and other crimes against the election system, crimes of sexual abuse of children, drug crimes, and international crimes (genocide, war crimes, crimes against humanity, terrorism, trafficking in persons, etc.). they also provided that the president cannot pardon sentences given by international courts. The 2009 Amendments preserved both the concept of pardon and that of abolition, recognizing only the regular procedure for issuing them as described above (initiated by the convict or by the Minister of Justice). Under these Amendments Article 11, which provided discretionary power to the President to issue an extraordinary pardon or abolition without prior procedure, was *erased*.

The Amendments did not make any noticeable changes in regard to the regular procedure for issuing a pardon or abolition, apart from establishing a consultative Committee on Pardoning which prepares the proposals for the persons to be pardoned on the grounds of certain criteria (type of the crime, personality of the convict, the possible impact of the pardon in the general opinion, etc).

In Macedonia, according to the Law of 1993 and the Amendments of 2009, only core and additional punishments for physical persons can be pardoned, whereas the Croatian law on pardoning provides for the pardoning of other sanctions for physical persons (security measures, alternative sanctions), sanctions for corporations as well as misdemeanor sanctions (Kurtovic Misic, Dragicevic Prtenjaca, & Strinic, 2012, pp. 735, 736), which is a much broader concept of the eligible sanctions to be pardoned in comparison to Macedonia.

Taking into consideration that the situation with the criminal law in Macedonia has changed dramatically in the past 25 years (with the Criminal Code amended 32 times), it is evident that a completely new law on pardoning is needed given the situation where much of the provisions of the 1993 Law and the entire Amendments of 2009 are out of legal use due to the Constitutional Court Ruling of March 2016 that will be explained in the next subtitles, where the last Amendment of the Law on Pardoning adopted in May 2016 will also be discussed.

The story of Ivanov: A Disappointing Failure of State Institutions

As explained in the introduction of this article, the 41 pardons firstly issued and then withdrawn by President Ivanov, were largely considered a disgraceful scandal that triggered a general unacceptance and disapproval by citizens of this country which protested several months against this appalling decision. It was compared to other shockingly reprehensible situations in the last years such as the pardons issued by the Egyptian president *Morsi* in 2012 (Cabinet annuls Morsi pardons, 2014), the 'narco-pardons' of the former Peru President *Garcia* (Bargent, 2014), and the shocking pardons given by the Speaker of the Vanuatu Parliament due to the absence of the President of the state (Vanuatu president revokes pardons passed by maverick speaker, 2015).

Similar to the above examples, Ivanov's pardons were considered a failed attempt to interfere in the work of the SPP (created with the Law on Public Prosecution for Prosecuting the crimes related to the illegally wiretapped materials (Закон за јавно обвинителство за гонење на кривични дела поврзани и кои произлегуваат од содржината на незаконското следење на комуникациите, 2015).) It was in fact a well organized process that involved the major state institutions, hence it created an uneasy feeling of betrayal for the citizens who requested justice for the alleged corruption and other kind of crime revealed in the wiretapped materials. As the political crisis emerged in Macedonia in 2014-15, the governmental majority started seeking legal ways to prevent the prosecution of those alleged crimes that were already beginning to be investigated by the SPP.

Hence, it was no coincidence that on March 14, 2016, the Constitutional Court of RM declared the Amendments of 2009 of the Law on Pardoning as unconstitutional and annulled them as such (CC Ruling number 19/2016-0-1). The explanation given in the ruling provided that the right to pardon of the President of RM is a constitutional competence and as such it cannot be subject to legislative limitations, although as explained above, the Constitution clearly states that this right is regulated by law. Hence, on the contrary with the decision of other regional countries, which despite not having a similar stipulation in their Constitution, still decide to regulate and limit their presidential pardon with specific laws, the Constitutional Court of RM took a completely divergent approach which was criticized by many as deliberate decision-making commissioned by the government. Although the Constitutional Court tried to justify its act as an attempt to prevent interference of the legislative to the executive power of the President, the ruling in fact tried to create opportunities for the executive power to directly interfere with judiciary, as precisely happened in April 2016. The ruling was adopted with a short 5:4 majority, with 4 judges signing a Dissenting Opinion – part of the above cited ruling. One of the dissenting judges, Justice prof. dr. Natasa Gaber- Damjanovska, has issued several dissenting opinions on other rulings of the Constitutional Court for a short period, thus reading her book (Габер-Дамјановска, 2016), one can surely grasp how the highest court of the country had become on the recent years a tool of the government for managing 'problematic' legislation).

In this way, the legal experts working for the Government and for the President actually considered that they had found a way for the President

to pardon any crime (most importantly, corruption and electoral fraud) without prior procedure. In fact, this remained formally impossible, since not only according to the constitutional theory but also according to a previous ruling from 2012 of the very same Constitutional Court, this court can annul amendments of laws but cannot bring back to power provisions that were previously (completely or partially) erased by these amendments (CC Decision number 97/2011-0-0). Only the Parliament, as a legislative body, can adopt laws and amendments of laws, whereas the constitutional Court can only annul them if it finds them unconstitutional.

Completely ignoring this very important legal fact, the President issued 56 pardons on April 12, 2016 grounding them all in the non-existent Article 11 of the Law of 1993 (Одлука за помилување-ослободување од гонење, без спроведување на постапка, 2016). He outrageously pardoned a wide range of politicians, witnesses, collaborators, public prosecutors and even persons not yet charged. While Article 11 actually provided that the presidential right to pardon without prior procedure should be used only exceptionally and in the national interest (which was not the case, since pardoning 56 persons on a single day, among which certain state officials were pardoned 16, 11, and 5 times for different crimes and mostly for corruption, hardly constitutes any exception or national interest at all), the problem remained in the non-existent legal grounds to actually do so, since Article 11 was not in force, despite the Amendment of the Law on Pardoning proclaimed unconstitutional. Therefore, it was clearly distinguished that in legal terms the issued pardons were illegal from the very beginning and should have been

treated as such. Moreover, the President provided no explanation or justification in his separate decisions on pardon that were published in the Official Gazette of RM. Furthermore, the President never explained how he received the information upon what he decided which persons should be pardoned by him, considering that some of them were not even charged with any offense, whereas others were still in the initial investigation phase of pre-criminal procedures that ought to be completely undisclosed (Калајџиев & Лажетиќ-Бужаровска, 2011) or otherwise, it constitutes a crime of threatening the secrecy of investigation (Criminal Code of RM, art. 369, (Каневчев, 2015)).

The withdrawal

The other major failure of the legal system in Macedonia in this regard was the way in which a solution for the problem of the presidential pardon was sought. The fact was that the 41 issued pardons were not at all well accepted by the citizens who went into continuous everyday protests reacting to this decision that they considered a severe violation and sabotage of the work of the SPP. With the political crisis descending into a blind alley, the pressure from the international community increased. As a result of these developments, solutions were sought to end up the further growing crisis. Thus, on May 19, 2016, the Parliament adopted another amendment to the Law on Pardoning that provided for the President to withdraw his pardons given without prior procedure within 30 days of the adoption of this amendment, either by his own will or upon the request of the pardoned person. The President is not obliged to justify in written such a decision (Закон за дополнување на законот

за помилување, 2016). There are two essential problems with this amendment: 1) it does not contradict the existence of Article 11 in the first place, hence, the pardons were considered completely regular and legal; moreover, the non-existent Article 11 was upgraded with a subsequent Article 11A (instead of opting for an authentic interpretation from the Parliament that would definitely acknowledge that Article 11 does not exist) that established the grounds for withdrawing the (illegal) pardons, which in a legal sense is an entirely absurd and impossible situation; and 2) it creates another very dangerous precedent, withdrawing a pardon that has been institutionally considered regular and legal, which is entirely unacceptable in the legal theory as explained in the earlier subtitles (see pages 8 and 9).

The President expressly used the newly provided rights, in turbulent and uncommon sessions of the Constitutional Court and Parliament, to first illegally pardon and then withdraw his illegal pardons, first partially and finally completely. The entire process can and will be characterized by history as an extraordinarily disgraceful and failed attempt to legalize corruption through granting a general pardon for state officials, politicians and their collaborators contrary to the legal and constitutional competences of the Head of State and entirely in breach with the essence of the principles of rule of law and separation of powers. This adventurous undertaking, that involved the highest legal institutions of the state, including the President, the Parliament and the Constitutional Court, is observed by many as the most serious failure of the legal system, legal provisions and legal institutions in this country (for more

information on this event, consider the other article of the author (Arifi, 2016).

Conclusions and recommendations

The article established that the institute of presidential pardon has a long history and has undergone substantial changes through the centuries and thus, it has remained in use as an institute of distributing justice and equity rather than a private right of the president to issue mercy at his arbitrary will. When used properly and according to the law, it can prevail as a possibility given to the rigid criminal law provisions to adjust to the changing times and values. However, one should always have in mind the critiques given by *Beccaria* and the Classical school in regard to pardon.

The article further explained the situation created in Macedonia with the pardons issued by President Ivanov on April 2016. From a thorough analysis it is revealed that the way they were issued entirely violates not only the legislation on pardoning in Macedonia, but the very essence of this concept in a democratic state where rule of law must prevail.

The article would suggest the following:

- It is highly unlikely that any state in the world would exclude the institutes of amnesty or pardon upon the idea of the Classical school of criminal law and the example of the French Criminal Code of 1791. Despite the criticism, these institutes appear to be of use in exceptional circumstances, provided that they are used according to the law. However, in times of general political crisis, when the state institutions are accused of high level corruption and misbehavior, searching solutions with a general pardon, as

President Ivanov did, showed not to be the right undertaking. Therefore, in the future, it would be wise for the holder of the presidential position to refuse such use of the pardon even with the justification of solving a political crisis. Namely, interference with the principle of rule of law, legality and criminal responsibility cannot solve any problems, instead, it can and will create new ones.

- Since the above given suggestion would depend entirely on the responsible governance and good will of the President, which has shown not to be sufficient, it is very important that a new law Law on Pardoning is adopted, once the political crisis has been resolved. It should exclude the abolition and preserve the pardoning, in accordance with the European approach on this issue. Moreover, the strict nomination of crimes that cannot be subject to any pardon or amnesty should be brought back to force by the Parliament, since there are certain crimes that are un-pardonable by the general principles of humanity and in accordance with the international law. Finally, any traces of discretion of the head of state and the possibility to pardon without prior procedure should be definitely and entirely obliterated in order to avoid any future misuse of legal holes in this regard. Furthermore, the law should clearly determine that a decision on pardoning must always be thoroughly explained in a written justification, part of the decision.
- The dangerous precedent created with the new amendment of the Law on Pardoning from May 2016 which provided unlawful ways of withdrawing a pardon by the President should be entirely ignored in the future and efforts should be made that such an illegal action not to occur again. Therefore, it is important that the last amendment of the Law on Pardoning, which had a 30 days expiring date, never to be brought back again. Instead, the Law on Pardoning should clarify that the once lawfully given pardon cannot be withdrawn. Instead, mechanisms of declaring an illegal pardon

as null should be created in accordance with the Constitution of RM and the respective laws.

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