MERCY IN GERMAN LAW

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A kegyelem a német jogban. Kizárólag az isteni kegyelem emelkedik felül a jogon. Felülmúlja a világi normákat és ennélfogva a jogot is. Emlékezzünk a tékozló fiú példabeszédére, aki feltételezhetően „nem megérdemelten" kapta meg az áldást az apján keresztül. A világi kegyelmet viszont esendő emberek osztják. Emlékezzünk Pilátusra, aki az ügytől teljesen független okokból kifolyólag, ugyanakkor a saját érdekében tagadta meg a kegyelmet Jézus Krisztustól. A világi kegyelemnek tehát a jogon belül kell megvalósulnia. Ehhez viszont jogi felülvizsgálat kell, másképp nem létezhet megfelelő védelem az emberi esendőséggel szemben. A kegyelem hatalmának gyakorlására kinevezett köztisztviselők általában saját belátásuk szerint döntenek. Ugyanakkor a kérvényező jogai sérülnek, ha a kegyelem jogával önkényesen visszaélnek. Ebben az esetben a jogállamiság, az emberi méltóság és egyenlőség alapelvei (a német alkotmány 1. és 3. cikke) szerinti kegyelemről való döntés joga sérül. Ez magában foglalja a kegyelemről hozott hátrányos megkülönböztetésektől mentes, igazságos és érdemi döntéshez való jogot. Az állami hatóságokat alapvető alapjogok korlátozzák; a döntésért felelős testületet ugyanezek a jogok kötik. Ezért az elutasított kegyelem jogi felülvizsgálat tárgyát képezi. A bíróságnak meg kell vizsgálnia, hogy a jogállamiság alábbi általános alapelveit, melyek a kegyelemről szóló eljárás során is érvényesek, tiszteletben tartották-e. Ez magában foglalja a meghallgatáshoz való jog alapelvét. A kérvényezőnek joga van ahhoz, hogy a kegyelmek megadására jogosult hatóság befogadja, és tartalmi szempontból értékelje, majd feldolgozza a kérvényét, és helyt adjon annak a kegyelemről szóló törvény alapján. Ha a kérvényező alapvető jogait sérti a kegyelemről hozott elutasító döntés, akkor lefolytatható a rendes jogi eljárás. A regionális fellebbviteli bíróság büntetőügyi részlegét nevezik ki arra, hogy objektív módon döntést hozzon.

Kulcsszavak: kegyelem a német jogban, amnesztia, jogi felülvizsgálat, a kérvényező jogai

1. The Introduction

Mercy was already practiced in pre-Christian times: among the Teutons, in the Roman Empire, in ancient Greek culture, in the Egyptian Ptolemaic Kingdom. The doctrine of

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mercy plays a key role in the New Testament. As the evangelist *John* says: The law was given through *Moses;* mercy and truth came through *Jesus Christ.* Perhaps the most prominent example can be found in the biblical parable of the prodigal son. The father – who represents the Lord – was merciful towards his remorseful younger son, who returned home ragged and unsuccessful, after wasting his fortune. The father, however, invited him to the feast – despite the objections of his older, diligent, but morose and envious son. He did not believe in the mercy of his father but wanted to gain recognition through his work. Yet, divine mercy is not a merit that could possibly be decided on, for example, by labor law. It cannot be measured by humans and certainly not by legal standards.

Pontius Pilate provides another example. He rejected pardoning *Jesus Christ* in order to satisfy the enraged crowd and to keep himself from danger. For him as the person entrusted with mercy his own concerns were crucial. *Pilate* was simply human.

For centuries the relationship of mercy to law has been an exciting one. Is mercy the "overcoming of the law"? Is mercy issued before or instead of law? Is mercy "the lawless miracle within the legal world of law"? Or is mercy a part of law?

These questions are not a mere legal "hair-splitting": If mercy – like divine mercy – is issued before or instead of law, in the place of law, then it is outside of all legal categories. Even the secular person entrusted with mercy is then no longer bound by legal conditions. He who is called to put mercy before justice does not act under the rule of law. The decision to pardon is made in total freedom from any written rules. It is free of any control. If mercy is denied because of the sex of the petitioner, his or her descent, race, language, homeland, origin, faith, religious or political beliefs, hatred, revenge, harassment or cowardice, there is no legal protection against that decision. If the right of pardon is left to the discretion of an individual, pardon could be granted at random. If, however, mercy is a part of law, then the person entrusted with pardon power is bound by the rule of law. Then the federal constitution and, if applicable, the state constitutions, would bind the person who exercises pardon power. Proscribed arbitrariness would apply. Legal action could be taken.

2. The Concept of Mercy

2.1. The (Individual) Pardon

A pardon is the mitigation or remission of legally binding long-term legal disadvantages. It takes place as an act of mercy by the person entrusted with pardon power in an individual case made with discretion.

This means that the penalty imposed after a court judgment can no longer be challenged, i.e. a final judgment, will no longer be executed or no longer be executed in full. The right to pardon does not affect the conviction; the social-ethical condemnation once-issued remains.

The German Federal Constitutional Court held that the functions of pardon power serve to provide a balance between the hardships of law, errors in the determination of judgment, and other inequities. Such hardship may arise from circumstances that have occurred after the verdict.

Another reason for a pardon is that the objective of punishment has been achieved. This is well illustrated by a Turkish case: in Erzincan, a city in eastern Turkey, an earthquake occurred in 1939, with many victims and countless casualties. Due to winter snow, all roads were blocked, and the city was inaccessible for helpers from other cities. The state prison was also destroyed, and the prisoners were able to escape. But some of the prisoners stayed and helped rescue the inhabitants of Erzincan. As a result, the parliament pardoned the prisoners who had helped. They had shown that they had reintegrated into the social community.

Pardons may also fulfill other questionable functions, for example, during the Cold War. The instrument of pardon allowed the states involved to engage in a businesslike exchange of prisoners, among them were agents like the top spies: *Alfred Frenzel, Heinz Felfe* and *Günter Guillaume.*

2.2. The Amnesty

An amnesty is to be distinguished from a pardon. It is a general pardon for an indefinite number of legally imposed, yet unenforced penalties. An amnesty can only be granted by (parliamentary) law. It is subject to the bindings of the constitution.

3. Mercy in Current Legislation

3.1. The Legal Starting Point in German Law

3.1.1. Federal Law

At the federal level the right to pardon is exercised in accordance with Art. 60 (2) of the German Constitution by the Federal President. He is in charge only if the criminal proceedings were carried out before federal courts or federal authorities from the first to the last instance.

3.1.2. State Law

3.1.2.1. The Legal Bases

Most decisions on mercy have been made under the authority of the federal states. On the state level, mercy is usually exercised by the respective Prime Minister. In most federal states, the procedure for pardon is regulated by administrative orders or ministerial decrees, the mercy codes. Such regulations already existed in the Weimar Republic, in the Nazi state and in the GDR. The primary motive for the enactment of these mercy codes is that it would "not …correspond to constitutional principles, if the holders of pardon power could and would arbitrarily exercise an unrestricted right of pardon". The practice of the right of pardon, *"must be decided on constant, uniform and consistent principles"*.

3.1.2.2. The Procedure for Pardon

The mercy codes of the federal states contain many similarities but differ in detail. Only in a few states is the convicted person granted the right of access to his file. Obligations for the holders of pardon power to justify their decisions exist in only a few single states. Not even a hearing of the convicted person is mandatory.

Formal legal remedies against rejected pardons are also not provided for in the German states. However, informal "objections" or "complaints" may be filed in almost all of them. The respective authority for pardons, usually the public prosecutor's office, can often remedy the objections and grant pardon. If the competent authority does not grant pardon, the case is usually for the Minister of Justice to decide. There are, however, no further regulations on the appeal.

3.2. Case-law

These practices and regulations of mercy on both, Federal and State level, conforms with the settled case-law opinion of the Federal Constitutional Court *(Bundesverfassungsgericht)*. The court maintains that acts of mercy are sovereign acts which are not subject to judicial review. There is no individual "right" to an act of mercy. Consequently, rejecting a pardon does not violate fundamental rights.

Decisions on mercy taken by the Federal President have remained exempt from judicial review to this day. Thus, refusal of pardon, as in the Weimar Republic, in the Nazi state and in the GDR, is not subject to judicial review.

The central authority for this position is the Federal Constitutional Court's decision of 04/23/1969 Case 2 BvR 552/63 – a controversial holding with four judges disagreeing.

Following the reasoning of these judges, Article 19 (4) of the German Constitution – a form of *'due process clause'* – requires judicial review to counteract arbitrary decisions on mercy. They argue that it would violate the fundamental principles of the rule of law and the separation of powers to deny judicial review on acts of mercy. An authority entrusted with pardon power is bound to exercise this power within the framework of the constitutional order and the limits imposed by it, in particular by the fundamental principles of individual dignity (Article 1 (3)) and the rule of law (Article 20 (3) of the German Constitution). It is accepted that the authority may, in principle, decide at his or her discretion. However, this discretion implies that a rejection of a petition for pardon may not be based on reasons that violate the values of the constitution. If the right to pardon is abused by arbitrariness, the convicted person is violated in his right to a decision on mercy according to the rule of law, i.e. the right to have a non-discriminatory and just decision on mercy as established by Articles 1 (human dignity) and 3 (equality) of the German Constitution. It is remarkable that in the case of *John Hugo,* the Constitutional Court of South Africa expressly agreed with the opinion of the dissenters of the German Court and unanimously recognized that presidential pardons are subject to judicial review.

3.3. Academic Legal Opinion

In academia, too, there is a broad spectrum of different opinions on the legal boundaries of mercy.

3.3.1. The Opponents of Reviewability

Even before the decision of the Federal Constitutional Court, mercy was assumed to be exempt from judicial review, due to the nature of mercy itself and the fact that power of pardon was vested in the respective heads of state. The right of pardon was considered a remnant of undivided state power reserved to the head of state, a remnant of the empire, or the *ius eminens*.

According to this opinion mercy is more than just free discretionary power, it is utterly free of any legal boundaries. Given that the right of pardon is unfettered and, in particular, not bound to follow objective justification, there is, consequently, no measure that could be applied for judicial control.

In addition, it is argued that by recognizing the State's power of mercy, the constitution has created a distinct system of "adjudication" alongside the law. Mercy is based on a different rationality. Mercy thus constitutes an alien element within the rule of law. Mercy illustrates, it is argued, the finiteness of law and may overcome the law's limitations. Mercy is a shining ray of light that breaks into the realm of law from a totally different world and makes the cool gloom of the legal world visible. Mercy opens the door for external values, such as religious mercy and ethical tolerance. Even today, a reminiscence of divine mercy can influence the rule of law as a foreign object from outside by means of the person entrusted with pardon power.

3.3.2. The Advocates of Reviewability

Yet, the position of the Federal Constitutional Court has also been criticized for a long time. As acts of public power, decisions on mercy should be subject to the limits of Art. 1 (3) (human dignity) and Art. 20 (3) (rule of law) of the German Constitution. The person entrusted with pardon power, as part of his or her executive power, is bound by fundamental rights as well as the rule of law. The right to have acts of mercy reviewed by the courts results from Art. 19 (4) of the German Constitution (due process), which basically excludes the possibility of non-reviewable acts of sovereignty and judicial acts of state. In particular, control of arbitrariness is mandated by the fundamental principle of equality enshrined in Article 3 (1) and (3) of the German Constitution. Otherwise, there would not be any review to ensure that the decision has not been dictated by irrational considerations. In addition, courts should be able to control whether administration has established an ongoing practice of mercy decisions and through such commitment fettered its discretion.

Despite the wide margin of discretion of those entrusted with pardon power, decisions on pardons generally, it is argued, need to be reviewable in terms of discretionary errors, such as non-use of discretion. Furthermore, this group of authors argues that the

historical preformation of pardon power cannot mean that the exercise was above the Constitution. Mercy needs to be integrated in the systematic context of current law and has to respect the prevalence of the Constitution.

A concept of mercy as a mild shower from heaven, based solely on irrational motives such as generosity, charity or benevolence cannot be reconciled with the requirements of the principles of democracy and the rule of law. Mercy thus can no longer be considered as the sovereign power of a head of state in divine office. As a people's sovereign, the head of state is a secular ruler and no longer the executor of a binding divine order of mercy. His legitimacy, based on the will of the people, make his rule to one pertaining to human law.

3.4. Position of the Author

3.4.1. Summary

With regard to the views of literature and case-law, I would like to take the following position:

Only divine mercy overcomes the law. It defies secular standards and is before law. We should remember the parable of the Prodigal Son who supposedly "undeservedly" received mercy through his father. Secular mercy, on the other hand, is administered by fallible humans. Remember Pilate, who rejected the pardon of Jesus Christ on considerations irrelevant to the case but also out of his own interests. Secular mercy must therefore be within the law. This requires judicial review as otherwise there cannot be effective protection against human fallibility.

Public officials appointed to exercise pardon power decide, in general, at their own discretion. However, the petitioner's rights are violated if the right of pardon is abused by arbitrariness. In that case it is the right to a decision on mercy according to the rule of law, according the principles of human dignity and equality (Art. 1 and 3 of the German Constitution) which is violated. This implies the right to have a non-discriminatory, just and relevant decision on mercy. Public authority is restricted by elementary fundamental rights; the body responsible for the decision on mercy is also bound to these rights. For this reason, a rejected pardon is subject to judicial review. The court must examine whether the following general principles of the rule of law, which also apply to the procedure for pardon, have been observed.

This includes the principle of the right to be heard. The petitioner is entitled to have his petition accepted and acknowledged, assessed in terms of content, processed and granted, according to the provisions of the mercy code, by the authority for pardons. If the fundamental rights of the petitioner are violated by a negative decision on mercy, the ordinary legal procedure (in Germany: §§ 23 et seq. EGGVG) can be pursued. The criminal division of the Higher Regional Court is appointed to make a decision in an objective manner.

3.4.2. The Reasons

3.4.2.1. The Historical Perspective

A deeper historical analysis shows that the exercise of the power of pardon was never able to do justice to the challenge and the ideal of the vicarious exercise of divine mercy. Oftentimes, very practical, secular, selfish, sometimes populist goals as well as objectives of political power and foreign policy were pursued by the use of pardons. An example is the pardon of the so-called "scout of peace" called *Heinz Felfe.* He was exchanged with twenty-one mainly political prisoners, among them three Heidelberg students and several severely punished BND *(Bundesnachrichtendienst)* staff members. This has nothing to do with the gift of divine mercy and compassion but is a procedure that follows the rationale of politics. Above all, a human potentate is unable to practice mercy like God. Even popes are not free from the pursuit of political power and thus equally not free of being instrumentalized.

The supporting pillar for the concept of the monarchical right of pardon is the idea that princes, kings and emperors were rulers by the grace of God, holders of law giving power and that they held the position of a lord over all laws. It was this rationale which justified them to grant dispensation from laws and by doing this to break through the validity of laws (power of dispensation). Mercy overcame law, was in place of law. The right of pardon was the reverse of law, the right to decide on whether a certain behavior was punishable. In the German National Socialist state this concept of an identity of rule-maker and pardon-giver became evident. Not only the passing of a law depended on the *Führer's* will, he also had supremacy over the courts. The fact that both judicial and legislative power were unified in the hands of one *"Führer"* formed the basis of his pardon power.

In contrast, today 's Federal President or prime ministers of federal states are not a monarchs and thus cannot claim any dispensation power. They administer the right of pardon as representatives of the Federal Republic only and cannot claim to be original holder of the right to pardon. The content, extent and modalities of the exercise of pardon power is therefore determined not by the president or prime ministers but by the respective constitutional law. Mercy within the Constitution appears in a new light. Mercy cannot be administered instead of law, for state action is under the rule of law. Mercy is no longer the lawless miracle of a ruler exercising it in the freedom of pure lawlessness – in a supreme princely whim on some kind of happy mood, for the more beautiful decoration of jubilees, for political agitation or as a political weapon. In a republican and secular state, mercy is not an act of compassion and benevolence. Unrestricted state action – as in the *'Führer'* state – is alien to the modern constitutional state. As the past shows, there is considerable risk that the boundless exercise of mercy can give way to arbitrariness. It is the aim of the Constitution to prevent this.

3.4.2.2. The Risk of Violation of Rights

When humans decide on mercy, the rights of the person to be pardoned may be violated by mistake or abuse. In such a case, the penalty for the petitioner continues in

contradiction to the law. The fact that mercy can be administered arbitrarily and improperly is richly illustrated in history. Even the *Reichsgericht* considered it quite possible that the officials concerned with decisions on mercy would not exert dutiful discretion regarding the general good but rather their personal advantage. Therefore, a violation of rights may occur in a decision on mercy. Irrational motives such as party-political malevolence may affect the decision. The decision to deny mercy may be based on discriminatory motives, contrary to the principle of non-discrimination enshrined in Article 3 (3) of the German Constitution. For example, the Provincial Court of Hesse considers it possible that the decision on the pardon would be affected by motives such as the petitioner belonging to a particular race or having certain religious or political convictions. If, therefore, a violation of rights is possible, then legal review should not be denied.

Above all, opponents of judicial review neglect the fact that the imperfection of the law, which is supposed to be corrected by mercy, is due to the imperfection of humans who created law. We have to take into account that those who administer mercy are no less imperfect than those subject to their grace. The imperfection of law could only be overcome by the transfer of the right of pardon to an infallible being, to God. Then there would be no need for judicial control. However, we do not have this possibility. The vicarious exercise of divine mercy by humans, however, cannot succeed due to human fallibility. To hope that by miracles or divine providence the person entrusted with pardon power will decide everything for the best is to be blind to the teachings of history. It ignores the not infrequent misuse for political power by rulers in the past. Only judicial review can make up for the mistakes of persons entrusted with pardon power. As long as violations of proscribed arbitrariness and violations of basic procedural requirements are not absolutely inevitable, then judicial review is a necessity.

The fact that there is no right to mercy is by no means contrary to the above. The decisive factor is not whether the person concerned is entitled to mercy. Independent of that, there is a formal, subjective public right to a due process and a right to dutiful conduct of the public authorities involved. The petitioner certainly has at least the formal right to arbitrary-free consideration, examination and answer to his appeal to mercy. It is the task of the judicial supervisory body to ensure the appropriate decision-making process.

3.5. Implications for Legal Policy

The necessary judicial review of decisions on mercy has further implications for legal policy:

Mercy codes in Germany certainly have had a long tradition since the end of the German Empire.

The exercise of the right of pardon must be decided on a constant, uniform and consistent basis. Therefore, the system of mercy should be governed by law or public administrative order or ministerial order.

The function of the right to pardon should be defined in a mercy code or in a specific law on mercy. It should be clarified that the decision of the person with pardon power is free but not of unlimited discretion and is subject to judicial review.

The following obligations of the person entrusted with pardon power and the following rights of the petitioner should be codified:

- The right of the petitioner to arbitrary-free consideration, examination, and answer to his application.
- The obligation of the person entrusted with pardon power investigate the facts of the case.
- The obligation of the person entrusted with pardon power to decide within a reasonable time.
- The right of the petitioner to have access to his file.
- The obligation of the person entrusted with pardon power to obtain information from experts.
- The obligation of the person entrusted with pardon power to give a legal hearing before a refusal.
- The obligation of the person entrusted with pardon power to supply a written justification of a refusal.
- The right to legal remedy for the petitioner in the event of a negative decision.
- Rules on jurisdiction of the courts.

4. The Conclusion

Divine mercy is before law, as it is commonly expressed. Governmental mercy, on the other hand, must be exercised within the law in order not to be improper or even condemnable. As part of the Constitution, pardon is not free of the Constitution. The Constitution has not endowed the Federal President with the power to act arbitrarily or to violate the law. To consider mercy as being outside or above the law would be incompatible with the constitutional balance of powers in Germany. The decision on mercy is an act of public authority. Legislative ties and restrictions on pardon power are legitimate if they are derived from the constitutional obligations and limitations of this right. There is no right to mercy, and a pardon can be denied for any reason not disapproved of by the constitution.

There is a formal individual public right to fair proceedings governed by the rule of law and a right to dutiful conduct of the public authorities involved. If these rights are violated, the petitioner has a right to judicial review.

The idea that acts of mercy are acts of sovereignty which are not subject to judicial review cannot be upheld. If the right to pardon was not subject to judicial review, it would be anachronistic and lose its legitimacy. The abuse of the right to pardon, characteristic of the monarchies and dictatorships of the past, would be difficult to prevent. The boundless exercise of mercy must be prevented from becoming arbitrariness.