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EPITAPH FOR PARDON BASED ON THE PURPOSE OF PUNISHMENT

Eva Carracedo Carrasco

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.

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. 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. 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.

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.

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.

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1 Postdoctoral researcher in Criminal Law and PhD in Law and Political Science, Universidad Autónoma de Madrid (Spain).
2 U.S. Const. art. II, § 2; C.E., B.O.E. n. 62(i), Dec. 29, 1978 (Spain).
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 autonómias y justicia constitucional [Constitution, State of Autonomies and constitutional justice] 612–13 (Luis Aguado de Luján, 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).
The Law of June 18, 1870 (hereinafter “LI”), 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.

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.

Additionally, Article 206 the Prison Regulation Royal Decree (“RP”) 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. Given its specific configuration as a prison benefit, its motives cannot be based on the totality of pardons granted in practice. The guidelines referred to are exclusively focused on the post-conviction behavior of the offender, with respect to serving his sentence.

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. They do not explain why a decision has been made, whether positive or a denial, because they are used for the most heterogeneous purposes.

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

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8 Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto (B.O.E. 1870, 175) (Spain).
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).
13 Puerto Solar Calvo, supra note 12; Jesús Espuny, supra note 12, at 238, 243.
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 Vizcaino Peralbo (B.O.E. 2019, 24) (Spain).
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 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 states of necessity — installed in the processes of transitional justice.

Once such distinction is 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 a pardon ends up being separated from the purposes assigned to the penalty and their fulfilment; it responds to


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. For example, the pardon granted to solve a situation of economically unsustainable prison overcrowding or to celebrate commemorative events. 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. 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. If society does not demand the punishment, then society is responsible for the public violation of justice.

However, Kant also contemplated an exception, structured as a state of necessity. 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.

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.

(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-

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21 *Id.* at 242–48, 280–89.
22 KANT, *Id.* note 18, at 231 32.
23 *Id.*
24 *Id.;* NORBERT CAMPAGNA, *Strafrecht und unbestraft* 
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Gerechtigkeit und ihren Grenzen* [Criminal Law and Unstated Disputes: Philosophical Considerations on Criminal

26 See KANT, *Id.* 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, *Id.* note 17, at 194.
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 desserts, 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.\(^ {39}\)


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


\(^{31}\) See Kunt, supra note 18, at 236 (explaining his theory in relation to crimes of lesse majesty).


\(^{34}\) 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); Dome, 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); Tam 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.


\(^{38}\) 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.

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.

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 could be raised and, additionally, a request for the repeal or modification of criminal legal provisions.

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. 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).

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


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 lead 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


\(^{47}\) 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).


\(^{50}\) Doulmus, *Die Begnadigung*, supra note 17, at 596; Mark Freeman, *Necessary Evils* 21 (2009).


\(^{52}\) 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. For example, those cases in which a certain conduct should no longer be considered as criminal (or should not be so severely punished), but the legal text has not yet been repealed or modified.

(b) To cover an area that neither the judicial power, given its constrictions, nor the legislative power reach. 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. 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.

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

[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.

[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.

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.

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56 Feuerbach, Revision, supra note 49, at xxvii–xxix.
57 Id. at xxvii–xxix.
58 Feuerbach, Lehrbuch, supra note 49, at 121.
(ii) However, as Feuerbach himself anticipated, the solutions regarding normal scenarios can be found in other ordinary mechanisms of the criminal system.

If the text of the law has become obso- lete, 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. 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.

Although Mittermaier himself had already announced the controversy and difficulties of resorting to pardon regarding this specific justification, 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. 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.

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. 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.” 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.
66 FEUERBACH, LEHRBUCH, supra note 49, at 122, note IV.
In exceptional scenarios, Jakobs establishes the possibility of using the pardon as a practical remedy to such situations, expressly following Köhler's thesis. 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.

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. Pardons could serve not only procedurally to avoid an inopportune process, but also legally-materi ally 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.

Setting aside the first assumption related to the avoidance of an inopportune process, an objective that would not be possible within most legal systems, 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.

When analyzing the normal scenarios, Dimoulis observes that pardons can serve as a mechanism to achieve the aims of positive general prevention, 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.

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. This mechanism, as an “safety valve”, would be aimed at

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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 Felio 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{84} Thus, pardons would become a positive instrument to legitimize the criminal system.\textsuperscript{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.\textsuperscript{86} There would be no insurmountable obstacles to its elimination. However, and despite reiterating that its abolition would not find insuperable impediments\textsuperscript{87}, he states that pardons will not disappear for three reasons: (a) because the executive branch would never want to lose its traditional power\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{91} Pardons are surpassed once again; this time, from the perspective of positive general prevention.

\subsection*{C.2.3. Pardons and special prevention theories}

Within the special prevention theories, pardons would have been accepted naturally,\textsuperscript{92} between all of the institutions which made enforcing the punishment more flexible (suspending the sentence, replacing punishments,
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.\(^95\)

\(^93\) 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, Leihbuch des Deutschen Strafrechts [Textbook of German Criminal Law] 268–69 (10th ed. 1900); Franz von Liszt & Eberhard Schmidt, Leihbuch 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 Strafrechtsreform, 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).


a) Negative special prevention theories

From a negative perspective, focused on the protection of society against the offender, it would seem \textit{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.

\(^96\) Freeman, supra note 50, at 22.

(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; or when the re-education of the offender no longer needs to be verified in prison.

(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. Pardons are configured as a supreme reward in response to the offender’s excellent behavior, which signifies that the purpose has been achieved.

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:

98 Dimoulis, Die Begnadigung, supra note 17, at 343–45; Linde Panaguia, Amnistia, 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).

(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 or by using Merkel’s or Bacigalupo Zapater’s idea on the predominant general political interests or limiting their use to certain crimes –political– as suggested by Ferri).

(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).

102 Von Liszt, Lehrbuch des Deutschen Strafrechts, supra note 93, at 268.
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, 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 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.

In relation to the reasoning in support of pardons based on arguments aimed at the reinsetion 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. However, I believe that nothing would prevent the reform of Article 80 CP in this sense, if it can be deemed necessary to ex-
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. 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]

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[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


In this regard, in relation to parole (similar, in its nature, to a prisoners subjective right),\textsuperscript{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."\textsuperscript{118} This also makes the pardon obsolete and outdated from this perspective.\textsuperscript{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.\textsuperscript{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.\textsuperscript{121}

\textsuperscript{117} Maria del Puerto Solar Calvo, \textit{La libertad condicional antisenitenciaria [The anti-prison probation]}, 8873 DIARIO LA LEY [Law Newspaper] 1, 1–2 (2016).

\textsuperscript{118} CADALSO, supra note 17, at 42.

\textsuperscript{119} DIMOULIS, \textit{Die Gnade}, supra note 81, at 354.

\textsuperscript{120} JAVIER CHINCION ALVAREZ, \textit{Derecho internacional y transitions 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.

\textsuperscript{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, \textit{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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