Criminal Law Practitioner

Volume 4 | Issue 6 Article 2

2019

Epitaph for Pardon Based on the Purpose of Punishment

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A. Introduction. Conceptual delineation of the individual pardon

The objective of this article is to analyze the purposes assigned to "the pardon" as an institution based on the different theories of justification of punishment. Its ultimate goal is to reflect on its justification in modern criminal law in the framework of democratic rule of law. To do this, it is necessary to start with the concept of the individual pardon.

In general terms, "pardon" could be defined as a discretionary act that, for a specific case, involves the mitigation or elimination of unfavorable legal consequences meted out in accordance with the law.[2]

In the face of the silence maintained by the Spanish Constitution and legislation, "individual pardon" can be defined as the discretionary act derived from the power nominally conferred to the Head of State.[3] The pardon power was materialized as an act of the Government, endorsed and proposed by the Minister of Justice and following the deliberation of the Council of Ministers.[4] In application, the sentence already imposed in a final judgment is not fully enforced, with it being partially or totally reduced or commuted to a less serious one.[5]

A pardon entails that, at the discretion of the Executive, a penalty is either partially or totally not enforced according to the extension established by the Royal Decree; or it is replaced with a lesser one.[6]

B. Purposes assigned to the institution of the pardon: introduction. Regulative and practical context of the pardon's Royal Decrees

Not only does the Spanish Constitution not define the *particular pardon*, but, as is often the case in comparative law, neither is there an indication of the reasons, requirements or requisites for it to be granted.[7]

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2 U.S. Const. art. II, § 2; C.E., B.O.E. n. 62(i), Dec. 29, 1978 (Spain).

3 César Aguado Renedo, *Problemas constitucionales de la potestad de gracia: en particular, su control* [Constitutional challenges of the power to pardon: particularly, its control], *in* La democracia constitucional: estudios en homenaje al profesor Francisco Rubio Llorente [Constitutional democracy: in homage to professor Francisco Rubio Llorente] 908 (Reyes et al. eds. 2002); Rosario García Mahamut, El indulto: Un análisis jurídico-constitucional [The Pardon: A Juridical-Constitutional Analysis] 127–48, 149 (2004).

4 Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto, arts. 21–23 (B.O.E. 1870, 175) (Spain). *See also* Rosario García Mahamut, Seis reflexiones sobre el indulto y una consideración acerca de la suspensión de la ejecución de la pena ante la solicitud de indulto [Six reflections on pardon and a consideration about the suspension of imprisonment when pardon is requested], *in* Constitución, estado de las autonomías y justicia constitucional [Constitution, State of Autonomies and constitutional justice] 612–13 (Luis Aguiar de Luque,Valencia, ed., 2005); Juan Luis Pérez Francesch & Fernando Domínguez García, *El indulto como acto del Gobierno: una perspectiva constitucional [Pardon as a Government act: a constitutional perspective]*, 53 Revista de Derecho Político [Political Law Review] 25, 30 (2002).

5 Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto, art. 4 (B.O.E. 1870, 175) (Spain).

6 Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto, arts. 4, 12, 30 (B.O.E. 1870, 175) (Spain).

7 *See generally* C.E., B.O.E., Dec. 29, 1978 (Spain).

The Law of June 18, 1870 (hereinafter "LI"),[8] when establishing rules for the exercise of a pardon—except for the general mention of achieving of justice, equity, or utility or public convenience in Articles 2.3, 11, and 16—does not determine the catalogue of reasons that justify its granting, nor does it reveal the conditions that the subject must meet to obtain it.[9]

In contrast to the silence guarded by the LI, the Spanish Criminal Code (hereinafter "CP") points to a function that the granting of a pardon should be directed towards, when the controversial CP Article 4.3 provides the option for the Judge or Court to address the Government to grant it, if the rigorous application of the provisions of the Act results in an action or omission being punished that, in its opinion, should not be, or if the penalty is noticeably excessive.[10]

Additionally, Article 206 the Prison Regulation Royal Decree ("RP")[11] refers to the specific conditions that the prisoner must meet so that he or she may be eligible to receive an individual pardon, as an extraordinary prison benefit.[12] Given its specific configuration as a prison benefit, its motives cannot be based on the totality of pardons granted in practice.[13] The guidelines referred to are exclusively focused on the post-conviction behavior of the offender, with respect to serving his sentence.[14]

On the other hand, resolutions granting pardon traditionally obey a stereotypical model in which reference to the concurrence of "*reasons of justice and equity*" is repeated.[15] They do not explain why a decision has been made, whether positive or a denial, because they are used for the most heterogeneous purposes.[16]

In accordance to what has been stated, it can be concluded that we are in an area that lacks regulation guidelines, except those in-

[8] Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto (B.O.E. 1870, 175) (Spain).

[9] Fernando Molina Fernández & Laura Pozuelo Pérez, Extinción de la responsabilidad penal y sus efectos [Extinction of the penal responsibility and its effects], *in* Memento Práctico Penal 717 § 6587 (2017) (Fernando Molina Fernández, ed., 2016); Francesc de Carreras, *El Indulto en Nuestro Estado de Derecho*, El País, Dec. 12, 2000, https://elpais.com/diario/2000/12/12/espana/976575627_850215.html; Jerónimo García San Martín, El Indulto: Tratamiento y Control Jurisdiccional: Con Formularios [The Pardon: Treatment & Jurisdictional Control: with Applications] 75–76 (2d ed. 2015).

[10] C.P. art. 4.3 (B.O.E. 1995, 281) (Spain).

[11] "The Assessment Board, on a proposal from the technical team, may request the Prison Supervision Court, the consideration of clemency, to the extent that circumstances may require, for inmates in which the following requirements on a long-term basis are met –for at least two years and in an extraordinary degree: a) Good behavior; b) Performance of a regular working activity (within the prison or outside, if it can be considered as useful to his/her future life in freedom; c) Participation in reeducation and social reintegration activities." Reglamento Penitenciario art. 206 (B.O.E. 1996, 40) (Spain).

[12] In order to access the possibility of obtaining that prison benefit, the convicted person must show, for more than two years and in an extraordinary way, good behavior, performance of a normal work activity that helps him prepare for life on the outside and participate in re-education and social reinsertion activities. *Beneficio Penitenciario de Indulto Particular*, Instrucción 17/2007 (Dec. 4, 2007) [hereinafter "instrucción 17/2007]. *See also* Maria del Puerto Solar Calvo, *El Indulto: Una Perspectiva Penitenciara,* legal today, July 31, 2014, http://www.legaltoday.com/practica-juridica/penal/penal/el-indulto-una-perspectiva-penitenciaria; Maria Jesus Espuny & Olga Paz Torres, 30 Años de la Ley de Amnistía (1977-2007) [30 years of the Amnesty Law (1977-2007)] 238, 243 (2009).

[13] Puerto Solar Calvo, *supra* note 12; Jesus Espuny, *supra* note 12, at 238, 243.

[14] Instruccíon 17/2007, *supra* note 12.

[15] *See, e.g.,* Real Decreto 52/2019, de 8 de febrero, por el que se indulta a don Luis Alberto González Sanz (B.O.E. 2019, 36) (Spain); Real Decreto 35/2019, de 25 de enero, por el que se indulta a don Antonio José Vizcaíno Peralbo (B.O.E. 2019, 24) (Spain).

[16] Ana del Pino Carazo, Problemas Constitucionales del Ejercicio de la Potestad de Cesar Aguado Renedo 37 (2001); Enrique Linde Paniagua, *El indulto como acto de administración de justicia y su judicialización. Problemas, limites y consecuencias [Pardon as an act of administration of justice and its judicialization: Problems, limits, and consequences]*, 5 Teoria y Realidad Constitucional [Constitutional Theory and Reality] 161, 163 (2000).

cluded in the Spanish Criminal Code Article 4.3 and Article 206 of the RP. It is the academic opinion which has tried to fill this gap, inquiring about the reasons that lead to a pardon being granted[17] without prejudice to those judicial resolutions that tangentially address the issue.

C. Purposes assigned to the institution of the pardon in relation to the theories of punishment: starting points

Before we begin analyzing the purposes assigned to the institution of the pardon by the different theories of punishment, we must stop to clarify a premise that is assumed to avoid contaminating the examination of the different scenarios. From now on, we will try to distinguish between normal scenarios and those of an urgent nature – likened to Kantian[18] states of necessity – installed in the processes of transitional justice.[19]

Once such distinction is that the basis for the granting of a pardon does not have to be related to the purpose of the sentence. In some types of cases, the granting of pardon ends up being separated from the purposes assigned to the penalty and their fulfilment; it responds to

[17] *See* Pedro Armengol y Cornet, *Estudios penitenciarios.–La gracia de indulto y su ejercicio [Penitentiary studies: The grace of pardon and its exercise]*, *in* La Defensa de la Sociedad [The Defense of Society] 87 (Nabu Press rev. ed. 2012) (1875); *see generally* Hansgeorg Birkoff & Michael Lemke, Gnadenrecht [Clemency] 80–82 (2012); Kathrin Blaich, System und Rechtsstaatliche Ausgestaltung des Gnadenrechts [System of Constitutional Design for the Right of Pardons] 185–202 (2012); Don Emilio Bravo, La Gracia de Indulto [The Grace of Pardon] 197, 198 (Madrid, 1889); Fernando Cadalso, La libertad condicionál, el indulto y la amnistía [Conditional Freedom, Pardon and Amnesty] 206–07 (1921); Dimitri Dimoulis, Die Begnadigung in vergleichender Perspektive: Rechtsphilosophische, verfassungs- und strafrechtliche Probleme (Strafrechtliche Abhandlungen) [Competition in Comparative Perspectives: Legal Philosophics, Constitutional and Criminal Problems (Criminal Acts)] 341–45 (1996); Rosario García Mahamut, El Indulto: un Analysis Juridico- Constitucional [The Pardon: A Juridical-Constitutional Analysis] 120–21 (2004); Ireneo Herrero Bernabé, *El derecho de gracia: indultos*, 133–47 (2012) (unpublished doctoral thesis, Universidad Nacional De Educación A Distancia), http://e-spacio.uned.es/fez/eserv/tesisuned:Derecho-Iherrero/Documento.pdf; Hans-Heinrich Jescheck & Thomas Weigend, Lehrbuch des Strafrechts: Allgemeiner Teil [Textbook of of Criminal Law: General Part] 923–24 (5th ed. 1996); Daniel T. Kobil, *Should Clemency Decisions be Subject to a Reasons Requirement?*, 13 Fed. Sent'g Rep. 150, 150 (2001); José Llorca Ortega, La Ley de Indulto: Comentarios, Jurisprudencia, Formularios y Notas Para Su Reforma [The Law of Pardons: Commentary, Jurisprudence, Forms and Notes for its Reform] 75–114 (3rd ed. 2003); Antonio Madrid Pérez, *El indulto como excepción. Análisis de los indultos concedidos por el Gobierno español durante 2012* [*Pardon as Exception: Analysis of Clemencies Granted by the Spanish Government in 2012*], 6 Revista Crítica Penal y Poder [Criminal Review Penal and Power] 110, 110, 113, 115–16 (2014); Heinz Zipf et al., Strafrecht Allgemeiner Teil. Teilband 2: Erscheinungsformen des Verbrechens und Rechtsfolgen der Tat [Section on General Criminal Law. Sub-Chapter 2: Forms of Crimes and Legal Consequences] 1001–03 (8th ed. 2014); Axel Maurer, Das Begnadigungsrecht im modernen Verfassungs- und Kriminalrecht [The Pardon in Modern Constitutional and Criminal Law] 47–48 (1979); Samuel von Pufendorf, Über die Pflicht des Menschen und des Bürgers Nach Dem Gesetz der Natur [About the Duty of Man and the Citizen According to the Law of Nature] 193–94 (Klaus Luig ed. & trans., 1994); Stefan Ulrich Pieper, *Das Gnadenrecht des Bundespräsidenten – eine Bestandsaufnahme [The Pardon Power of the Federalist President]*, *in* Gnade Vor Recht–Gnade Durch Recht? [Pardon Before Law – Pardon Through Law?] 101–05, 109 (Christian Waldhoff ed., 2014); Hinrich Rüping, *Die Gnade im Rechstsstaat [Grace in the Law]*, *in* Festschrift für Friedrich Schaffstein [Commemmorative for Friedrich Schaffstein] 36–41 (Gerald Grünwald et al. eds., 1975); Johann-Georg Schätzler, *Gnade vor Recht [Grace Before Right]*, 28 Neue Juristische Wochenschrift 1249, 1250–52 (1975); Leslie Sebba, *Clemency in Perspective, in* criminology in perspective: Essays in Honor of Israel Drapkin 228–33 (Simha F. Landau & Leslie Sebba eds.,1977); Luis Silvela, El Derecho Penal Estudiado en Principios y en la Legislación Vigente en España [Criminal Law Studied in Principles and in the Current Legislation in Spain] 434–35 (1879); José Enrique Sobremonte Martínez & Manuel Cobo del Rosal, Indultos y Amnistia [Pardons and Amnesties] 25, 268 (1980).

[18] Immanuel Kant, Die Metaphysik der Sitten, in zwey Theilen [The Metaphysics of Morals, in Two Parts] 231–32 (2d ed.1803).

[19] *See* Alicia Gil Gil et al., Colombia Como Nuevo Modelo para la Justicia de Transición [Colombia as a New Model for Transitional Justice] 28–30 (2017).

other *exogenous* reasons.[20] For example, the pardon granted to solve a situation of economically unsustainable prison overcrowding or to celebrate commemorative events.[21] The proposed analysis concentrates on the first group, the normal scenarios, and examines the different purposes assigned to pardon to justify its use based on the different theories of punishment.

Finally, the following analysis may be transferred *mutatis mutandis* to mixed, unified, or unifying constructions of punishment, insofar as they are based on or are composed of the abstractions and premises that will be analyzed without deeming a specific study necessary. Such a study, in this regard, would not add anything to the constructions of punishment.

C.1. How the pardon fits into absolute theories

It might seem counterintuitive that theories based on retributive premises could make room for the pardon. The often-mentioned Kantian example of the inhabitants of the island quickly comes to mind.[22] Kant argued that, even when the risk of a civil society being dissolved exists, the last remaining murderer in prison would have to be executed first, so that each has done to him what his actions deserve.[23] If society does not demand the punishment, then society is responsible for the public violation of justice.[24]

However, Kant also contemplated an exception, structured as a state of necessity.[25] To construct his exception, it is illustrative that Kant resorted to the crime of rebellion, inspired by what took place in Scotland in 1745. Kant observes that, if the number of accomplices of such action was so great that the state almost reaches the point of having no subjects and did not want to be dissolved by returning to the state of nature, the sovereign would have power, in that extreme case (*casus necessitatis*), to judge and deliver a judgement imposing another penalty on criminals instead of the death penalty, in order to preserve the life of the people as a whole.[26]

At the heart of absolute theories, therefore, resorting to pardon is eventually defended. The question that continuously arises is: in which cases is its use advocated?

(**i**) In exceptional circumstances, like those Kant would assume, those theories allow a relaxation of his postulates and accept the possibility of employing pardon.[27]

(**ii**) In scenarios considered as normal:

(**a**) The arguments used to defend the pardon are not specific to the absolute theories nor do they sur-

[20] Eva Carracedo Carrasco, *Pena e indulto: una aproximación holística [Punishment and pardon: a holistic approach]* 296–333 (2018).

[21] *Id.* at 242–48, 280–89.

[22] Kant, *supra* note 18, at 231 32.

[23] *Id.*

[24] *Id.*; Norbert Campagna, Strafrecht und unbestrafte Straftaten: Philosophische Überlegungen zur strafenden Gerechtigkeit und ihren Grenzen [Criminal Law and Unstated Disputes: Philosophical Considerations on Criminal Justice and its Limits] 75 76 (2007); Dimoulis, Die Begnadigung, *supra* note 17, at 595.

[25] *See* Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 Buff. L. Rev. 101, 109–10 (2005) (noting that Kant believed that the state retains a right of necessity to grant clemency in extreme situations).

[26] *See* Kant, *supra* note 18, at 231–32, (explaining that the sovereign would not implement this decision by means of a public law, but through an act of authority, as an act of the law of majesty that, as a pardon, can only be exercised in isolated cases); von Pufendorf, *supra* note 17, at 194.

[27] Kathleen Dean Moore, Pardons: Justice, Mercy & the Public Interest 164, 201–02 (Oxford Univ. Press 1997) (1989).

pass the premises on which they are based[28] (making use of reasons such as offender rehabilitation or the achievement of heroic merits and services)[29] and, consequently, they will be analyzed later; or

(**b**) They defend the granting of forgiveness in favor of amnesty (like Hegel)[30] or the forgiveness of the victim,[31] not the pardon[32] and, therefore, outside the scope of our analysis; or

(**c**) They are justified: (**c. 1.**) when the expiatory purpose or moral reform of the convict has been completed earlier or (**c. 2.**) when based on moral or legal just deserts, the act of the pardon intends to replace deficiencies or correct dysfunctions that are observed when assuming the said premises.[33] In this regard, the constructions based on the idea of just desserts as a metaconcept stand out[34]: in the same way as the offender deserves the punishment, he may gain the benefit of pardon.[35]

In both scenarios of justified pardons (**c.1 and c.2**), the application of the pardon has now been surpassed by more precise institutions, through the adequate application of the legal theory of crime developed in our legal system and due to fundamental premises of our rule of law.[36]

When it is a matter of resolving the anticipated fulfilment of the expiatory purpose assigned to the punishment, there are already mechanisms designed to adapt the prison regime applicable to the subject who shows good behavior, who is already "reformed," as well as legal solutions that allow early release, an effective shortening of the time that he is deprived of his liberty.[37] Therefore, a pardon would be overcome by the current gradual prison regime (including parole)[38] and the prison benefit of granting parole in advance.[39]

[28] Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 New Eng. J. Crim. & Civ. Confinement 413, 450 (2007); Heidi M. Hurd, *The Morality of Mercy*, Ohio State J. of Crim. Law 389, 417 (2007); Morison, *supra* note 25, at 112.

[29] Moore, *supra* note 27, 197; Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 Chi. Kent L. Rev. 1501, 1523–31 (2000).

[30] Georg Wilhelm Friedrich Hegel, Grundlinien der Philosophie des Rechts: Naturrecht und Staatswissenschaft im Grundrisse [Basics of Philosophy of Rights: Natural Law and State Science in an Outline] 293–94 § 282 (1821).

[31] *See* Kant, *supra* note 18, at 236 (explaining his theory in relation to crimes of lese majesty).

[32] Heinz Zipf et al., Strafrecht Allgemeiner Teil. Teilband 2: Erscheinungsformen Des Verbrechens Und Rechtsfolgen Der Tat [Criminal Law General Part. Part 2: Appearance of the Criminal and Legal Actions of the Act] 135–36 (2014).

[33] Hugo Adam Bedau, *A Retributive Theory of the Pardoning Power*, 27, U. Rich. L. Rev. 185, 189 (1992); Jeffrie G. Murphy, *Mercy and Legal Justice*, 4, Soc. Phil. & Pol'y 1, 7, 9 (1986).

[34] *See, e.g.,* Hurd, *supra* note 28, at 392–93, 417.

[35] Moore, *supra* note 27, at 10; Claudia Card, *On Mercy*, 81 Phil. Rev. 182, 184–89, 204–06 (1972); Dorne, *supra* note 28, at 413, 421; Dan Markel, *Against Mercy*, 88 Minn. L. Rev. 1421, 1471–73 (2004); (defending the redirection to legislation and not to pardon); Tara Smith, *Tolerance & Forgiveness: Virtues or Vices?,* 14 J. Applied Phil. 31, 39–40 (1997).

[36] Markel, *supra* note 35, at 1425–78; Rapaport, *supra* note 29, at 1501–02.

[37] Karl David August Röder, Die herrschenden Grundlehren von Verbrechen und Strafe in ihren inneren Widersprüchen [The Initial Basics of Criminal and Penalty in their Inner Conflicts] 104–05, 127–28 (1867).

[38] Cadalso, *supra* note 17, at 206; Markel, *supra* note 35, at 1468–69.

[39] Reglamento Penitenciario arts. 202.2, 205 (B.O.E. 1996, 40) (Spain). Nothing could prevent the incorporation of the scenario of article 206 in the regime provided for in the preceding provision.

If the argument used at the heart of absolute theories is constructed based on the rule of behavior – that an act should no longer be subject to blame or criminal punishment – then the act no longer necessarily needs to be addressed as a statutory offence. Therefore, the use of pardon has been replaced by legislative reform and by the subsequent revision of the judgements.

Another main use for those who defend resorting to pardon within these theories, is to solve proportionality deficiencies that would result in the application of excessive penalties. In this area, the use of that institution is intended to solve malfunctions of the rule in the abstract, and to correct the punitive excess that the application of the rule to a specific case may generate. If the deficiency refers to the rule in the abstract, then there is no solution other than legal reform and, once again, a revision of the judgements passed under the previous and more burdensome regulatory regime.[40]

If the point is to adjust the application of the general rule to the particularities of the specific case, which is assumed as the cornerstone of the issue, then there are currently sufficient mechanisms available to achieve the necessary individualization and adjustment without resorting to pardons. The Judges implement the individualization and determination of the penalty, in accordance with the guidelines (adaptable) set by the legislator. This task of individualization is not limited to the sentencing phase, but also, once the judgement is passed and a specific penalty is imposed, all the pre-established measures in the prison regulations are deployed to carry out said individualization in the gradual enforcement of the sentence which, could even be suspended.[41]

If the sentencing court noticed the impossibility of reaching a solution that was proportional to the specific case, then the deficiency would reside not in the individualization process, but in the rule to be applied and, therefore, a question of unconstitutionality[42] could be raised and, additionally, a request for the repeal or modification of criminal legal provisions.[43]

Curiously, the absolute theories would also try to solve, through the pardon, the disproportion of the imposed punishment when the prisoner's personal circumstances changed.[44] In those cases, the solution lies with, as already settled by our legislator, allowing that adjustment *ex ante*, incorporating legal provisions (suspension of imprisonment, access to parole or the progression through the prison system) that include those cases that are deemed relevant (qualified medical conditions or advanced aging).[45]

Finally, it is observed how the defenders of retribution theories would have structured the pardon as a mechanism to correct the deficiencies in the application of the deserved

[40] Daniel T. Kobil, *Quality of Mercy Strained: Wresting the Pardoning Power from the King,* 69 Tex. L. Rev. 569, 627–30 (1991).

[41] C.P. (B.O.E. 1995, 281) (Spain).

[42] The result of which could be the interpretation according to the Constitution of the challenged precept. Enrique Bacigalupo Zapater, *La Rigurosa Aplicacion de la Ley* [*The Strict Application of the Law*], 48 Anuario de Derecho Penal y Ciencias Penales [Y.B. of Crim. Law and Crim. Sci.] 862 (1995); Javier Sánchez-Vera Gómez-Trelles, *Una lectura crítica de la Ley de Indulto* [*A Critical Review of Pardon Law*], 2 InDret 1, 12–13, 17–18 (2008).

[43] Silvela, *supra* note 17, at 436–37 (noting that repeal or modification that could be implemented not only at the initiative of the sentencing court, but also in accordance with the specific mechanisms established in the Spanish Constitution).

[44] Markel, *supra* note 35, at 1470–71.

[45] C.P. art. 92(3) (B.O.E. 1995, 281) (Spain).

punishment. The catalogue of scenarios that are raised is broad.[46]

In fact, this body of reasons is so vast because, in practice, it is projected on all those cases that lend to the construction of the criminal theory (the validity of the rule of behavior and the rule of punishment being assumed). In the end, the reasons would allow the conclusion of the inexistence of a criminal act committed by a subject to whom criminal responsibility can be demanded. Not because the act is made to fictitiously disappear, but because, more than anything, it cannot be considered criminal[47] (or the act does not exist, it is not statutorily defined, it is not unlawful, it is not culpable, or it is not punishable).[48] The application of criminal theory to these cases makes it unnecessary and inadmissible to resort to the institution of the pardon to resolve an issue that the application of justice itself solves.

C.2. How the pardon fits into the general prevention theories

C.2.1. Pardon and negative general prevention theory

It seems that negative general prevention theories would not find space for pardons. The father of the psychological coercion theory, Feuerbach, assumed that the legal threat would not be sufficient, it being essential that the threatened evil be applied as soon as the offense was determined. For the threat contained in the law to be real, it must truly imply the real imposition of an evil.[49]

It seems to be confirmed then that, in general, at the heart of these constructions, there would be a shielded opposition to the use of pardons and forgiveness.[50] However, Feuerbach himself made exceptions to his general opposition, based on the indifference of the application of pardons for the purpose of deterrence in cases where judgments are considered unjust or perceived as such.

The reasons that justify resorting to pardons, in accordance with the arguments used by Feuerbach[51] and Mittermaier,[52] can be arranged into two categories: (i) the arguments used within normal contexts; and (ii) the reasons referring to extraordinary contexts, in which its use serves to maintain the legal state against pressing dangers (for example, conspiracies).[53]

In normal scenarios, the reasons can be divided, in turn, into three subgroups:

[1] The cases in which, although the sentence cannot be regarded as a judicial error subject to review, it provokes a public outcry. The scenarios in which

[46] *See* Ross Harrison, *The Equality of Mercy*, in Jurisprudence, Cambridge Essays 119 (Hyman Gross & Ross Harrison eds., 1992); Moore, *supra* note 27, *passim*; James Barnett, *The Grounds of Pardon,* J. Crim. L. & Criminology 490, 502–03, 511–12, 515–16 (1927); Kobil, *supra* note 40, at 630–32; Morison, *supra* note 25, at 25; Nigel Walker, *The Quiddity of Mercy*, 70 Phil. 27, 33–34 (1995).

[47] Markel, *supra* note 35, at 1455.

[48] Hugo A. Bedau, *A Retributive Theory of the Pardoning Power*, 27 U. Rich. L Rev. 185, 194 (1993) ("We cannot infer from the fact that a given offender does *not* 'deserve' a given sentence, that the offender *does* 'deserve' the mercy that a pardon brings. For it may be that the offender does not 'deserve' anything at all[.]") (emphases in original).

[49] Paul Johann Anselm von Feuerbach, Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts [Textbook of the Community in Germany Valid Permanent Rights] 38–40 (Giessen, Heyer, 1847); Paul Johann Anselm von Feuerbach , Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts [Revision of the Principles and Basic Concepts of Positive Public Law] 48–51 (Erfurt, Henning, 1799).

[50] Dimoulis, Die Begnadigung, *supra* note 17, at 596; Mark Freeman, Necessary Evils 21 (2009).

[51] Feuerbach, Lehrbuch, *supra* note 49, at 120–21; Feuerbach, Revision, *supra* note 49, at xxvii–xxviii.

[52] Feuerbach, Lehrbuch, *supra* note 49, at 122, notes II to IV.

[53] *Id.* at 121.

this aversion could arise, are identified as those cases in which material justice would not correspond to legal justice, at the time it was applied by the sentencing court:

(**a**) Due to a temporary lack of adaptation: Cases where society has evolved in some way that legal texts have not been capable of keeping up with.[54] For example, those cases in which a certain conduct should no longer be considered as criminal (or should not be so severely punished[55]), but the legal text has not yet been repealed or modified.[56]

(**b**) To cover an area that neither the judicial power, given its constrictions,[57] nor the legislative power reach.[58] There are the scenarios in which, considering the special circumstances of the case and given the express wording of the law, the adjudicating body must be subjected to an asymmetry between formal justice and material justice occurs again. This time not because the legal text is disproportionate in the abstract, but because of the idiosyncrasy of the case that is pending before the Court, which is limited by its duty to apply the law.[59] A pardon would serve to correct the severity of the law that has become cruel, allowing it to maintain the dissuasive authority of the law when faced with the risk of provoking moral repugnance or indifference.[60]

(**c**) Because the delivery of a judgement goes against the principle of equality, by breaking away from the normal repressive practice.[61]

[**2**] Cases in which the sentencing judgment does not cause an outcry, its enforcement can be disapproved of, and a pardon would be innocuous to the punishment's deterrence effect. Its granting is recognized as a reward for the offender's good behavior from perspectives similar to those of special prevention.[62]

[**3**] As a reward mechanism that encourages collaboration with justice, promising impunity to gang members or participants in collective actions who inform on fellow members.[63]

Once those cases are identified where resorting to pardon is justified, based on the negative general deterrence theory, the following is observed:

(**i**) In exceptional scenarios, the negative general prevention theories expressly allow for the use of a pardon, when, ordinary means for overcoming these exceptional circumstances are expected to fail.

[54] Antonio Beristain Ipiña, Un Derecho Fundamental de la Persona Todavia no Suficientemente Reconocido: El Derecho al Perdon [A Fundamental Right of the Person Still not Sufficiently Recognized: The Right to Pardon] 22 (1985-1986).

[55] Vittorio Emanuele Orlando, Principii di Diritto Costituzionale [Principles of Constituional Law] 220 § 287 (5th ed. 1920).

[56] Feuerbach, Revision, *supra* note 49, at xxviii.

[57] *Id.* at xxvii–xxix.

[58] Feuerbach, Lehrbuch, *supra* note 49, at 121.

[59] Feuerbach, Revision, *supra* note 49, at xxvii–xxix.

[60] Feuerbach, Lehrbuch, *supra* note 49, at 121 § 63.

[61] Dimoulis, Die Begnadigung, *supra* note 17, at 455–59.

[62] Feuerbach, Lehrbuch, *supra* note 49, at 122, note IV.

[63] *Id.* at 121 § 63.

(ii) However, as Feuerbach himself anticipated[64], the solutions regarding normal scenarios can be found in other ordinary mechanisms of the criminal system.

If the text of the law has become obsolete, nothing prevents its reform; both in terms of adapting social consideration with respect to the rule of behavior, and adjusting the *quantum* of the penalty that would be imposed on a specific crime by minimizing it.[65] This would allow judgements delivered under the previous and more burdensome regime to be reviewed.

If the point is to adjust the ideal of *material justice* to a specific case that presents particular circumstances, to solve a deficiency in terms of individualization when applying the rule, Feuerbach himself admits the possibility of defending an alternative in which it is accepted that the adjudicating body is able to resolve said mismatch through the interpretation and application of the rule.[66]

Although Mittermaier himself had already announced the controversy and difficulties of resorting to pardon regarding this specific justification,[67] if the intention was to acknowledge a reward for the convicts, as an incentive to leave prison early, other institutions have far exceeded its use. Mittermaier himself did not discard the possibility of making use of the institution of the indeterminate judgement as a mechanism to value not only the necessary reparations of the harm caused by the crime and the protection of society, but also reform of the offender.[68] Consequently, the use of pardons would be relieved by a gradual prison regime (including parole) and the prison benefit of granting parole in advance.

Finally, as Bacigalupo Zapater pointed out, resorting to pardons to incentivize the collaboration with justice would have been replaced by an express regulation to that effect, so that the institution of the pardon would have become, from this perspective as well, superfluous.[69]

C.2.2. Pardon and positive general prevention theory

Prima facie, it seems again that there is no room for pardon within the positive general prevention theories. However, Jakobs himself (who, let's recall, demands the affliction of criminal pain) or authors who advocate for idealistic foundations of punishment within those constructions, recognize the possibility of resorting to the said institution.[70] In this regard, it is noteworthy that Silva Sánchez has already pointed out that "*positive general prevention is surely the foundation of forgiveness in criminal law.*"[71] So, the questions that arise are, in which cases and under what conditions?

Within the positive general prevention theory, I will highlight the constructions elaborated by Jakobs himself and by Dimoulis.

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[64] Feuerbach, Revision, *supra* note 49, at xxvii–xxix.

[65] Enrique Bacigalupo Zapater, Justicia Penal y Derechos Fundamentales [Criminal Justice and Fundamental Rights] 20–22 (2002); Enrique Linde Paniagua, Amnistía e indulto en España [Amnesty and Pardon in Spain] 43 (1976).

[66] Feuerbach, Revision, *supra* note 49, at xxvii–xxix.

[67] Feuerbach, *Lehrbuch*, *supra* note 49, at 122, note IV.

[68] *Notes on Current and Recent Events.*, 3 J. Am. Inst. Crim. L. & Criminology 266, 303–05 (1912).

[69] Enrique Bacigalupo Zapater, Derecho Penal y el Estado de Derecho [Criminal Law and the Rule of Law] 23 (2005).

[70] For the purpose of this study, theories considering forgiveness as a functional equivalent of punishment are excluded because, despite their suggestion, they do not determine in what specific assumptions that interchangeability would be acceptable, arguing for the unpredictability of the granting as a requirement for subrogation.

[71] Jesús-María Silva Sánchez, *De nuevo, el perdón [Again, a pardon]*, 4 InDret Penal 1, 1–2 (2011), www.indret.com/pdf/editorial.2_4.pdf.

In exceptional scenarios, Jakobs establishes the possibility of using the pardon as a practical remedy to such situations,[72] expressly following Köhler›s thesis.[73] Pardons could be used as a mechanism whereby the implementation of strict enforcement of the sentence is more flexible for state reconstruction, within the framework of achieving internal peace in critical environments.[74]

In normal scenarios, Jakobs himself also positively considers the possibility of using the pardon mechanism, assuming it as an obstacle to material punishment or as a complex mechanism.[75] Pardons could serve not only (procedurally) to avoid an inopportune process, but also (legally-materially) to correct an erroneous judicial decision – modifying the evidenced fact or object examined in the proceedings – or to make an adjustment to a legal assessment of the fact, which has been modified but not yet been reflected in the appropriate retroactive legislative change – the fact or object was correctly evidenced and remains intact, but a change in the assessment of that fact has occurred.[76]

Setting aside the first assumption related to the avoidance of an inopportune process, an objective that would not be possible within most legal systems,[77] the two possible uses that Jakobs points out would be reduced to these purposes: the correction of errors made by the judicial body and the adjustment to the new legal assessment that corresponds to the fact—which will remain unchanged—(the solution to the temporary lack of adaptation that was pointed out earlier and indicated by Feuerbach).

In turn, Dimoulis divides the potential use of pardons into two scenarios: the normal scenario and a scenario that he characterizes as exceptional, or as a state or situation of emergency linked to political changes that have occurred in a society.[78]

When analyzing the normal scenarios, Dimoulis observes that pardons can serve as a mechanism to achieve the aims of positive general prevention[79], although he announces, from the start of his theoretical constructions, that other resources or alternatives to replace it in terms of the said purpose can be found without any problems.[80]

These are cases in which pardon is recognized and used as a means to repair the errors of justice (which are still human, *ergo* fallible) in order to achieve *material justice*.[81] This mechanism, as an "safety valve", would be aimed at

[72] *See* Günther Jakobs, Strafrecht Allgemeiner Teil: Die Grundlagen und die Zurechnungslehre [Criminal Law General Part: The Foundations and the Court] 5 (2nd ed. 1991).

[73] Michael Köhler, *Strafgesetz, Gnade und Politik nach Rechtsbegriffen [Penal law, Grace and Politics according to legal concepts]*, *in* Rechtsdogmatik und Rechtspolitik [Legal Dogmatics and Legal Policy] 68–74 (Karsten Schmidt ed., 1990).

[74] *See* Jakobs, *supra* note 72, at 345 n.41.

[75] *Id.* at 344.

[76] *Id.* at 345.

[77] Given that, within them, to grant an individual pardon, a final guilty judgement is demanded.

[78] *See* Dimoulis, Die Begnadigung, *supra* note 17, at 465–72.

[79] The said author, starts from the idea pointed out by Bernardo José Feijoo Sánchez, La pena como institución jurídica: retribución y prevención general [Penalty as a Legal Institution: General Compensation and Prevention] 311 (2014), that in certain cases in which pardon is granted, for example, because the penalty imposed is unjust, if instead of granting pardon the sentence was served, that unjust exigence of the punishment weakens the purpose of positive general prevention. It reduces it to the extent that it would contradict the commitment to present criminal proceedings as necessary and just and, at the same time, damages trust in institutions, denying the legitimacy of the criminal law system by demonstrating both its rigidity and its dysfunctionality.

[80] *See* Dimoulis, Die Begnadigung, *supra* note 17, at 450–51, 602–04.

[81] Dimitri Dimoulis, *Die Gnade als Symbol* [*Grace as a Symbol*], 81 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft [Critical Q. Letter for Legis. & Legal Sci.] 357, 357–59 (1998).

providing a quick and effective response to the criminal system's legitimacy crisis within the framework of sentencing, without it being necessary to resort to reforming the system.[82]

In these scenarios, pardons would not only have a direct function but a symbolic-liberating effect in which it publicly demonstrates that the criminal law system corrects its own deficiencies and has the necessary capacity to adapt in situations of crisis.[83] The key to granting pardons would not, therefore, be rooted in the error contained in a specific judgement, but on the lack of necessity in terms of positive general prevention.[84] Thus, pardons would become a positive instrument to legitimize the criminal system.[85]

However, once these conclusions are reached, Dimoulis himself recognizes that, if the institution were to be conceptually abolished by a rationalization of the criminal system, structural deficiencies would not appear.[86] There would be no insurmountable obstacles to its elimination. However, and despite reiterating that its abolition would not find insuperable impediments[87], he states that pardons will not disappear for three reasons: (**a**) because the executive branch would never want to lose its traditional power[88] – an irrelevant argument for our analysis; (**b**) for the symbolic function assigned to the institution; and (**c**) because, in crisis situations, exceptional scenarios, it is a unique mechanism.[89]

In relation to the symbolic function (b), the said author concludes that the fact that this task can be assigned to the institution of pardon, related to the guarantee of satisfying material justice which allows people to trust the system, does not imply that this institution has to be simply accepted and that it has to be acknowledged as eternal.[90] Insofar as it is represented as a last illusion (*letzte Täuschung*) of an imaginary guarantee of the justice of punishment (which materializes in a few cases), resorting to pardon can be overcome by creating other forms of conflict resolution in the system.[91] Pardons are surpassed once again; this time, from the perspective of positive general prevention.

C.2.3. Pardons and special prevention theories

Within the special prevention theories, pardons would have been accepted naturally,[92] between all of the institutions which made enforcing the punishment more flexible (suspending the sentence, replacing punishments,

[82] *Id.* at 368.

[83] *See* Dimoulis, Die Begnadigung, *supra* note 17, at 450–52.

[84] *Id.* at 451.

[85] Dimoulis, *Die Gnade*, *supra* note 81, 363–68 (1998).

[86] *See* Dimoulis, Die Begnadigung, *supra* note 17, at 602. *But see*, Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. Rev. 802, 802, 807–808, 832–861, 869 (2015); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1, 2, 5, 17, 18, 26 (2015).

[87] *See* Dimoulis, Die Begnadigung, *supra* note 17, at 603.

[88] Manuel Fanega, *El Indulto: Análisis y Alternativas Bajo el Prisma Criminológico [The Pardon: Analysis and Alternatives Under the Criminological Prism]*, *in* Criminología y Justicia [Criminology & Justice] 114 (Guillermo González et al. eds., 3d ed. 2016); Linde Paniagua, Amnistía, *supra* note 65, at 70–71.

[89] Dimoulis, Die Begnadigung, *supra* note 17, at 603.

[90] Dimoulis, *Die Gnade*, *supra* note 81, at 365–366; Dimoulis, Die Begnadigung, *supra* note 17, at 604.

[91] Dimoulis, Die Begnadigung, *supra* note 17, at 604.

[92] The reasons why pardons would have fit so naturally are based on the centrality of the offender's personal circumstances in the construction of the special prevention theories; and in the fact that precisely in the phase of enforcement of the sentence, the only phase in which the *post-sententiam* pardon can appear is in that which the reasons of special prevention are projected or have to be taken into consideration, even if a monist theory on special prevention is not defended. Claus Roxin, *Sentido y límites de la pena estatal [Meaning and Limits of State Punishment]*, *in* Problemas básicos del Derecho penal [Basic Problems of Criminal Law] 31–32 (Diego-Manuel Luzón Peña trans., 1976).

the conditional sentence, parole, or the reduction or remission of the sentence).

In view of the above, it is not at all surprising that Von Liszt, who was considered the founder of these theories, came to defend the use of the pardon.[93] However, and this point is fundamental, among the functions that he assigns to pardons, no special prevention objectives are mentioned.[94] The said author states that a decision that does not give the convict any control in terms of obtaining his anticipated release, a measure over which he has no influence on and does not provide him with any certainties, is of no use for his resocialization. For this reason, he would defend, instead of pardon, an indeterminate sentence or, as he preferred to call it, a suspended sentence.[95]

a) Negative special prevention theories

From a negative perspective, focused on the protection of society against the offender, it would seem *a priori* that a pardon would not fit, as it entails releasing from prison those who still have to be neutralized and kept away from the community. However, as Freeman[96] states with regard to amnesty, the other form of state pardon, a pardon may be conditioned. Therefore, measures may be established that aim to achieve this incapacitation of the offender in the first place, to achieve the protection of society on a secondary level.

Although these constructions do not determine which criteria positively guide the granting of a pardon or its grounds, instead they are centered on protecting the innocuous purpose related to granting pardons, they cannot be marginalized, insofar as they suggest considering the conditioning of the pardon as a functional equivalent to applying the punishment. Note that this conditioning is an essential element of parole and therefore, the practical likeness of this institution for that purpose could be stated.[97]

b) Positive special prevention theories

From the perspective of positive special prevention constructions, however, there would be reasons to justify resorting to pardons to achieve the convict's reinsertion into society. These are based on two types of arguments.

[93] Von Liszt identifies three justifications for pardons: **(i)** as a self-correction of justice, as a safety valve, with which it is possible to reconcile the rigid generalization of the law with the demands of material justice; **(ii)** to improve judicial errors, whether true-confirmed or presumptive; and **(iii)** to help the triumph of state intelligence or politics, at the expense of the Law. Franz von Liszt, Lehrbuch des Deutschen Strafrechts [Textbook of German Criminal Law] 268–69 (10th ed. 1900); Franz von Liszt & Eberhard Schmidt, Lehrbuch des Deutschen Strafrechts [Textbook of German Criminal Law] 440 (26th ed. 1932).

[94] Franz von Liszt, *Bedingte Verurteilung und bedingte Begnadigung [Conditional Condemnation and Conditional Pardon]*, *in* 3 Vergleichende Darstellung des deutschen und ausländischen Strafrechts: Vorarbeiten zur deutschen Strafrechsreform, Allgemeiner Teil [Comparative Presentation of German and Foreign Criminal Law: Preparations for the German Criminal Renewal, General Part] 58–59 (Karl Birkmeyer et al. eds., 1908); Franz von Liszt, *Welche Maßregeln können dem Gesetzgeber zur Einschränkung der kurzzeitigen Freiheitsstrafe empfohlen werden? [What measures can be recommended to the legislature to limit short-term imprisonment?]*, 1 Mitteilungen der Internationalen Kriminalistischen Vereinigung [Comm. of the Int'l Crim. Ass'n] 51 (1889); Franz von Liszt, *Kriminalpolitische Aufgaben [I] [Criminal Policy Tasks [I]]*, 9 Zeitschrift für die gesamte Strafrechtswissenschaft [J. of All Crim. Sci.] 452, 495 (1889); Franz von Liszt, *Kriminalpolitische Aufgaben [II] [Criminal Policy Tasks [II]]*, 9 Zeitschrift für die gesamte Strafrechtswissenschaft [J. of All Crim. Sci.] 737, 781–82 (1889).

[95] von Liszt, *Welche Maßsregeln*, *supra* note 94, at 44; von Liszt, *Kriminalpolitische Aufgaben II, supra* note 94, at 755–76.

[96] Freeman, *supra* note 50, at 22.

[97] Gimeno Gómez, *La gracia de indulto [The grace of pardon]*, 4 Revista de Derecho procesal iberoamericana [Mag. Procedural L. Iberoamericana] 899, 925 (1972); Amadeo Pineda, *Derecho de gracia o indulto [Right of Grace or Pardon]*, *in* 11 Iuris: actualidad y práctica del Derecho [IuriS: Actuality & Practice of Law] 34, 36–38 (1997).

(**A**) The first subgroup includes those grounds that defend the use of the institution of pardon when the resocialization that the penalty intended to achieve has already been realized and the remaining sentence to be served becomes superfluous and even harmful[98]; or when the re-education of the offender no longer needs to be verified in prison.[99]

(**B**) Additionally, a second positive use for pardons can be found, as an autonomous mechanism incentivizing the convicted person and giving him hope, by rewarding him if he succeeds in achieving the penalty's objective: his resocialization.[100] Pardons are configured as a supreme reward in response to the offender's excellent behavior, which signifies that the purpose has been achieved.[101]

An analysis of the arguments used by the defenders of positive special prevention theories in relation to the limits of the pardon's use, shows the following:

(**i**) In exceptional cases, those identified as transitional contexts, the defenders of these theories expressly and unanimously accept resorting to pardons (either by using the *state intelligence* idea employed by Von Liszt[102] or by using Merkel[103] or Bacigalupo Zapater's[104] idea on the *predominant general political interests* or limiting their use to certain crimes –political– as suggested by Ferri[105]).

(**ii**) Regarding normal scenarios, functions assigned to the pardon that have been assumed or could be assumed by other ordinary mechanisms of the criminal system have been identified. The transfer of functions to other institutions and the overcoming of pardons are both recognized and assumed by the defenders of preventive-special postulates.

In normal scenarios, the justifications given to pardons can be divided into two subgroups: those related to the accomplishment of the punishment's purpose – the resocialization of the convicted person – and those not specifically related to the achievement of that purpose (such as serving as a correction mechanism when faced with a dysfunctional application of a general law to a particular case, as a temporary adjustment mechanism between social reality and a new legislation, and as a mechanism to amend judicial errors).

[98] Dimoulis, Die Begnadigung, *supra* note 17, at 343 45; Linde Paniagua, Amnistía, *supra* note 65, at 73.

[99] Enrico Ferri, Principii di Diritto Criminale [Principles of Criminal Law] 179–80 (1928) (basing argument on positivist ideas). However, Ferri himself, who showed his reluctance regarding the employment of the institution, admitted that pardons would have been surpassed by the conditional sentence and parole (which would serve to undertake a periodic review of judgements and take into account the convicted person's meritorious behavior, having a jurisdictional guarantee that the pardon didn't have).

[100] Miguel Ruiz Muñoz, *A propósito de la política de clemencia en Derecho de la Competencia [About the clemency policy in Competition Law]*, Almacén de Derecho [Law Mag.], Sept. 6, 2016, https://almacendederecho.org/perdon-unos-panales/ (basing this analysis on competitive law).

[101] Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 Fed. Sent'g Rep., 125 (2000-2001); David A. Shaw, *Clemency: A Useful Rehabilitation Tool*, Army Law., Aug. 1975, at 32.

[102] von Liszt, Lehrbuch des Deutschen Strafrechts, *supra* note 93, at 268.

[103] Adolf Merkel, Lehrbuch des Deutschen Strafrechts [Textbook of German Criminal Law] 251 53 (Stuttgart, 1889).

[104] Bacigalupo Zapater, Justicia Penal *supra* note 65, at 25.

[105] Ferri, *supra* note 99, at 178–79 (following François Guizot, *De la peine de mort en matière politique [Death penalty in political matters]* 172–73, 177 (Paris, 2d ed. 1822)).

If the aim of the pardon is to adjust the application of the general rule to the particularities of a specific case, it has already been pointed out when dealing with absolute theories, that there are sufficient mechanisms to achieve the necessary individualization without the need to use the pardon.

If, as Ferri observed,[106] the criminal punishment provokes a public outcry as a result of a temporary imbalance (insofar as the current legislation is more beneficial for the convicted person, having been adopted after the judgement was delivered and which the convict is now serving), nothing prevents, in accordance with the current regulation, the review of the judgements delivered under the previous and more burdensome regime.

If the aim is to defend the pardon as a mechanism for repairing judicial errors, as Von Liszt[107] defended, in relation to the fundamental rights and freedoms involved, this mistake must be corrected through the appeals system set up for that purpose and, as a last procedural remedy, resort to judicial review (*recurso de revisión*). If the established system is thought to be insufficient, the solution will consist in the reform of the existing review mechanisms.[108]

In relation to the reasoning in support of pardons based on arguments aimed at the reinsertion of the individual, I anticipated its division to distinguish between: those reasons that are based on the early achievement of resocialization, before the end (temporal) of the punishment was reached; and those that focus on the pardon as a reward or incentive for the convict.

In the first subgroup, the constructions have to be distinguished according to the temporal stage in which the offender's resocialization was achieved in relation to the enforcement of the sentence. In a scenario where resocialization has been completed before the sentence has been enforced, due to the excessive lapse of time between the acts (not prescribed) and the sentence, there would no longer be a need for the subject to verify his re-education in prison. In these cases, the judgement may or may not have been delivered. When delivering the judgement, the sentencing court has: (**i**) the mitigating circumstance of undue delay at his disposal (CP Article 21.6); (**ii**) the closing clause set forth in CP Article 21.7; (**iii**) the general rules that allow for its adjustment depending on the offender's personal circumstances (CP Article 66); or (**iv**), if the requirements are met, the suspended sentence (CP Articles 80 *et seq.*).

If social reinsertion had been achieved after the judgement declaring an imprisonment sentence was delivered, two scenarios should be distinguished: one in which the enforcement of the sentence has not yet begun and the one in which said reintegration materializes during the sentence.

In the first of the scenarios described, Bacigalupo Zapater advocates for the use of pardons in cases where the convicted person has completed his or her social reintegration in the time between the commission of the criminal act and the enforcement of the sentence imposed.[109] However, I believe that nothing would prevent the reform of Article 80 CP in this sense, if it can be deemed necessary to ex-

[106] Ferri, *supra* note 99, at 178–79.

[107] von Liszt, Lehrbuch des Deutschen Strafrechts, *supra* note 93, at 268.

[108] *See, e.g.*, L.E. Crim. (B.O.E. 1882, 260) (Spain). This was also the case with Royal Decree 41/2015, of October 6, on the modification of the Procedure Criminal Law for the acceleration of criminal justice and the strengthening of procedural guarantees. (B.O.E. 2015, 239).

[109] Bacigalupo Zapater, Derecho Penal, *supra* note 69, at 25.

tend and expand those cases where imprisonment may be suspended.

On the other hand, if the offender's resocialization takes place during his imprisonment, once the offender is inside the penal institution and before the end of the sentence being served, it is not necessary to resort to pardons. Merkel[110], a defender of this particular argument, pointed out that institutions such as parole would have displaced it. Additionally, the Spanish prison system, based on the individualization of treatment and the various security categories that allow the regime to be adjusted to the preventive-special needs of the subject (including the advancement of parole as a prison benefit), would perfectly satisfy the function assigned to pardons.

Finally, if the purpose is to use pardons as an incentive or reward to achieve the offender's resocialization with the aim of establishing it as a maximum prison benefit, it should be specified that according to Article 25 of the Spanish Constitution, the said purpose should not be understood as an exception but should be applied to all the punishments to be served.

In the second of the scenarios described, the existing prison regulation positively values the offender's good behavior, allowing for the individualized enforcement of punishments in which the possibility of advancing parole is provided as a prison benefit, whose regime could be legally extended, if deemed necessary. Therefore, also in this area, pardons have been surpassed by institutions subject to predetermined requirements, endowed with greater guarantees and which are, in practice, less disturbing for the convicted subject[111] and society itself.

In short, those who have approached the study of the pardon assuming the starting hypotheses of special prevention have realized that, actually, this institution has lost its importance in favor of other mechanisms.[112] These instruments would impact not only at the time of determining the penalty to be applied to the subject but, also the terms in which the punishment that is finally imposed must be achieved. I refer to the introduction of mitigating circumstances *ex lege*, to the incorporation of ranges in relation to the penological limits associated with the definition of crimes,[113] to the suspended sentence,[114] its replacement by alternative penalties, conditional reduction, parole,[115] or the system of individualization of the enforcement of the punishment.[116]

[110] Merkel, *supra* note 103, at 251.

[111] Concepción Arenal de García Carrasco, El derecho de gracia: ante la justicia; y el reo, el pueblo y el verdugo [The Right of Grace: Before Justice: The Inmate, the People and the Executioner] 55–56, 117–118 (Madrid, 1893); Carmen Navarro Villanueva, *Notas acerca del indulto [Notes on pardon]*, *in* 30 Años de la Ley de Amnistia (1977-2007) [30 Years of Amnesty Law (1977-2007)] 235–36 (Maria Jesus Espuny I Tomas et al. eds., 2009).

[112] Jerónimo García San Martín, La suspensión de la ejecución y sustitución de las penas [The suspension of the execution and substitution of penalties] 66–67 (2012).

[113] von Liszt, *Kriminalpolitische Aufgaben [I]*, *supra* note 94, at 497; Franz von Liszt, *Kriminalpolitische Aufgaben [III] [Criminal Policy Tasks [III]]*, 10 Zeitschrift für die gesamte Strafrechtswissenschaft [J. of All Crim. Sci.] 51, 53 (1890).

[114] Diego-Manuel Luzón Peña, Medición de la pena y sustitutivos penales (Colección de criminología y derecho penal) [Measurement of Penalty and Criminal Substitutions (Collection of Criminology and Criminal Law)] 93–95 (1979).

[115] Bacigalupo Zapater, Derecho Penal *supra* note 69, at 25; Dimoulis, Die Begnadigung, *supra* note 17, at 421 26, 600; Linde Paniagua, Amnistía, *supra* note 65, at 45; Luzón Peña, *supra* note 114, at 95–97; Santiago Mir Puig & Francisco Muñoz Conde, *Propuesta alternativa de la parte general del código penal del grupo parlamentario comunista [Alternative proposal of the general part of the penal code of the communist parliamentary group]*, *in* 18 Cuadernos de política criminal [Crim. Pol'y Books] 609, 614 (1982); S.T.C., Nov. 2, 2015 (B.O.E., No. 296) (Spain).

[116] Ley Orgánica General Penitenciaria art. 72 (B.O.E. 1979, 239); Reglamento Penitenciario arts. 100–109 (B.O.E. 1996, 40); Maria del Puerto Solar Calvo, *El principio de flexibilidad en el medio penitenciario [The principle of flexibility in the penitentiary environment]*, 8912 Diario La Ley [Law Newspaper] 1, 1–4 (2017).

In this regard, in relation to parole (similar, in its nature, to a prisoners subjective right),[117] its indissolubility regarding the enforcement of the sentence has been pointed out, given that it would soften the potentially inflexible rigidity, improving legal guidelines and allowing "to put an end to suffering, which when it is not necessary, is unjust."[118] This also makes the pardon obsolete and outdated from this perspective.[119]

D. Conclusions

According to the distinction assumed at the beginning of this article between the normal scenarios and transitional contexts, the study of the arguments aiming to support the use of pardon by the diverse theories of justification of punishment reveals a dichotomous solution.

In the transitional contexts, there is consensus among academic opinion that pardons can be seen as an irreplaceable tool to make the enforcement of punishment flexible in order to achieve social peace and harmony within the so-called toolbox of transitional justice.[120]

However, in normal scenarios, pardons have been surpassed by other institutions that have absorbed the functions that were historically assigned to it. That means that the uses that in practice had been granted to pardons are met through the opportune corrections and reforms of the system whose deficiencies were intended to be corrected through that institution: a more correct statutory definition of punishable acts and their legal consequences; an adequate application of the law by the judges and the provision of a more complete appeals system (including a potential improvement of the judicial review regime –*recurso de revisión*–); or specific institutions provided for in the law (parole). Perhaps this effect on the inexorable overcoming of pardons would precisely explain the sharp decrease in the number of pardons granted in Spain in the last ten years.[121]

[117] Maria del Puerto Solar Calvo, *La libertad condicional antipenitenciaria [The anti-prison probation]*, 8873 Diario La Ley [Law Newspaper] 1, 1–2 (2016).

[118] Cadalso, *supra* note 17, at 42.

[119] Dimoulis, *Die Gnade*, *supra* note 81, at 354.

[120] Javier Chinchón Álvarez, Derecho internacional y transiciones a la democracia y la paz [International Law and Transitions to Democracy and Peace] 458–65, 522 (2007). A different question, which goes beyond the limits of this analysis, is the material scope that such a pardon must have and the body that must grant it.

[121] In 2017, 26 pardons were granted; in 2018 (until April 8) that figure dropped to 9, which contrasts with the average of 311 that Spain granted over the previous 10 years. Eva Belmonte & David Cabo, *Casi uno de cada cuatro indultos concedidos en 2017 fue para condenados por corrupción* [*Nearly one in every four pardons granted in 2017 were for those convicted of corruption*], Publico, Apr. 9, 2018, https://www.publico.es/espana/cuatro-indultos-concedidos-2017-condenados-corrupcion.html.

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