



Pardon of punishment in Algerian and Kuwaiti legislation

العفو عن العقوبة في التشريع الجزائري والكويتي مغني دليلية

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الملخص:

العفو عن العقوبة ليس نظاما جنائيا جديدا، فلا يكاد يخلو قانون في دولة ما من النص على هذا الإجراء، إذ عرفته كل من الجزائر والكويت كغيرها من دول العالم منذ القدم، وهي سلطة مخولة في الجزائر بحكم الدستور إلى رئيس الدولة وفي الكويت للأمير يستعملها في مناسبات الأعياد الوطنية والدينية وتزول بموجبها العقوبة عن المحكوم عليه كلها أو بعضها أو تستبدل بعقوبة أخرى أخف منها. وعلى الرغم من انتشار نظام العفو عن العقوبة، والذي يعرف كذلك في بعض البلدان تحت مسمى "العفو الخاص" أو "العفو الرئاسي" في كل الدول إلا أنه لم يلقي التأييد من قبل جميع الفقهاء، حيث انقسموا بشأن تحديد طبيعته القانونية ومسألة الإبقاء عليه أو إلغائه أو استبداله بأنظمة جنائية أخرى إلى عدة اتجاهات.

الكلمات المفتاحية: العفو الرئاسي- الصفح- مرسوم رئاسي- العفو العام- العفو الخاص- العفو الأميري.

Abstract

Pardon of punishment is not a new criminal system, no State law almost devoid of text to this procedure, as defined by both Algeria and Kuwait, like other countries of the world since antiquity, it is defined as an authority vested in Algeria by the Constitution to the head of State and in Kuwait to the Prince used in national holidays occasions under which exempt the sentenced person from the penalty, either by dropping it in whole or in part or by replacing it with a lighter penalty. Despite widespread amnesty for punishment, also known in some countries under the name "Pardon" or "Presidential Pardon" in all States but not supported by all scholars, so split on the identification of legal nature and retaining it or cancel it or replace it with another criminal system to several directions.

Keywords: The presidential pardon- Forgiveness-Presidential Decree-Amnesty.

INTRODUCTION

Presidential pardon or pardon of punishment is an authority delegated to the head of state in the state of the Republic, or to the king or the prince in kingdom that result in the abolition of the punishment of the sentenced person, either in whole or in part, or by replacing it by with a lighter penalty. Considered in several States, and endorsed by the comparative legislation for many considerations.

One of the theoretical justifications for launching the right of pardon to the head of state, to the king, or to the prince is that it is a means of redressing the judicial errors discovered after the judgment has become obsolete and cannot be challenged. However, the jurists have identified a number of negative aspects of the pardon procedure, the most important of which is that it undermines the credibility of the judiciary authority and the organs of combating crimes, and violates the general principles of law, which requires that the punishment shall expire by execution. Implementation is the natural way to end the punishment and achieve its purposes,

while the presidential pardon is an unusual cause in its extinction and disrupt the desired wisdom of punishment is the reform and rehabilitation of the perpetrators.

Despite the many criticisms of the President's special amnesty, this power is still available to the head of state in Algeria under the Constitution, which he exercises through a presidential decree setting out the conditions for its application.

This article aims at addressing the issue of pardon of punishment in the Algerian and Kuwaiti laws by studying and analyzing through exposure to its definition and characteristics to distinguish it from the amnesty system, then defining its conditions and procedures and finally explaining its effects and evaluating its negatives and positives to identify the similarities and differences in its organization in both countries.

Based on the above, we raise the main problem: To what extent is important the survival of the system pardon of punishment in Algeria compared to its provisions in the Kuwaiti law? To answer this problematic, we have adopted a descriptive approach to the report and the general provisions of this system and its bases in the Algerian and Kuwaiti legislation, as well as the analytical method. This is done by analyzing the legal texts and analyzing the opinions of scholars in this field. In order to know how the Algerian legislation and the Kuwaiti legislation addressed this topic? For assessment. Therefore, we divided the article into the following outline:

First Part: Pardon of Punishment

Second Part: Conditions and Procedures of Pardon of Punishment

Third Part: The Legal Effects of Pardon of Punishment and Appreciation

The first part: Pardon of Punishment

This part defines pardon of punishment, and its legal basis in the Algerian and Kuwaiti legislations (sect. I), and then examines the characteristics of it and its distinction from general amnesty and judicial amnesty (sect. II).

Section I: Definition of the Pardon of Punishment and its Legal Basis

There are many definitions to determine the content of the pardon of punishment (first). However, most of the legislations in the world, including those of Algeria and Kuwaiti established its legitimacy in their constitutions and legislations (second).

1-1 Definition of the Pardon of Punishment

Some scholars have defined pardon of punishment as: "Termination of the obligation to carry out a sentence against a person to whom a judgment has been pronounced in which he is terminated in whole or in part or the obligation is replaced by another penalty".¹ This definition did not indicate that in the case of the replacement of one sentence with another which is less severe.

Others defined pardon of punishment as a "traditional authority of the head of state, under which he is allowed to pardon any criminal after his final conviction has been proved that all or part of the sentence has been dropped"². It is noted in this definition that he has not indicated the possibility of replacing the sentence with a lighter sentence.

Dr. Mohamed El-Halabi defined pardon of punishment as a "grant from his majesty the king to the convicted person. He has no right to demand it, but if he is issued, he is bound by it and there is no room for his refusal, and the courts have no right to consider its legitimacy because it is an act of sovereignty"³. This definition did not show the effects of the pardon of punishment instead focused on its legal nature.

1-Rabah Ghassan, Modern Trends in the General Amnesty Law, 2nd ed., Dar El-Khaloud, Beirut, 1992, p.75.

2- Abdullah Soliman, General Theory of Precautionary Measures, National Book Foundation, Algeria, 1990, p.381.

3- Mohamed Halabi, Explanation of the Jordanian Penal Code, edition 1, page 605.

Others explained the shortcomings mentioned in the previous definitions, including the definition of Ammar Yasser Jamous, in which the pardon was stated as follows: "One of the reasons for the expiry of the right of the state to carry out the punishment, and it is a grant from the head of state granting it individually to a particular person or group of persons in such a way as to exempt the sentenced person from the penalty, either by dropping it in whole or in part, or by replacing it with a lighter penalty or by reducing it in part"⁴.

In another definition, Dr. Mahmoud Ismail stated that: "pardon of punishment is a grant from the President of the Republic to a person who has been sentenced to a final sentence shall be exempted in whole or in part, or replaced by a lighter sentence which shall be legally prescribed⁵.

The term "Pardon" which is called "forgiveness" in accordance to the United Nations is defined as: "a formal procedure exempting a convicted criminal from the full or partial punishment, without removing the conviction on which the sentence is based "⁶. Amnesty, then, is a legal measure leading to the prohibition of criminal prosecution or the reversal of any retroactive liability⁷.

4-Ammar Yasser Jamous, "Parliamentary Immunity and Special Pardon and their Impact on Combating Corruption in Palestine", Musawah Magazine, issued by the Palestinian Center for the Independence of Law and Justice, 2015, p.46.

5- Mahmoud Ibrahim Ismail, Explanation of general provisions in the Penal Code, Arab Thought House, Cairo, p.795.

6- See the report of Mr. Louis Joinet, Special Reporter of the Sub commission on Prevention of Discrimination and Protection of Minorities, in the study on "Amnesty laws and their role in the protection and promotion of human rights", which states that "forgiveness leads to exemption from punishment but does not erase conviction".

7-Office of the United Nations High Commissioner for Human Rights, Rule of law instruments for post- conflict countries, amnesty measures, 2009, p.5.

1-2 Legal Basis of the Pardon of Punishment in the Algerian and Kuwaiti Legislations

In the Algerian legal system, the legislator did not define the pardon of punishment, but it was enshrined as a constitutional principle explicitly and clearly in all the constitutions that Algeria has known after independence to this day, and also stated in some national legislations as follows:

1-2-1 In Constitutions

Article 46 of the Constitution of 1963 stated that the President of the Republic has the power to grant amnesty after the Supreme Council of the Judiciary is informed that: "The President of the Republic shall exercise the right of pardon after consulting the Supreme Council of the Judiciary." In Article 111, paragraph 13, of the 1976 Constitution, it is stated that: "The President of the Republic shall have the right to issue amnesties, the right to repeal or reduce the penalties, as well as the right to remove all legal consequences of any kind arising out of judgments rendered by the courts". The article 182 of the same Constitution states that the Supreme Council of the Judiciary expresses an advisory opinion before the President exercise the right of pardon. We note here that the article 181 states that the President of the Republic presides over the Supreme Judicial Council.

Which are the same provisions in the Constitution of 1989 in article 74, paragraph 8, where it is stated that the President of the Republic has the right to issue pardon and the right to reduce or replace sanctions. Article 147 states that the Supreme Council of the Judiciary expresses an advisory opinion in the exercise of the right of amnesty by the President of the Republic.

In the 1996 Constitution, article 77, paragraph 9, included the right to pardon by saying: "... he has the right to pardon and the right to reduce or replace sanctions"⁸,

8- Article 17 of the French Constitution, 1958, states: "The President of the Republic shall have the right to pardon individually."

after consultation with the Supreme Council of the Judiciary, pursuant to article 156 of the same Constitution. The Supreme Judicial Council has an advisory opinion in the exercise of the right of amnesty by the President of the Republic". We note that these two articles came in the same wording as in the 1989 Constitution.

Finally, the text of the first paragraph of article 91 of the Constitution of 2016 reads as follows⁹: "The President of the Republic, in addition to the powers expressly conferred upon him by other provisions of the Constitution, shall have the following powers". Referring to paragraph 7 of the same article of the same Constitution, Has the right to issue pardon and the right to reduce or replace sanctions ", after consultation with the Supreme Council of the Judiciary pursuant to article 175 of the same Constitution.

It is clear from previous texts that the President of the Republic of Algeria is the only authority constitutionally empowered to issue a pardon for punishment. The role of the Supreme Council of Magistracy is determined by the mere presentation of a non-binding advisory opinion to the President of the Republic when he submits amnesty to convicted persons. Thus, the power of pardon is a single individual authority that is ultimately dedicated to the President of the Republic, as long as he is the President of the Supreme Council of Magistracy¹⁰ under article 173 of the present Constitution¹¹.

The Kuwaiti legislator also did not address the definition of pardon for the sentence, but also dealt with its legal effects. Under article 75 of the Constitution, the prince of

9-Article 91 of Law 16-01 of 06 March 2016 includes a constitutional amendment, edition 14.

10-Organic Law No. 04-12 dated 06 September 2004 concerning the formation, work and powers of the Supreme Judicial Council.

11-Article 173 of the 2016 Constitution: "The President of the Republic shall preside over the Supreme Council of the Judiciary." This is one of the main reasons for the presidential amnesty for criticism.

Kuwait was granted the power to pardon the sentence by saying that: "The Emir may pardon, or reduce the sentence by decree." As a rapprochement between the Algerian and Kuwaiti constitutions, we conclude that both recognized the right of the head of state or the prince to pardon the penalty. This is done by president or prince decree. However, the effects of amnesty in Algeria under the provisions of the Constitution, Sentenced, reduced or replaced, while the Kuwaiti Constitution recognizes only the first two effects, although Kuwait's law of Criminal Procedure provides for three purposes, making this latter law unconstitutional.

1-2-2 In Legislations

The Algerian Penal Code did not include the provision of the pardon of punishment, except its effects mentioned in the Code of Criminal Procedure¹² in article 677, its final paragraph that "a whole or partial exemption from the sentence in the form of amnesty shall be carried out in whole or in part". The word pardon was also cited as the reason for the expiry of the sentence in articles 582, paragraph 2, and 589 of the same law.

In view of the gravity of the death sentence, the Algerian legislator provided for a substantial procedure to seek a pardon from the President of the Republic prior to the execution, where the sentenced person would be executed only after the request for pardon was rejected in accordance with article 155 related to the Organization of Prisons and Social Reintegration of Detainees.

As referred to the Law on the Organization of Prisons and Social Reintegration of Detainees¹³ in Article 16, paragraph 8.9, article 17 paragraph 4, article 155 paragraph 1, article 156 and article 168 paragraph 2. Article 134 paragraph 5, of the same Act states that "the period of reduction of the penalty under a presidential pardon is like a period of imprisonment actually spent...".

12-Order N° 66-155 of 08 June 1966 containing the amended and completed Algerian Code of Criminal Procedure.

13-Law N° 05-04 dated 06 February 2005, which contains the Law on the Organization of Prisons and Social Reintegration of Detainees.

In Kuwaiti legislation, however, the legislator provided for the prince's power to grant pardon in article 239 of Law N° 1960/17 on criminal proceedings and prosecutions, stating: "The Amir has the right, after a sentence of punishment against a particular person and before execution of the judgment or during execution, to grant pardon in order to remove all or part of the sanction or replacing it with another less severe". This text is fully in line with Algerian legislation, but in contrast is incompatible with the Kuwaiti Constitution, which did not provide for the replacement of the sentence handed down with a lighter sentence as a result of the pardon.

Section II: Characteristics of the Pardon of Punishment and its Distinction from other Amnesties

Pardon of punishment has a number of characteristics (First). It shares also similar points with the general amnesty and judicial amnesty in several respects, and differs in other respects (Secondly).

2-1 Characteristics of the Pardon of Punishment

The pardon of punishment has general characteristics which we propose as follows¹⁴:

1. Leads to the exemption of the offender from the sentence that he has been convicted of,
2. It is a public order, a grant from the President of the Republic justified by the public interest, not a right of the offender, and therefore, he does not have his refusal or appeal, nor the executive authority¹⁵ may refuse to act under it,

¹⁴-Farida Ben Younis, Criminal Sentences, PhD Thesis, Faculty of Law and Political Science, Mohammed Khaydar University, Biskra, 2012-2013, p. 309.

¹⁵-The French Council of State responded to the appeal of the presidential pardon on the case of Gugel on 30 June 1893, which called for the abolition of the replacement sentence. The Council decided that the decision to grant or reject amnesty should not be subject to any judicial challenge. See Jean Pradel et André Varinard, les grands arrêts du droit criminel, T2, Le procès, La sanction, Paris, Sirey, 1984, p. 268.

3. It does not, as a general rule, affect the rights of third parties relating to compensation. The injured person has the right to enforce the civil provisions he has obtained and may file his claim for compensation in the court,
4. It has a personal nature, relating to a specific individual or group of individuals who are self-appointed, as a result only the person who is pardoned and whose name appears in the presidential amnesty decree has benefit,
5. It is limited to punishment and does not extend to crime, that is to say, the criminality of the act committed in terms of a criminal precedent and in terms of rehabilitation,
6. It is a deterrent to punishment and is not precluded from criminal liability, or a reason for permissibility.

2-2 Distinction of Pardon of Punishment from other Amnesties

This part deals with the distinction between pardon of punishment and general amnesty in first and with judicial amnesty in second.

2-2-1 Discrimination of Pardon of Punishment from General Amnesty: General amnesty is the total elimination of the offense committed and the elimination of its effects¹⁶ and shall be under the legislation of parliament. It is usually resorted to as a result of political circumstances or historical events. Pardon of punishment may be similar to general amnesty, that is why indicating the similarities and differences between them must be made clear.

2-2-1-1 Similarities: Both agreed upon in the following points¹⁷:

1. They maintain the victim's right to claim compensation,
2. Both lead to the immediate release of the convict,
3. Both do not include education, reform and precautionary measures.

16-Mahmoud Mahmoud Mustafa, Explanation of the Penal Code, General Section, eighth edition, p 636.

17-El-Ochaibi Kouider, Balancing Punishment and Amnesty, PhD thesis, Faculty of Islamic Civilization and Human Sciences, University of Oran, 2012-2013, p.71.

4. Both are not bound by any condition and are not limited in scope. The law leaves their discretion to the public authorities competent to issue them, leaving the judiciary to apply each of them as the other laws apply¹⁸.
5. Both do not depend on the will of the beneficiary, because both are from public order.

2-2-1-2 Differences: Pardon of punishment differs from general amnesty in many points:

1. Pardon of punishment can be issued by the President of the Republic, the King, or the Prince, while the general amnesty is issued by law under the legislation power,
2. A presidential amnesty shall be issued only after the judgment has become unenforceable, while general amnesty can be issued at any time and at any stage of the case before it is moved or thereafter or after the verdict of conviction¹⁹.
3. Presidential amnesty is of a personal nature, it is limited to a person who has been issued in his favor, while general amnesty is of an objective nature, limited to determine the type of crime or a range of crimes, and the circumstances of their commission, which are usually of a political nature, and that can benefit all who participated in the crime.
4. The presidential pardon abolishes all or part of the original penalty or replaces it with a lighter sentence, while the effects of general amnesty remove the

18-Shardoud al-Tayeb, "Special amnesty in criminal law and its effects," Al-Haqq, Ahmed Derayah University, Adrar, No. 39.

19-Habzi Abdel Malik, The Criminal Encyclopedia, Ed.2, C4, Dar al-'Alm All, Beirut, Lebanon, p360.

criminal status of the act and erase all its effects either before or during the proceedings, or after a final judgment has been issued²⁰,

5. Presidential amnesty is limited to original sanctions alone, no other penalties are waived, and security measures are not extended unless otherwise provided for in the presidential amnesty, while general amnesty abolishes all penalties and other criminal effects, which is considered by the Kuwaiti legislator as a judgment of acquittal²¹.
6. Pardon of punishment is one of the reasons of prescription of punishment , and its effect is only effective from the date of its issuance, while general amnesty is one of the reasons for the expiry of the public action and it applies retroactively from the time of the commission of the crime (art. 6 Code Procedure Penal)²².
7. Pardon of punishment ends the obligation to carry out the original sentence, and does not entail the elimination of all the traces of the crime, and as long as it preserves the crime, the convicted person can request rehabilitation, unlike the amnesty, because it erases the criminal character of the act and all the consequences resulting from it, so no need to ask for rehabilitation after that (art. 679)²³.

20-Ammar Yasser Jamous, "Parliamentary immunity and special amnesty and their impact on combating corruption in Palestine," Palestinian Center for the Independence of Law and Justice "Musawah", December 2015, p.47.

21-Article 238 of the Kuwaiti Code of Criminal Procedure and Trial states that: "The Amir may at all times grant a blanket amnesty for the crime or certain crimes. The amnesty shall be considered as a judgment of acquittal and shall result in the annulment of all proceedings and previous judgments against him.

22- Farida Ben Younis, "The Comprehensive Amnesty and Legislative Jurisdiction of the President of the Republic in Algerian Law," Journal of the Thinker, Faculty of Law and Political Science, Mohammed Khaydar University, Biskra, Seventh edition, p.211.

23-Louni Farida, rehabilitation for the condemned in Algerian criminal law and comparative law, Master's thesis, Faculty of Law and Administrative Sciences, Ben Aknoun, University of Algiers, 2003-2004, p.39.

2-2-2 Discrimination of Pardon of Punishment from Judicial Amnesty

Article 52 of the Algerian Penal Code authorizes the judge, in specific cases, to exempt the accused from punishment with the commission of the crime. These include the provisions of articles 92, 179, 199 and 205 of the Penal Code, which relate to the excuse for reporting the crime before committing it. As well as the excuse of family kinship provided for in Article 90 of the Penal Code and the excuse of repentance stipulated in Article 182 of the Penal Code. All of these excuses are legally defined and the judge does not have the power to exempt outside them.

In accordance to Article 12 of the Law against crimes of information technology Kuwaiti No 15-63 concerning the judicial amnesty, which states: "The court may exempt from the penalty any of the perpetrators who have informed the competent authorities of the crime prior to their knowledge and before the commencement of the crime. If the information is after their knowledge about the crime and prior to the commencement of the investigation, the exemption from the penalty would have the effect of reporting the rest of the perpetrators in case they are several

There is a special type of amnesty given to Article 240 of the Kuwaiti Code of Criminal Procedures and Trials, which the Kuwaiti legislator called the individual amnesty, which is a right of the victim in the crimes for which the complaint is to be filed, and the offenses of abuse and abuse, Crimes of destruction on the property of others.

2-2-2-1 Similarities

The parallels between pardon of punishment and judicial amnesty are:

1. Both cannot be applied until conviction has been handed down,
2. Both do not affect the rights of the victim of the crime,
3. Both effects extend only to original penalties.

2-2-2-2 Differences

Differences between pardon of punishment and judicial amnesty are limited to the following matters:

1. Pardon of punishment is issued either by the President of the Republic, the King, or the Prince, while the judicial amnesty is issued by the judge of the subject, or the judge to apply the penalties.
2. A judicial amnesty can only be applied in simple sentences, while the pardon of punishment can be applied to all penalties.
3. A judicial amnesty may associate a condition or conditionality in all cases. However, pardon of punishment is not necessarily accompanied by a condition or suspended.

Second Part: Conditions and Procedures of the Pardon of Punishment

When a pardon of punishment is issued, certain conditions must be met (section I) and specific procedures (sect. II) should be followed in order to say that the pardon of punishment has produced its legal effects.

Section I: Conditions of the Pardon of Punishment

The conditions of pardon of punishment agree with both the Algerian and Kuwaiti legislations, which are as follows:

1. There should be a final penal judgment issued by a competent judicial court. The pardon of punishment only affects the criminal judicial decisions issued by a criminal judicial body which has jurisdiction in its three forms: personal, qualitative and local; , Rather than merely a preliminary or preparatory decisions, thus excluding judgments in civil, administrative and commercial matters.
2. Judgment shall be absolute: the final judgment, which has exhausted all ordinary means of appeal: opposition and appeal, and extraordinary means of appeal: cassation and the request for reconsideration. Legally. On the grounds that pardon of punishment is a reserve, it should be resorted to only if the sentence is pronounced by an absolute decision.
3. The punishment imposed by the sentence shall be effective: among the aims of the pardon of punishment decree is to spare the convicted person from carrying

out the sentence in whole or in part. It is understood that the pardon for the sentence includes only the judicial decisions that determine effective penalties regardless of the nature of the penalty: restricted to freedom or financial. Therefore, does not issue pardon of punishment in the right of the person who carried out his sentence or fell statute of limitations or benefited from the suspension of the implementation of the sanction.

Section II: Pardon Procedures for Punishment

The pardon of punishment measures differ according to whether the pardon was individual in response to the request of the convict or a collective pardon initiated by the President of the Republic or the Amir. However, the two types agree in terms of the competent authority to issue pardon.

2-1 The State of Pardon of Punishment Initiated by the Head of the State

The President of the Republic or the prince may issue the pardon decision on his own initiative without the need for a request. In this case, the pardon shall be collective issued on religious or national occasions. The President of the Republic or the Amir shall issue the pardon decree in the form of a presidential or a prince decree, as the case may be.

2-2 The Case of Pardon of Punishment upon Request

Kuwaiti law does not require the applicant to request pardon, although it did not forbid that. The application may be submitted by the prison administration itself when it notices that the conduct of the convicted person justifies its coverage of the pardon. In addition, the Kuwaiti law does not specify if the pardon request is filed by the accused or his lawyer, whether the execution of the sentence shall be stopped and the sentenced fines shall be paid or not?

2-3 The Presidential Pardon Decree

The Presidential Pardon Decree goes through the following steps:

1. Consult the Supreme Council of the Judiciary: The Supreme Judicial Council shall be considered as an adviser in the exercise of the right of amnesty by the

- President of the Republic, in accordance with article 175 of the current Constitution and article 13, paragraph 01, of the Rules of Procedure of the Supreme Council of the Judiciary, whether the pardon was a result of a request or an initiative of the President of the Republic.
2. **Presidential Pardon Decree:** The pardon decree is issued in the form of a presidential decree containing pardon measures, in accordance with the provisions of article 91, paragraph 7 of the present constitution, indicating the beneficiary prisoners and persons who are not being held in the Pardon Decree. The presidential pardon decree also shows the total and partial reduction of the sentence, and those exempted from it are those concerned by the provisions of the Charter for Peace and National Reconciliation or sentenced for acts of terrorism and vandalism, treason or espionage, premeditated murder, intentional murder, murder of assets and poisoning, corruption offenses, drug crimes.
 3. **Implementation of Presidential Pardon Decree:** The President of the Republic signs and issues it in the form of a presidential decree published in the official newspaper. The Ministry of Justice then supports by Directorate General of Prison and Reintegration Department the process of enforcing the pardon by means of a ministerial directive sent to general prosecutors in courts and the directors of penal institutions, provide a detailed explanation of the content of the pardon decree relates to the date of the initiation of the operation, the persons benefiting from the pardon and those exempted from it, the conditions of pardon and the documents on which this is based, as the extractor of the judgment, the certificate of non-appeal, criminal record n°2, and also success certificate of the baccalaureate exams, the intermediate education, the graduation from the university and professional training obtained by the penal institution, and the determination of the competent

authority to adjudicate the problems of implementation, and notify central administration of application results of the provisions of the decree.

2-4 Application of the Decree Pardon of Punishment

In case of application, the following steps must be taken in Algerian legislation:

1. The request may be submitted by the convicted person personally or his lawyer, it can be submitted by the public prosecution, the penal judge, the director of the penal institution or by the minister of justice, and shall contain all information concerning the identity of the convicted person, the crime committed and the sentence pronounced, and the application shall be sent by mail in a closed envelope to the competent representative of the Republic or the ministry of justice or to the Presidency of the Republic.
2. The competent the Public Prosecution shall form the file and carry out investigations on the conduct of the sentenced person within the penal institution, and then send the file with his opinion to the Public Prosecution, which shall send it to the Ministry of Justice.
3. When the request for pardon is received with the file by the Ministry of Justice, the latter will immediately refer it to the Directorate of Penal Affairs and amnesties. After receiving the request by this latter, the file will be reviewed and sent to the Public Prosecutor for his report on the pardon applicant. Finally, the file is presented to the Supreme Judicial Council.
4. Whether the presidential pardon is granted at the request or at the initiative of the President of the Republic, the competent authority shall not change. The President of the Republic, under Article 91, paragraph 1 and 7, is constitutionally empowered to issue the pardon decision. The exercise of the right of pardon by the President of the Republic pursuant to the provisions of article 175 of the 2016 Constitution. Consequently, the only authority authorized to issue it is the President of the Republic. The opinion of the Judicial Council remains only an advisory opinion.

Third Part: Legal Effects of Pardon of Punishment

The pardon of the sentence entails a number of legal effects relating to the sentence being sentenced (section I). In view of the reasons for the amnesty and the authority concerned, as well as its effects, the pardon system assesses many disadvantages and advantages (section II).

Section I: Legal Effects of Pardon

The legal effects of pardon in the Algerian and Kuwaiti legislations are limited to the following:

1. Exemption from full or partial punishment or replacement by a lighter sentence, as indicated in article 91 of the Constitution and the final paragraph of article 677 CPP, stating: "The total or partial exemption of the sentence by pardon is the basis for its total implementation Or partial ". It is the provision stated in the second paragraph of article 239 of the Kuwaiti law of Criminal Procedure referred to above.
2. The sentenced person may benefit from the temporary postponement of the implementation of the deprivation of liberty provisions if the sentence of imprisonment for which he is sentenced is less than six (6) months, or equal to it, for which he has applied for an amnesty, in accordance with article 16 paragraph 8, of the Law on the Organization of Prisons and Social Reintegration of Detainees.
3. A convicted person who is fully exempt from punishment shall be released immediately upon the issuance of the presidential amnesty decree, in accordance with the provisions of article 365 paragraph 01 of the CPP.
4. In the case of the physical multiplicity of the offenses here, the amnesty shall be limited to the severe sanction to be applied in the case of annexation.
5. The period of reduction of the sentence under a presidential pardon is tantamount to a period of imprisonment for which the person actually has

- been imprisoned and is included in the probationary period, except for the case of the prisoner sentenced to perpetuity²⁴.
6. Suspension of the execution of the death sanction until the request for amnesty is rejected, and the person sentenced to death is not informed about the rejection of the pardon unless the penalty is implemented in accordance with articles 155 and 156 of the Law on the Organization of Prisons and Social Reintegration of Detainees.
 7. Presidential pardon affects the original penalties and does not affect supplementary sanctions unless the amnesty decree explicitly states otherwise.
 8. Presidential pardon affects the original penalties too and does not affect, in accordance with the amended Article 21 of the CPP the security measure on judicial detention in a psychiatric institution, which states that this measure may be taken on the basis of an order, judgment or decision to convict the accused or pardon of punishment. It is understood that the decision of pardon does not affect the application of security measures with a therapeutic objective.
 9. Presidential pardon does not affect the right of the injured party to compensation or the right of the public treasury to pay the amount of the fine unless the amnesty decree explicitly states otherwise.
 10. The sentence of conviction remains valid and recorded on the pardoned and produced all its legal effects except for what the amnesty has removed from it²⁵.

24-Article 134, paragraph 5, of the Law on the Organization of Prisons and Social Reintegration of Detainees.

25-Salwa Hussein Hassan Rizk, "The Constitution and the Principle of Pardon of Punishment", Journal of Legal and Economic Research, No. 49 April 2011, Faculty of Law, Mansoura University, Egypt, p.278-279.

11. The pardon does not affect the penalty in the crime and its effects. The ruling remains and the conviction is fixed and the judgment is recorded as a precedent in the criminal record. All what is happening is the editing of the amendment cards and sent them to the clerk of the Judicial Council or the Court or to the magistrate in charge of the central criminal record if the matter relates to pardon, replacement or reduction of the sentence²⁶.
12. The judicial consideration for the beneficiary of the pardon is that the decision to rehabilitate is at the request of the following conditions: a pardon for the accused, five years after the pardon if the penalty provided by law is more than three years or a three-year sentence for the penalty which is not more than that in accordance with article 242 of the Kuwaiti Code of Criminal Procedure.

Section II: Appreciation of the Pardon of Punishment

The assessment of the pardon of punishment requires a statement of the negatives (first) and the advantages of this system (second) which we draw from the provisions of this system and its justifications as follows:

2-1 The Disadvantages of Pardon of punishment

It still raises a great controversy in the jurisprudential circles, especially in theory, because it contradicts many legal principles. The most important negative aspects that were recorded are the following:

1. Violation of the principle of the authoritative power of the matter for the absolute judgement, which exhausted all the methods of appeal ordinary and extraordinary . this judgement became a title of the truth and requires the executive authority to implement as stated by the judiciary, then came the pardon of punishment system to rule out or replace the application of the sentence sentenced. It compromises the credibility of the authoritative judicial decisions.

²⁶-First paragraph of Article 627 of the Code of Criminal Procedure.

2. Violation of the principle of separation of powers: The pardon of punishment was considered a means of easing cruel penalties. The legislator decided to impose penalties in the Penal Code on the basis of the principle of criminal justice²⁷, making them commensurate with the gravity²⁸ of the crime and opening the judge's scope to decide the punishment according to the criminal gravity of the accused. Consequently, there is no need to an outside part of the legislative and judicial authority to carry out the task of commutation or replacement of the sentence, which is not considered to be in the very essence of its powers, since it cannot disrupt the judicial decisions issued in accordance with the law at the time it is responsible for its implementation, this violates the principle of separation of public authorities and the principle of the independence of the judiciary authority.
3. A non-judicial authority controls the judge's assessment of the penal penalty: The Supreme Court shall be a court of law whose unique function is to monitor the proper interpretation and application of the law in view of the consideration of the appeal before it, and not to interfere with the assessment of substantive matters, including the judge's assessment of the penalty. Such authority must not be vested to another authority (the President of the Republic and the Prince).
4. Creating a situation of conflict in the same legal system: to say that the existence of pardon of punishment under the report of sanctions as a sanction for violations of the provisions of the Penal Code leads to create a conflict between the existence of the penalty and pardon in the same legal system.

27-Article 1 of the Penal Code states: "There shall be no crime, no punishment or security measures other than by law".

28-Article 27 of the Penal Code states: "Crimes shall be divided according to their gravity to crimes, felonies and offenses and shall be subject to the penalties prescribed for offenses, misdemeanors or offenses."

5. The existence of better legal alternatives than the pardon for punishment: The justification for this pardon is to reduce the overcrowded prisons and to reduce the severity of punishment. These considerations are achieved by better legal mechanisms such as mitigating circumstances, impunity excuses, suspension, conditional release and alternatives to punishment without prejudice to the authority of the law and the validity of judicial decisions, while ensuring a measure of reform and rehabilitation achieved by the penalty of public benefit, for example, and not achieved by presidential amnesty.

2-2 The Advantages of the Pardon of Punishment

Despite the negatives and criticisms of some of the precepts of the pardon of punishment system, this mechanism has remained in practice and is enshrined in the constitutions and legislations of many countries around the world for its advantages:

1. Pardon of punishment is an indispensable means of achieving justice in order to remedy judicial errors in judgments that cannot be fixed by ordinary or unusual methods²⁹.
2. Pardon of punishment is important in correcting and correcting the convict through the possibility of using it as a reward for the convicted person for his good behavior, and his response to the rehabilitation program in a way that shows that the punishment has produced its purposes in it, so that there is no place to continue.
3. Pardon does not interfere with the work of the judiciary, because it does not erase the conviction attributed to the accused by the judiciary.
4. Punishment is a means of avoiding the implementation of some cruel punishments such as death execution if it is found to be more severe than is required by justice and the interest of society.

²⁹-Salwa Hussein Hassan Rizk, previous reference, p.275.

For our part, we believe that the application of pardon of punishment directly or indirectly involves violations of the general principles of law, such as the principle of separation of powers, the principle of the independence of the judiciary and the principle of the authority of the sentence, without forgetting that a presidential pardon would reduce the deprivation of liberty. Long-term punishment to short-term punishment, which judges refrain from speaking in response to recent trends and legislation calling for their exclusion and resort to alternatives.

Therefore, it is necessary to maintain the conditions of the presidential pardon in order to guarantee the real reform and rehabilitation of the convicted person who is benefiting from the pardon by committing him to certain measures of education and reform, such as preserving portions of the Qur'aan applied in some countries and has produced very encouraging results.

CONCLUSION

The study of the subject of pardon of punishment in the Algerian and Kuwaiti legislations ended with a number of conclusions and recommendations, the most important of which are the following points:

- **Results**

1. The pardon of punishment is not a procedural imperative necessary to achieve the purposes advocated by its supporters. It is practically useless practical, as there are several more amnesty laws in line with modern penal policy and do not conflict with the principles such as general amnesty, judicial amnesty, impunity excuses, suspension, conditional release and alternatives to freedom-related punishment.
2. The disadvantages of this system in the form prescribed in Algerian law are more than their positives. It is a flawed system in many ways, in violation of the principle of equality of all in the law and the judiciary, in violation of criminal legitimacy and the principle of separation of powers.

- **Recommendations**

This recommends the abolition of the pardon of punishment system, if it must be maintained, it shall be constrained by a set of restrictions. Therefore, the study recommends the following:

1. Linking the pardon with a security measure or the penalty for public benefit to ensure rehabilitation of the convicted person.
2. The restriction of pardon of punishment by a special committee belonging to the Ministry of Justice and not by the Ministry of the Interior, which regulates the conditions for benefiting from the pardon, and does not leave it in the hands of the President or the Amir in respect of the principle of separation of powers.
3. To determine the crimes for which the perpetrators of the pardon benefit from the penalty in specific crimes not related to the crimes of the common law, and to limit them to certain crimes whose purpose is to preserve the supreme interest of the state and the stability of the country.

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