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This book is dedicated to all who suffered injustice under a repressive regime that was overthrown in the elections of September and the uprising of the people in October of 2000.

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Legislation

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AMNESTY
Concept and Legal Nature

I.

In legal textbooks (as well as in most constitutional and legal texts and international documents) *amnesty denominates* – as a rule – *a legal act in the form of a law by which an unspecified number of persons are granted a favorable decision pertinent to their penal and legal status.*

Legally speaking, amnesty is not a ‚homogeneous' category from the point of view of its contents: it has several modalities, such as acquittal from prosecution or annulment of the legal consequences of a pronounced verdict.

In addition to that, amnesty can be: a) *general*, i.e. it can be applied (be ‚granted') to *all* crimes (regardless of their kind, gravity and punishment), or it can be b) *specific*, i.e. it can apply only to *certain* crimes. While *general* amnesty is practically never applied, *specific* amnesty is a rule. In that sense, when one speaks of amnesty, one usually has specific amnesty on mind, with certain limitations

related to the type and gravity of the crime, as well as the punishment and persons who committed it.

As a rule, amnesty is proclaimed in the form of an *Amnesty Act (Amnesty Law)* after an armed conflict (such as civil wars, ethnic or political clashes). In such situations, amnesty usually applies to so-called *military offenses* (e. g. ‚draft evasion'), but not to so-called *ordinary* felonies (e.g. theft, counterfeiting) or so-called *war crimes* (e.g. genocide). An explicit provision of Art. VI („Amnesty"), Annex 7 („Agreement on Refugees and Displaced Persons" of the 1995 *Dayton Peace Accords*, for example, stipulates that a refugee or a displaced person who returns and who is accused of a crime (or a felony) will be granted amnesty except in cases of „serious vilolation of international humanitarian law as defined in the Statutes of the International Tribunal on former Yugoslavia of Jan. 1, 1999" (i.e. *war crimes*), or in cases of „crimes unrelated to the conflict" (i.e. *ordinary* felony).[1]

It is amnesty's specific feature that it does not legally challenge the very existence of a crime (i.e. the crime exists) or legal validity of the verdict (i.e. the verdict exists), but their legal consequences are not executed.

II.

According to its contents, there are several amnesty *modalities*. Amnesty can thus be related to: a) acquittal of penal prosecution, b) total or partial

[1] Cf. **Dayton Accords** (Dejtonski sporazum), „Nasa borba", Belgrade, 1996, p. 101.

anullment of the serving sentence; c) substitution of an existing punishment with a milder one; d) deletion of the conviction from penal records; e) anullment of a verdict's legal consequences.

a) *Acquittal of penal prosecution*

In its modality as acquittal of penal prosecution, amnesty presupposes that a) *no penal procedure can be set in motion,* or b) a penal procedure that has been set in motion *must be stopped* against a person who has been granted amnesty.

Acquittal of penal prosecution – also known as *abolition* – as a special modality of amnesty presupposes discharging of penal prosecution a person *suspected* to have committed a crime. Abolition means that penal prosecution *can not* be set in motion (although there is reason for penal prosecution), or that an already commenced penal procedure *must be stopped*, i.e. penal procedure may not be conducted further if it has commenced.

Generally speaking, the legality principle applied in penal procedure, presuposses that against any person suspected to have committed a crime, a procedure aimed at the establishment of the existence of that crime or at the establishment of that person's penal accountability is initiated, whereby so-called *reasons for doubt* are examined to begin with. Depending on the outcome of this examination (of the *reasons for doubt*) the penal procedure is then stopped (if the doubt is not „reasonable"), or the accused is taken to court (if the doubt is „reasonable"). During the ensuing procedure, the court decides on the penal accountability of the

accused (i.e. it takes a final decision on whether there has been a crime and whether it was committed by the accused). In case that the existence of both is established, the court pronounces an adequate sanction (e.g. a jail sentence, fine etc.).[2]

The granting of abolition is usually motivated by *political reasons* which - in certain situations or in relation to the fullfillment of certain political functions – justifies and/or makes it opportune *not to examine* one or more persons' penal accountability any more, and „leave the matter to oblivion" (such as the decision not to carry out the impeachment, i.e. penal prosecution of US President Nixon, after his resignation in the aftermath of the Watergate affair).

From a formal and legal point of view, abolition can be granted before penal procedure is set in motion, but only before valid verdict and sentence have been reached. In other words, no abolition is possible if the penal procedure has been carried through and completed: once convicted, a person can not be granted abolition afterwards.[3]

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[2] Consequently, *abolition* in fact represents „prohibition" which can pertain either to the preliminary examination whether there is „reasonable doubt" (that a crime has been committed), or to the further conduction of the procedure (e.g. in the sense of bringing the accused to court).

[3] However, although abolition cannot be applied in this case, a convicted person can. on the basis of other amnesty modalities be freed from punitive measures, the sentence can be substituted by a milder one etc.

It is interesting to note that – since abolition means the so-called *absolute prohibition* of penal prosecution – a person granted abolition cannot demand that penal procedure against him/her be initiated or continued, even in cases when this person has a specific interest in it (e.g. for political reasons).

Finally, from the point of civil law, abolition does not exclude third persons' right to claim damages eventually caused by the act for which abolition was granted.

b) Anullment of serving sentence

Amnesty as anullment of serving sentence can be total or partial. *Total anullment* of serving sentence relates to all sentences pronounced - both primary (jail sentence) and auxilliary (fine). *Partial anullment* relates only to some of the sentences pronounced, i.e. relates to the reduction of primary or to the reduction of auxilliary. This amnesty modality is applied mostly to imprisonment sentences.

c) *Substitution with a milder punishment*

Amnesty can pertain to a situation where a sentence is *substituted with a milder one*. Since each kind of punishment can be substituted by a milder

one, there are in principle no limitations in relation to this modality.[4]

d) *Deletion of convictions*

Amnesty can also be related to the *deletion of a conviction* and other data relevant to the offense committed from the official records. This modality can be implemented both in accordance with legal provisions which regulate such legal situations, but also outside of those legal norms if special reasons dictate that (for example, deletion of a sentence or other data entered in official records prior to the legally due term, or on the basis of circumstances not explicitly foreseen by law). This is possible because amnesty is, as a rule, granted by law (Amnesty Act), relying on the legal maxim *lex specialis derogat legi generali*, i.e. special laws (e.g. an amnesty act) derogate general laws - (e.g. the Penal Code).

e) *Anullment of legal consequences*

Finally, amnesty can pertain to the anullment of *legal consequences of a conviction*. Such is a case when – as a consequence of a conviction for a crime – a legal situation is brought about which represents a restriction. Thus, if a restriction (such as prevention to take part in elections or in politics for a certain period) is imposed as a punitive measure,

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[4] Death penalty can thus be substituted by imprisonment, imprisonment can be changed to a fine, etc.

legal consequence of such a conviction can be anulled, i.e. the restriction is abolished.

Beside these, amnesty has several other features. In this sense, amnesty carries in itself certain *limitations*. Amnesty does not apply to sentences which have been served, nor can it be basis for material compensation for served sentences. In addition to that, amnesty can not be used as basis for claims to compensate trial costs of a procedure already carried through and finalized, nor can it serve as basis for retribution or property or money confiscated as a consequence of an already finalized procedure and served sentence.

On the other hand, the general rule is that amnesty can not do damage to third persons. Third persons who are in any way damaged by the offense for which amnesty is granted, are entitled to claim damage compensation or the return of stolen or confiscated property, as well as to request realization of other civil and property claims, regardless of the fact that amnesty has been proclaimed for that offense.

III.

When discussing amnesty (and abolition), one should also mention *pardon* as a specific act with which a convicted person is discharged (wholly or in part) from serving the sentence or penalty. In its contents and legal features, pardon sometimes practically coincides with abolition, i.e. in cases when pardon pertains to the acquittal of penal prosecution. Reasons to grant pardon can be different (for example, good conduct or reasons of

social and political nature such as national holiday etc.). Conditions and procedure of granting pardon are specified in corresponding laws.[5] According to our positive laws, pardon procedure is initiated either by an appeal or an official motion. The procedure must be initiated officially in cases in which death penalties have been pronouced (and the appeal for some reason has not been submitted). On the other hand, the procedure of granting pardon in the form of acquittal of penal prosecution (abolition) is initiated set in by an official motion. Pardon is granted by organs specifically authorized to do so. According to the Constitution of the Federal Republic of Yugoslavia, for example, pardon for offenses enumerated in federal law is granted by the President of the FRY.[6] Similarly, according to the constitutions of Serbia[7] and Montenegro,[8] pardon is granted by presidents of the respective Republics.

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[5] Cf. **Pardon Act** (Zakon o pomilovanju), „Official Gazette of the Federal Republic of Yugoslavia", No. 90/94; **Pardon Act** (Zakon o pomilovanju), „Official Herald of the Republic of Serbia" No. 49/95); **Pardon Act** (Zakon o pomilovanju), „Official Gazette of the Republic of Montenegro, No. 12/98

[6] Cf. **Constitution of the Federal Republic of Yugoslavia** .(Ustav Savezne Republike Jugoslavije), „Official Gazette of FRY" No. 1/92), Art. 96, Para. 8.

[7] Cf. **Constitution of the Republic of Serbia** (Ustav Republike Srbije), „Official Herald of RS" No. 1/92), Art. 83, Para. 9.

IV.

Amnesty is often stipulated *in international documents*, especially in peace treaties. Provisions of the *Dayton Accords*[9] thus oblige the Parties to the Agreement, i.e. Federal Republic of Yugoslavia, Republic of Croatia and Republic of Bosnia and Herzegovina, to pass adequate amnesty bills.[10]

According to the *Amnesty Act* of the Federal Republic of Yugoslavia (Article 1)[11] „amnesty is granted to persons who prior to December 14, 1995 committed the crime of *draft evasion* or *evasion of military service*, as stipulated in the Article 214,[12] or

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[8] Cf. **Constitution of the Republic of Montenegro** (Ustav Republike Crne Gore), „Official Gazette of RM" No. 12/92) Art. 88, Para. 6.

[9] Cf. **Dayton Accords** (Dejtonski sporazum), Annex VII, Art. 6, „Nasa borba" , Belgrade, 1996

[10] It is remarkable, however, that peace agreements concluded in the aftermath of the Kosovo crisis and the NATO air strikes on our country, no amnesty provisions are to be found.

[11] Cf. **Amnesty Act** (Zakon o amnestiji), „Official Gazette of the FRY"), No. 28/96.

[12] **Article 214** of the **Penal Code of the Federal Republic of Yugoslavia** („Official Gazette of the SFRY" Nos. 44/76; 36/77; 34/84; 37/84; 74/87; 57/89; 3/90; 38/90; 45/90 and 50/90, as well as „Official Gazette of the FRY", No. 35/92; 37/93 and 24/94) – **„Draft evasion and evasion of military service"** stipulates:

the crime of *deliberate abandonment* of or *escape from the Yugoslav Army*, as stipulated in the Article 217[13] of the Penal Code of the Federal Republic of

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„Who for unjustifiable reason does not report at the specified time for recruitment, to be advised of his deployment or to be handed weapons, or to perform military service, military exercise or some other service in the armed forces, although he has been called individually or by a general call, will be fined or punished with up to one year in prison..

Who hides in order to evade the obligations stated above (para. 1 of this article), although he has not been called individually or by a general call, will be punished with three months to five years in prison.

Who leaves the country or remains abroad in order to evade recruitment or military service, military service or some other service in the armed forces, will be punished with one to ten years in prison.

Who calls on or instigates other persons to commit the acts stated in para. 1 to 3 of this article, will be punished with up to three years in prison for the crime in para. 1, and no less than one year in prison for crimes in para. 2 and 3 of this article.

Offenders from para. 2 and 3 of this article who voluntarily report to the competent state authority may be passed a mitigated penalty or be released from penalty.

[13] **Article 217** of the **Penal Code of the Federal Republic of Yugoslavia** („Official Gazette of the SFRY", No. 44/76; 36/77; 34/84; 37/84; 74/87; 57/89; 3/90; 38/90; 45/90 and 50/90, as well as „Official Gazette of FRY" No. 35/92; 37/93 and 24/94) – **„Deliberate abandoning of and escape from the Yugoslav Army"** stipulates:

Yugoslavia (...), except professional soldiers and commissioned officers".[14]

„A military person who deliberately abandons his military unit or service and does not report back on duty within ten days or does not return from a permitted leave of absence from his unit or service within ten days, will be punished with up to one year in prison.

The punishment from para. 1 of this article will be passed on a military person who more than twice and for a period shorter than ten days leaves the unit or service, as well as on a military person who deliberately abandons his unit or service while important tasks are performed or during his unit's state of higher alert.

A military person who hides in order to evade service in the Yugoslav Army, or who deliberately leaves his unit or service and does not return to duty within thirty days, or does not return from a permitted leave of absence within thirty days, will be punished with six months to five years in prison.

A Military person who leaves the country or remains abroad in order to evade service in the Yugoslav Army, will be punished with no less than one year in prison.

A military person who prepares escape from the country in order to evade service in the Yugoslav Army, will be punished with six months to five years in prison.

Offenders from para. 2 and 3 of this article who voluntarily reports to the authorities can be passed a mitigated punishment.

[14] In this case amnesty is not complete in the sense that the Amnesty Act does not apply to „ (...) professional soldiers and commissioned officers".

This bill foresees amnesty related to: a) acquittal of penal prosecution, b) annulment of serving sentence, and c) deletion of legal penalties.[15]

This Act also contains provisions on the abolishment of detention, complaints and application of the provisions of the Penal Procedure Act pertaining to amnesty, in case this Act does not stipulate otherwise.[16]

[15] Cf. **Amnesty Act** (Zakon o amnestiji) „Official Gazette of the FRY", No. 28/96, Art. 2.

[16] Cf. **Amnesty , Act** (Zakon o amnestiji), „Official Gazette of the FRY", No. 28/96, Art. 5, 7 and 9.

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