

The presidential pardon's crisis in Algeria under the new constitutional and legislative mutations

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Abstract:

Royal pardon was able to survive under the constitutional regimes after it proved the effectiveness of its motives goals, and despite the doctrinal controversy that it raises every time about the extent to which it respects many constitutional and legislative principles, this right is experiencing a new crisis in light of legislative alternatives which are more effective in term of reintegrating the convicts , this was what prompted doctrine to question the need to it , especially in its traditional collective form, which is the same crisis that the right of presidential pardon in Algeria encounters , in particular because it retains its traditional form, that is, collective, despite the existence of legislative alternatives that achieves the same purposes as it does , but do not go with conflict with the constitutional and legal principles especially the principle of individualization of penalty .

Keywords: PP ; comprehensive amnesty ; individual pardon ; penalty alternatives ; individualization of penalty .

المخلص:

استطاع العفو الملكي أن يعيش في ظل الأنظمة الدستورية بعد أن أثبت نجاعة أهدافه، ورغم الجدل الفقهي الذي يثيره في كل مرة حول مدى احترامه للعديد من المبادئ الدستورية والتشريعية، غير أن هذا الحق الرئاسي يعيش أزمة جديدة في ظل ظهور بدائل تشريعية أكثر فعالية في إعادة إدماج المحكوم عليهم، وهو ما دفع الفقه إلى التساؤل عن مدى الحاجة إليه خاصة في صيغته الجماعية التقليدية، وهي نفس الأزمة التي يعيشها حق العفو الرئاسي في الجزائر خاصة أنه يحتفظ بشكله التقليدي أي الجماعي رغم وجود بدائل تشريعية تحقق نفس الأهداف التي يسعى إليها العفو الرئاسي كما أنها في نفس الوقت

لا تتعارض مع المبادئ الدستورية والقانونية وخاصة مبدأ فردية العقوبة.

الكلمات المفتاحية: العفو الرئاسي ، العفو الشامل التشريعي ، العفو الفردي ، العقوبات البديلة ، مبدأ فردية العقوبة .

1- Introduction:

Since independence until the present day the constitutional founder insists on granting the President , elected by the people the right to grant pardon as being one of the institutions through which the people exercises his sovereignty, along with the right of amnesty granted to the parliament as well .

The right of PP (hereinafter PP) has proven its effectiveness in achieving several human, social and even political purposes , yet this constitutional right established for the elected president (hereinafter PDR) has always been disapproved by constitutional doctrine on the grounds that it violates some constitutional principles, namely: the principle of Separation of powers and the principle of the independence of the judiciary , and other legal principles such as the principle of crime and punishment and the principle of individualization of punishment.

Therefore, many constitutional regimes, especially occidental ones , tried to re-adapt this right established for the President (to the king in constitutional monarch regimes) on one hand by finding legal alternatives in penal laws (hereinafter Pl) , and on the other hand , by constitutionally restricting this right as it happened in France when this right of collective pardon was abandoned starting from 2008, and replaced by the right of individual pardon in order to achieve the principle of individualization of punishment.

In fact, these developments in the comparative regimes shed the light on the right of the PP in Algeria once again, regarding its effectiveness in achieving various objectives , and the extent to which it respects legal principles .

This paper adopts a comparative analytic and descriptive approach to highlight the different systems of pardon in Algeria on top of them the PP and the different crisis facing it .

2-Going with conflict with legal principles the PP 's old crisis

The right of pardon was found in order to give a second chance to the convict by reintegrating him into society as an alternative to custodial punishment , the dimensions of this right vary according to its forms, whether it is a PP or an amnesty issued by Parliament, with the need to note the clear differences between the two systems in many aspects – first subtitle .

In fact, the PP compared to the amnesty, encounters broader opposition due to the controversy it raises which is mainly due to the difficulty of adapting it legally and the difficulty of justifying its existence in light of the assumption that it violates many principles – second subtitle .

2-1 Different systems of pardon in the Algeria

The pardon was an ancient royal right that enables the king to interfere in the field of justice, then it turned practiced within the framework of popular sovereignty in republican regimes by the PDR in order to spare the convicts to execute a penalty to which he is finally sentenced in whole or in part or to replace it with a lesser penalty than that is stipulated in law.

The Algerian constitutions since independence to the present day have taken care of framing it on the grounds that he exercises the supreme power within the limits as stated in the art 91 of the current constitution .

Although the Algerian PL did not mention this right or its consequences, other than what is mentioned and referred to in separate articles of the law, it is agreed that the PP includes all the original penalties, but it does not include secondary and supplementary penalties except under an explicit text in the presidential decree that includes a pardon , and it includes all convicts, whether they are beginners or repeater , we should also mention that there is no difference between citizens and foreigners.

The PP in Algeria coexists with another type of pardon which is the comprehensive pardon also known as : the amnesty as article 139 of the 2020 Constitution, under Chapter Three, Titled: Parliament, refers to another type of right of pardon but we should mention that it differs from the PP in several aspects, in term of effects , of legal conditions and term conditions and term of motives as the purposes of the PP differ ranging from humanitarian, social, or health purposes , to logistical ones such as relieving pressure on prisons in order to preserve the dignity of prisoners, while the purposes of amnesty are usually political and perhaps the Algerian experience during the black decade during the nineties is the best example of its success in restoring security and stability , we mention, for example, the National Reconciliation Law, the Civil concordance Law, and the mercy measures Law .

2-2 The legal qualification

The doctrine tends to consider that the administrative decision that is taken in order to achieve political goals inevitably loses its administrative nature and become dominated by the political or governmental nature , this type of acts in this case cannot be subject of any judicial review in all its types and degrees, on the grounds that it is a sovereign act, so that the criterion of sovereignty becomes a basis for differentiating between acts of government and acts of administration and accordingly the presidential decree, as long as it is stipulated in the constitution, it is an act of sovereignty and thus remain immune from any judicial oversight .

In fact, the hypothesis that the decree of PP may be subject to any judicial review is out of question given that all presidential decrees in the Algerian regime without exception and whatever their subject, are immune from the oversight of the State Council given that the constitution decided on that explicitly when it pull presidential decrees out of the administrative Judicial Oversight to the Constitutional Oversight by the Constitutional as explicitly stated in the text of Art 190 .

Perhaps what supports this theory is the firm position of the constitutional founder to make this competence attached to the person of the PDR only, so that he cannot delegate it under any circumstances , just as it is not possible for the person who subrogates him in the event of an impediment or in the event of declaring a final vacancy due to death or persistence of impeachment , this right is exercised only until the election of the new PDR .

It is also noted that the Algerian constitutional founder differed from his French homologue when he refused to subject this type of decree to the countersign of each of the Prime Minister - or the Head of Government, depending on the case and the Minister of Justice, but rather made the PDR the only qualified to sign the decree of PP.

a- A non-delegable jurisdiction:

This is confirmed by Art 3 of the Constitution .

b- A jurisdiction that cannot be exercised in the event of a presidential impediment, of a declaration of vacancy or death, of the extension of the presidential term for any reason:

This is confirmed by Art 96 of const .

knowing that Case 8 of Article 91 refers to the right to pardon penalties , and that the two periods stipulated in Article 94 of the Constitution relate to the case of the head of state - the head of the Council the nation or the President of the Constitutional court fulfilling the duties of the presidency of the state in the event of an impediment to the PDR or in case of persistence and the declaration of the final vacancy by the constitutional court due to the impediment or in the event of death. .

c- A discretionary jurisdiction :

As Art 91 of the Const did not set any condition or restriction to exercise this PP except for what is stated in Art 182 , as the consulting of the high Council of magistracy before the issuance of the decree of PP is considered obligatory as it is mentioned in the subtitles of the decision .

This Consultation is compulsory as a procedure but it in any case is not binding on the PDR who has the absolute discretionary power, bearing in mind that he is himself the

head of the high Council of magistracy and that he is the one who appoints some of its members.

It should be noted that the PDR in the French regime is not bound by any procedure or consultation except for the countersign of each of Prime Minister and concerned minister in this case the Minister of Justice, Keeper of the Seals, knowing that the adjacent signature in this case does not move the government's responsibility before Parliament.

Returning to Algeria, it is noted that the PDR has an absolute discretion in deciding the appropriateness of resorting to the right to pardon for any motive at any moment, it can also take the form of an individual or collective pardon by setting a maximum number of beneficiaries, he also has the right to pardon any penalty as long as it is final and issued by the judiciary so we could not find any restriction to this right except for what we found as a presidential auto limitation as mentioned in the statements made by the presidency services before the notification of the PP to the beneficiary convicts, since the decree of PP is not published in the Official journal since it is not published in the official journal but notified to each concerned convict by its measures, the presidency services statement of the 2022 precised that :

“ Is excluded from this PP every person sentenced for committing: crimes of terrorism, murder, escape, espionage, conspiracies against the state and the integrity and unity of the country, forgery of official and public documents, usurpation crimes, intentional wounding leading to disability, assault on parents or minors, indecent act and rape, kidnapping, human or organ trafficking, neighborhood gangs, assaults on employees of state institutions and health officials, smuggling of immigrants, drug crimes of all kinds, smuggling and corruption crimes, exchange crimes and capital movement crimes, felonies of forming a group of maleficent, counterfeiting money, discrimination crimes and hate speech, fraud and monopoly crimes and illegal speculation of commodities ”

3-The emergence of legislatives alternatives the PP's new crisis

In addition to the old crisis that the PP has always known especially in the systems that kept it in its traditional collective form and without any restriction and due to the assumption that it violates several important principles, this system has known a new crisis due to the tendency of legislation in most regimes among them Algeria to adopt alternatives to the penalty of deprivation of liberty (custodial penalties), in a way that made them achieve the same goals as of the PP – first subtitle.

It also sheds light on the issue of the utility and the need to PP in Algeria, especially since it is still maintained in its traditional collective form, and still unrestricted in light of the modern constitutional trends towards to reforming the PP system through replacing it with individual PP as an alternative to collective pardon - second subtitle.

3-1 -The emergence of new alternatives to PP in PLs

Despite the importance of the PP's motives whether on the human, social or political level, this right has not escaped criticism for several considerations, especially how is it possible that a decision issued by the head of state cancels a final sentence approved by the judiciary, and many jurists believe that it is necessary to abandon this procedure as it is one of the remnants of old monarchical regimes which cannot be compatible with modern regimes although another doctrine believes that the exercise of this right goes in line with the principle of separation of powers as long as the PDR when exercising this right, is an implementation of the powers vested to him especially since modern regimes whether republican or monarchical, do not adopt an absolute interpretation of the principle of separation of powers.

Perhaps the best example of what this right of pardon may turn into in terms of clear violation of powers, is what came in the text of the article 111 of the 1976 Constitution,

13- He has the right to grant pardon and the right to cancel or reduce penalties, as well as the right to remove the legal consequences, whatever their nature, resulting from judgments sentenced by courts.

It is noted that there is a clear confusion between the special pardon prescribed for the PDR by a decree and the amnesty of the crime decided for the Parliament by law.

The constitution of 1962 was the only that did not mention this article as it was transmitted by all constitutions starting from the 1976 until the current constitution of 2020, however, the wording in the Arabic language differed from that in the French language, as the wording in the Arabic language carried the article more than its scope.

Recent legislative developments in the field of PLs the world has known have raised many questions about the need to preserve the PP in light of the new alternatives developed in these penal legislations that have been placed in the hands of the judge to achieve the goals envisaged to pardon decided by the PDR, on the other hand, the right of pardon remained a procedure that has known any tangible development, so that it remained practiced in an old traditional way, especially since its advantages have become possible to achieve through several procedures established in modern penal rulings.¹

These alternatives enable the judge to re-adapt the punishment individually according to the case of each convict to guaranty its effectiveness instead of the collective pardon

¹ Bouras, op-cit, p 173.

procedure, which is carried out in an unstudied manner individually , we mention for example : ¹

Open prisons system :

Considered, through art 25/4 of the Law No. 05/04 which includes the Law for the Organization of Prisons and the Social Reintegration of Detainees , that the open prison is distinguished by a system based mainly on the prisoner's acceptance of the principle of obedience without resorting to the management of the penal institution to the use of the usual methods of surveillance and on his feeling of responsibility towards society .

Semi freedom system:

Art 104 of the law 05/04 defines it as: “ Placing the convict outside the penal institution during the day only , without guarding or supervision, to return to it every evening”

So this system allows the convict to be trained on freedom during the execution of his sentence which enables him to perform a work, practice a study, or continue training .

Probation system:

It is a conditional release system that does not end the execution of the sentence period, but rather it is merely an amendment to how it is implemented outside the penal institution with the beneficiary of this system being subject to an agreed obligations in order to benefit from it, according to what is stated in articles 134 to 136 of the law 05/04 , the convict must be of good behavior .

Community service penalty :

provided in accordance with the amendment of the PL in 2009 in the article 5 bis 1 , this modern alternatives to short term penalties that deprive of liberty consists in the convict's working for the benefit of the society .

Electronic surveillance system :

This system was adopted for the first time in Algeria under law 18/01 supplementing law 05/04 which is considered huge progress in the field of promoting alternatives to custodial punishment, where the convict carries an electronic bracelet that allows to determine his location, the placement under this system is at the request of the convict and requires that his sentence does not exceed three years, or if the remaining sentence does not exceed this period, this alternative penalty is decided by the penalty application

¹ See Badr El-Din El-Hajj Ali, *The Legal System for Penal Institutions in Algerian Legislation*, Algeria, New University Publication, 2022, pp 102-117 .

judge, and in the case of its canceling the convict can complain before the penalty adaptation committee.

3-2-The individual pardon instead of the collective pardon

Individual pardon means that every pardon granted by the PDR will benefit of it only one person specified with his name, this type of pardon is the most common since ancient times when it was applied to one person only, the individual pardon is not related to a national or religious occasion or a specific date, but rather based on the authority vested to him .

Collective PP , on the contrary, is granted by the PDR for the benefit of a group of convicts, and it usually coincides with national and religious occasions¹ , and certainly not at the request of the convicts, but rather at the initiative of the president himself after preparatory measures carried out by the Ministry of Justice, as the latter sets standards on the basis of which the directors of prison's facilities set lists of convicts who are candidates to benefit from a PP taking into account the convicts' readiness to be reintegrated into society.

However, what is taken about the collective PP is that it violates one of the most important principles of the PL as the collective presidential pardon decree is issued without taking into account the particularity of each convict individually, it also violates an important constitutional principle, that is the principle of equality between citizens before the law on the grounds that this procedure equalizes the convicts benefiting of the PP regardless the type of violation committed by each person, and regardless of the period sentenced period and regardless the remaining period of each convict in prison.

It is clear that the new form of PP in France has become more in line with one of the most important principles of PL, which is the principle of the individualization of punishment , France after 2008 joined many occidental regimes that rely on the individual pardon system instead of the collective one .

4-Conclusion:

At the end of this paper , we conclude that the developments in the field of PLs in many comparative regimes have put the right of PP into question regarding the need to it , which prompted many regimes to abandon it completely or at least re-frame it constitutionally whether by imposing new restrictions on it or replacing it with the individual pardon system like in the old customary form, especially since the new legislative measures in the PLs gave the judge the power to re-adapt the penalty in a way that exempts the convict from serving his sentence in prison, which led to relieving

¹ The total number of beneficiaries of the PP measures during the last three years has reached 145,739, according to a statement of the Presidency services

pressure on the prison facilities, especially that this was the justification on which is based every time for issuing collective PP decrees.

The right to pardon in its individual form restored this procedure to its original nature as the sovereign pardoning the convict in an individual manner which enables respect for the principle of individualization of punishment and respect for the specificity of each case, especially since the constitutional texts have reserved for the president his authority to estimate the need for it, except for what is related to the quantitative aspect, so that the beneficiary of it each time becomes one specific person just as it does not set a limit to the number of times that the PDR is entitled to resort to this right as long as it is individual form not collective .

It became clear to us that the PP in the Algeria in the form in which it is still existing which is the collective form , raises a lot of controversy about its respect for many principles and about its usefulness in light of the availability of legislative alternatives that may achieve the same objectives envisaged by it , but at the same time respond to the particularity of each case and at the same time achieve the ruling of the law and the principle of crime and punishment so that the crime does not go unpunished .

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