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References to Mercy in the Reasons for Judgments of British and Irish Courts

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Abstract: **References to Mercy in the Reasons for Judgments of British and Irish Courts**
The article considers the reasons for the judgments of British and Irish courts, in terms of the courts' explicit references to mercy. The paper indicates, among others: how courts understand mercy; categories of cases in which the courts show mercy, in what cases it is excluded and why; accepted grounds for mercy; the relationship between justice and mercy; separation of powers in the context of prerogative of mercy; the influence of the victim's will or the interests of the offender's relatives on the merciful sentence. Courts to a certain extent and degree are guided by mercy. Considering judicial practice may help legal scholars and philosophers formulate realistic theories in regard to *argumentum ad misericordiam* in the judicial decision-making process.

Keywords: Mercy, Justice, Reasons for Judgments, British and Irish Courts, Judicial Decision-making.

Summary: 1. Introduction – 2. The Concept of Mercy – 3. Showing Mercy and Its Limits – 4. Grounds for Showing Mercy – 5. The Role of the Victim and Other People in Merciful Treatment of the Perpetrator – 6. The Relationship Between Mercy and Justice – 7. Showing Mercy as the Subject of a Dispute over the Competences of the Judiciary and the Executive – 8. Summing-up.

1. Introduction

The issue of the relationship between mercy and law, or specifically of its possible place and role in the process of judicial decision-making, is of interest to both legal sciences, and other sciences, especially philosophy. The scientific reflection in this regard is characterised by two basic regularities. Firstly, the potential role of mercy is often confined to criminal cases in which the defendant faces the death penalty[1]. Secondly, it can be noticed that in the philosophical and legal discourse devoted to

[1] See e.g. S. Garvey, "'As the Gentle Rain from Heaven': Mercy in Capital Sentencing", in *Cornell Law Review*, 81 (1996), n. 5, pp. 989-1048; P. Cobb, "Reviving Mercy in the Structure of Capital Punishment", in *The Yale Law Journal*, 99 (1989), pp. 389-409; I. O'Donnell, *Justice, Mercy, and Caprice: Clemency and the Death Penalty in Ireland*, Oxford University Press, Oxford, 2017.

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the issue of the possibility of a court being guided by mercy, individual theories or concepts are often formulated almost completely disconnected from the judicial practice of applying law[2]. In other words, the doctrinal claims are typically normative, which ignore the seemingly fundamental questions of whether the courts in reality reach for the category of mercy, and what this invocation of mercy means in practice. Such studies more often contain quotations from Shakespeare's "The Merchant of Venice" or "Measure for Measure" than fragments of judgments[3].

The few scientific studies whose main subject is the issue of the actual use of mercy by courts are usually of a historical and legal nature[4]. However, legal literature lacks publications dedicated to the analysis of contemporary judicial decisions in terms of their references to mercy. If references to specific judgments appear in monographs and scientific articles dealing with the issue of the participation of mercy in the judicial process, the mention of the judgments is usually of an exemplary nature[5], being part of a case study rather than a broader analysis of judicial decisions[6].

The article presents the results of a study of the reasons for the judgments of British and Irish courts, in terms of the courts' explicit references to mercy. Although the reasons for judgments are not a full reflection of the actual course of the judicial deliberation process preceding the decision, it can be assumed, however, that, as a rule, these reasons truthfully report what the court was guided by when issuing a particular judgment. Of course, this does not mean *a contrario* that in cases where the court did not make explicit references to mercy, it did not play any role in the decision-making process.

The objectives of the study are typically descriptive in nature. The research aim is to provide answers – based on the reading of the reasons for the judgments – to questions regarding such issues as, in particular:

[2] See e.g., E. Muller, "The Virtue of Mercy in Criminal Sentencing", in *Seton Hall Law Review*, 24 (1993), pp. 288-346; D. Dolinko, "Some Naive Thoughts About Justice and Mercy", in *Ohio State Journal of Criminal Law*, 4 (2007), pp. 349-360.

[3] Abstracting from judicial practice is not justified even when judges are denied the opportunity to invoke mercy as part of their own prerogative. Cf. J.G. Murphy, "Mercy and Legal Justice", in J.G. Murphy, J. Hampton, *Forgiveness and mercy*, Cambridge University Press, Cambridge, 1988, p. 174. Critically about mercy in the judicial process, however, referring to numerous court decisions, cf. e.g., D. Markel, "Against Mercy", in *Minnesota Law Review*, 88 (2004), pp. 1421-1480.

[4] Moreover, in these studies, the role of mercy in the judicial process is usually not reduced to literal references to mercy in the reasons for judgments. Cf. J. Burbank, "Mercy, Punishment, and Law: The Qualities of Justice at Township Courts", in *Kritika: Explorations in Russian and Eurasian History*, 7 (2006), n. 1, pp. 23-60.

[5] See e.g., D. Menashe, "Should We Be Merciful to the Merciless—Mercy in Sentencing", in *Emory International Law Review*, 35 (2021), n. 4, pp. 549-593; M. Nussbaum, "Equity and Mercy", in *Philosophy & Public Affairs*, 22 (1993), n. 2, pp. 83-125.

[6] As an exception cf., however, R. Fox, "When Justice Sheds a Tear: The Place of Mercy in Sentencing", in *Monash University Law Review*, 25 (1999), n. 1, pp. 1-28; R. Ferguson, "The Place of Mercy in Legal Discourse", in *Practice Extended: Beyond Law and Literature*, Columbia University Press, New York, 2016, pp. 57-62.

- how do courts understand mercy?
- in what categories of cases did the courts show mercy and what did it involve, and in what cases was mercy excluded and for what reasons?
- what do courts accept as the basis for showing mercy?
- what impact for the courts does the attitude or good of third parties, especially the will of the victim or the interests of the perpetrator's relatives, have on showing mercy?
- how do courts see the relationship between justice and mercy?
- how do courts distinguish the competences of the judiciary and the executive in the context of showing mercy?

Findings regarding the operationalisation of mercy in the judicial process and whether courts actually refer to mercy at all should constitute an important determinant, or at least a reference point, for doctrinal considerations on the expected role of mercy in the judicial decision-making process. Any normative model created in a complete isolation from the existing practice runs the risk of remaining only a projection of views – often intellectually interesting and expressing erudition – of its author, without any potential to influence the reality. Answering the above questions can profile and direct better the postulates of legal science regarding the place of mercy in the judicial process. Therefore, the selected descriptive objectives of the given study have not only cognitive value.

The subject of the research has been the reasons for judgments collected in the publicly available database of The British and Irish Legal Information Institute (BAILII)[7]. The selection of the analysed judgments was the result of entering terms such as "mercy" or "merciful" into the search engine of this database, and then determining in which of the indicated judgments the court approvingly referred to mercy or disapproved of it, and not only reported statements or arguments of the parties to the proceedings[8]. As part of some simplification, the British courts from the title included judgments of the courts of Jersey (Bailiwick of Jersey) as a dependency of the British Crown. The scope of the research also included judgments of the British Judicial Committee of the Privy Council.

The judicial decisions were analysed qualitatively, not quantitatively. The intention was not to present statistical data on direct references to mercy in court judgments and decisions, nor to provide an exhaustive examination of all cases of such references. As a side note, it can be said, even without thorough empirical research, as a general observation, that courts' invocation of mercy is rare[9]. Based on the reading of over 80 judgments, mainly issued in criminal cases, certain regularities were established in the judicial use of mercy in regard to the above-

[7] https://www.bailii.org/

[8] Cf. G. Maroń, "Odwołania do miłosierdzia w procesie karnym w świetle orzecznictwa sądów Stanów Zjednoczonych", in *Prokuratura i Prawo*, 9 (2019), pp. 5-35.

[9] A. Mischa, *Locating forgiveness in criminal law and punishment* [PhD Thesis], Birkbeck, University of London, London, 2015, p. 8.

mentioned issues. However, as already noted, the findings concern only those cases where the court explicitly referred to mercy in the reasons for the ruling.

2. The Concept of Mercy

Relatively little attention in the analysed judicial decisions was devoted to the concept of mercy itself, treating it as an existing term. Courts often combine or even treat synonymously the term "mercy" with terms such as "leniency", "clemency"[10] and "compassion"[11], although they are not identical in meaning in philosophical thought[12]. Courts rarely refer to linguistic dictionaries in their conceptual determinations. As noted in one case, "Mercy, in its first meaning given by the *Oxford English Dictionary*, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness"[13]. Most often, the judicial explanation of the concept of mercy is made in comparison to the concept of justice and takes place in controversial issues of delimiting the competences of the judiciary and the executive. As the Supreme Court of Ireland points out,

> The concepts of mercy and justice are different. Mercy, as defined in the New Shorter Oxford English Dictionary, means: 'Forbearance and compassion shown to a powerless person, especially an offender, or to one with no claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected […]'[14].

Apart from cases where the term "mercy" appears in the reasons for judgments as an element of the name of a party to the proceedings or another entity, this concept usually referred to the attitude that the court adopted or did not adopt towards the participant in the proceedings in its decision. The word "mercy" also appears in judicial decisions to mean euthanasia. Sometimes courts use the term "mercy killing" in quotation marks, other times they do not, which shows the questionability of treating this type of acts as an act of mercy[15]. It happens that in cases of this type of murder, the concept of mercy refers both to the naming of the

[10] The People (DPP) v. Stephen Duffy [2023] IESC 1_2; Callan v. Ireland & Anor [2011] IEHC 190.
[11] AG v. Richomme [2009] JRC 108, pt. 5.
[12] For example, the Roman scholar Seneca contrasted the criticised mercy with the virtue of clemency (*clementia*). *Seneca, De clementia.* Cf. L. Mateja, "Sprawiedliwość i miłosierdzie w starożytności. Porównanie myśli Seneki i Tertuliana", in *Teologia Polityczna* 1 (2003-2004), pp. 140-147.
[13] Reyes v. R (Belize) [2002] UKPC 11, pt. 44.
[14] DPP v. Cunningham [2002] IESC 64, pt. 35.
[15] Gordon, Appeal Against Sentence By Against Her Majesty's Advocate [2018] ScotHC HCJAC_21, pt. 36; Caster, R. v. [2023] EWCA Crim 931, pt. 25.

criminal act and the court's reaction towards its perpetrator, since the court talks about justice "appropriately tempered with mercy"[16].

3. Showing Mercy and Its Limits

Most of the judgments whose reasons included direct references to mercy were made in criminal cases in the broad sense. However, there are also many judgments issued in civil cases in which mercy was invoked. The courts also used the category of mercy in matters of professional or disciplinary liability.

The court's showing of mercy consisted in particular in: reduction of the prison sentence; imposing probation; sentencing non-custodial penalties, especially community service; ordering two or more imposed penalties to be served concurrently with each other rather than consecutively; reducing the awarded amount of court proceedings costs to be paid by the losing party; replacing an absolute ban on practicing a given profession by the defendant with a temporary suspension from professional activities[17].

Quite often, the courts, while showing mercy to the perpetrator, at the same time warned him or her that if he or she violated the law again, he or she would no longer be able to count on merciful treatment[18]. Sometimes the announcement of the exclusion of the application of mercy was narrowed directly to the situation if the defendant committed again not any illegal act, but the same crime or an offence of the type for which he or she had been convicted[19]. Sometimes the "threat" of not showing mercy in the future was accompanied by a request to the defendant to appreciate the court's current merciful attitude and to improve his or her behaviour[20].

Some judgments indicate categories of cases or circumstances in which, according to the courts, mercy cannot or should not be shown. It is not obvious whether the courts in this case were concerned with principles of general application, or – which is more likely – the courts' comments were made in the context of the specific nature of the individual cases being decided. Several judgments made reservations that people who intentionally or deliberately fail to comply with court orders issued against them (e.g. freezing orders or search and seizure orders) cannot count on the court's mercy, and on the contrary, they should expect "serious sanctions"[21]. In other cases, it was indicated that, for example,

[16] Inglis, R v. [2010] EWCA Crim 2637, pt. 55.
[17] Court can refuse an application by a successful defendant to award costs, if the appeal against sentence was allowed as an act of mercy to him. Cf. Pluckrose v. Snaresbrook Crown Court [2009] EWHC 1506, pts. 12, 17, 18, 21.
[18] AG v. Le Long [2004] JRC 030, pt. 7.
[19] Gomes v. AG [2012] JRC 149, pt. 9.
[20] AG v. Scobie [2004] JRC 201, pt. 4.
[21] Aspect Capital Ltd v. Christensen [2010] EWHC 744 (Ch), pt. 48. Cf. also Hytec Information Systems Ltd v. Council Of City Of Coventry [1996] EWCA Civ 1099; Emirates NBD Bank PJSC

gangsters who deliberately fight members of a rival gang, including murdering them, cannot expect mercy from the courts[22], similarly, people engaging in "vicious, ruthless and heartless human trafficking"[23], or landlords "if they conduct their business in flagrant disregard to statutory controls"[24].

In the analysed judicial decisions, there were cases when the court, refusing to treat the defendant mercifully, referred to the fact that the previous showing of mercy had not had a positive effect on him or her in any way[25]. However, it would be wrong to conclude that for the courts mercy is a one-time thing that cannot be counted on after a second or repeated violation of the law[26]. There are many cases in which the court showed mercy to the perpetrator again, even though he or she had not appreciated the merciful verdict the first time and had not taken advantage of the opportunity given to him or her then. It is difficult to determine whether the announcements made at that time about giving the "last chance" to the accused, "exhaustion of mercy" or that on the third occasion the court "will have no option but to send [the accused] to prison" and his difficult personal situation will not "rescue [him] from the consequences of [his] actions" were enforced categorically or consistently later on[27].

The wording used by the courts in the reasons for the judgments indicates that the issue of showing mercy is not a zero-to-one issue for them. Mercy can be dosed. Merciful treatment of the perpetrator is of a gradational nature, hence the courts talk about, for example, showing an "element of mercy"[28], "some mercy"[29], receiving the "full quotient of mercy"[30], or an "extremely merciful" decision[31]. However, it should be crucial from the point of view of rationalizing a judicial decision whether it reflects an "appropriate" or "proper degree of mercy" in the light of all the circumstances of the case[32].

v Almakhawi and Ors [2023] JRC 053, pts. 28 and 30; Heidelberg Graphic Equipment Ltd. & Anor v Hogan & Ors [2004] EWHC 3090 (Ch), pt. 68.

[22] Hamilton & Ors, R. v [2021] EWCA Crim 424, pt. 43 (with reference to the comments of the judge of the first instance court). The judge noted that this type of criminals cannot count on mercy from the court, even relying on their youthful age.

[23] Iyamu, R. v [2018] EWCA Crim 2166, pt. 51. The court noted that perpetrators of this type of acts "play for high stakes", should "expect severe sentencing" and "they need to know that the courts will show no mercy when their criminality is exposed".

[24] Jenson v. Fappiano, EH1 3LE [2015] ScotSC 7, pt. 14.

[25] Taylor Forrest v. Owen & Anor [2010] EWCA Civ 769, pt. 13.

[26] Sometimes the court itself indicates that a merciful judgment is a "next chance" and not the "last one". Stevens, R. v. [2007] EWCA Crim 1128, pt. 8.

[27] AG v. Richomme [2009] JRC 108, pt. 8; AG v. Howard [2015] JRC 066, pt. 11.

[28] Barrett v. AG [2011] JCA 105, pt. 16.

[29] AG v. Cleaver [2016] JRC 080 , pt. 3.

[30] Callan v. Ireland & Anor [2011] IEHC 190.

[31] Lovegrove, R.v. [2006] EWCA Crim 255, pt. 36.

[32] Nightingale, R. v. [2012] EWCA Crim 2734, pt. 20; Kenward v. AG [2000] JCA 137, pt. 11. Abada, R. v. [2006] EWCA Crim 1182, pt. 16.

4. Grounds for Showing Mercy

Mercy alone cannot justify merciful treatment of the perpetrator[33]. As the foundations for showing mercy, the courts primarily treat the broadly understood characteristics and personal conditions of the perpetrator, usually legally regulated to some extent as mitigating factors. Most often, merciful treatment of the accused was justified by such circumstances as: young age, immaturity, poor health (including mental health), proper fulfilment of parental duties, diligence and good reputation in the workplace, admission of guilt, no previous criminal record, difficult life experiences (e.g. being sexually abused or subjected to domestic violence in childhood, witnessing crimes against his or her closest relatives as a child, death of a life partner, loss of a job, separation from own children or other close family, suicide attempt or other "horrible events"[34]), committing a crime without premeditation on the spur of the moment or life difficulties (e.g. financial problems, relationship crisis), exemplary behaviour in prison[35].

It should be noted that in many cases the reason for showing mercy was not primarily the attitude of the defendant himself or herself, or his or her personal characteristics, but the situation and well-being of other people close to him or her, who were to some extent dependent on him or her in life, e.g. those under his or her care. The merciful treatment of the perpetrator was then determined by the need to protect the interests of third parties, and even by the very fact of their difficult situation, especially in the case of the poor health of a spouse (partner), child or close relative, or the threat of transferring minor children to foster care because of sending a parent to prison[36]. In one of the cases, the court noted that if the accused were not shown mercy, her children would be raised by other people in an unnatural environment, separated from their parents, which would also result in "pain, anguish and shame" for the mother. Hence, "the seasoning of justice with mercy seems […] appropriate in these highly unusual circumstances"[37]. Similarly, in another case, the court decided that sending the accused to prison would be "devastating" to her dependent children and put their future at "risk", so it showed her mercy[38].

The above-mentioned factors supporting merciful treatment of the perpetrator are each time considered in the context of a given case, as part of an individual

[33] Stanley Cole (Wainfleet) Ltd v. Sheridan [2002] UKEAT 0824_01_1807, pt. 127.
[34] Kbrom, R v. [2018] EWCA Crim 3119, pt. 13.
[35] For example, Ag v. Harrison [2001] JRC 136; Simpson v. AG [2003] JCA 007; AG v. Schneider [2005] JRC 141; The Queen v. Attuh-Benson [2005] 2 Cr. App. R(s) 11; AG v. Boyle [2006] JRC 123; AG v. Richomme [2009] JRC 108; Gomes v. AG [2012] JRC 149; AG v. Howard [2015] JRC 066; DPP v. Glennon [2018] IECA 329; F, R. v. [2018] EWCA Crim 2693.
[36] AG v. Appleyard [1998] UR 20; DPP v. Muszak [2018] IECA 327; AG v. De Sousa [2019] JRC 147.
[37] Meehan & Ors, R v. [2009] NICC 59, pt. 49.
[38] AG v. Harrison [2001] JRC 136, pt. 2.

assessment. None of them prejudges *per se* the court's decision to show mercy. There is no general rule that would automatically connect a specific claim to mercy with the existence of these factors. On the contrary, courts usually emphasise the "uniqueness" of the circumstances of a particular case as a justification for its merciful resolution. For example,

> an offender's serious medical condition may enable a court, as an act of mercy, in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence that would otherwise be appropriate[39].

Health problems on the part of the perpetrator do not justify automatically showing him or her mercy. Thus, people who are "gravely ill or severely disabled, or both, may well have to be imprisoned if they commit serious offences. Their condition cannot be a passport to absence of punishment"[40]. In one of the traffic offence cases, the court showed no mercy to a recidivist, despite his poor health, although it stated that it was "not without sympathy for him". The court rightly stated that in this particular case, the perpetrator's disability was to his disadvantage. The defendant was once again guilty of dangerous driving when he was blind in one eye and had damage to the other. With this in mind, it is difficult to see how "the interests of justice will be well served by invoking the court's mercy"[41].

The decision to show mercy is the result of a comprehensive, nuanced assessment of the circumstances of the case and the attitude of the perpetrator, e.g. his or her remorse or humility[42]. In one case, the court held that despite the defendant's advanced age, his poor health and the illness of his spouse, the sentencing judge may conclude that "in view of the appellant's conduct, he had forfeited any mercy which the court might otherwise have extended to him"[43].

In another case, the court emphasised that whenever the accused pleads guilty and has the will to discontinue criminal activity, the court will give significant weight to a previous lack of criminal record or impeccable professional conduct, otherwise it will not[44]. In the case concerning attempted rape and other sexual crimes, the court clearly stated that it did not show mercy even though it noticed the exceptional circumstances related to the accused and his relatives. Although the court "empathised with the position of the defendant's family, and in particular his son, who will suffer the loss of his father for important years of his life", the case

[39] DM, R. v. [2021] EWCA Crim 203, pt. 28; Watson, R. v. [2021] EWCA Crim 1248, pt. 19; AG v. Swinburne [2000] JRC 172, pt. 4; R v. Bernard [1997] 1 Cr.App.R. (S) 135.
[40] DM, R. v. [2021] EWCA Crim 203, pt. 28.
[41] Oliver, R. v. [2016] EWCA Crim 2017, pt. 8.
[42] Hytec Information Systems Ltd v. Council Of City Of Coventry [1996] EWCA Civ 1099, pt. 7.
[43] Bright, R v. [2008] EWCA Crim 462, pt. 38.
[44] DPP v. Glennon [2018] IECA 329, pt. 23.

"was too serious for it to be appropriate for the Court to exercise its prerogative of mercy"[45].

There are cases in the context of which doubts arise as to the laxistic grounds for showing mercy adopted by the court. Objections are raised in cases where merciful treatment of the accused was justified by the fact that he was a "bright lad" who had "something to offer the community"[46]; the reason for the court to take a "merciful course" was seen in the "glimmer of hope" that the accused would improve[47]; or likewise, in a battery case it was considered a circumstance for showing mercy that the accused, a few days before the incident, had found out that his partner was pregnant by his best friend and, under emotional stress, he got drunk to forget about his problems[48].

However, the courts can also oppose bizarre cases of invoking mercy by the parties to the proceedings. In one case, the defence argued that the defendant in an attempted rape case should have his sentence reduced because he had allegedly shown mercy to the victim by refraining from rape in response to the victim's screams and pushing him away. The court sensibly noted that the facts in question cannot be equated with a situation where the attacker really decides not to commit rape under the influence of the victim's supplication. It emphasised that the accused had no sympathy for the injured, as he later made fun of her, claiming that he had taken half of her virginity. Finally, the court concluded that "it is also difficult to see how desisting from actual rape could be reflected in a sentence for attempted rape" since "had he not desisted, for whatever reason, the offence would have been more serious as a completed offence of rape". Therefore, "logically, it is not a mitigating factor in an attempted rape to argue that it was not a completed rape"[49].

5. The Role of the Victim and Other People in Merciful Treatment of the Perpetrator

In some of the analysed judgments, in the context of showing mercy to the perpetrator, the role of the victim or – less often – the victim's relatives or the perpetrator's relatives was mentioned. Firstly, the courts explain that these people do not have the right to indicate to the court the sentence that they consider appropriate, but only they are "entitled to put forward an *ad misericordiam* plea"[50]. Secondly, the courts emphasise that the consideration of a request for mercy is

[45] AG v. Santos [2015] JRC 077, pt. 25.
[46] AG v. Munks [2001] JRC 111, pt. 1.
[47] Lovegrove, R. v. [2006] EWCA Crim 255, pt. 36.
[48] AG v. Ford [2004] JRC 062.
[49] DPP v. HV [2021] IECA 57, pts. 22-23.
[50] The People v. Duffy [2023] IESC 1_2, pts. 40-42. See also DPP v. R. O'D. [2000] 4 IR 361. More on the so-called *argumentum ad misericordiam* (*ad misericordiam plea),* cf. D. Walton, *Appeal to Pity: Argumentum ad Misericordiam*, Suny Press, Albany, 1997.

conditional on the fact that it is not unfounded but based on "appropriate grounds". The victim must therefore provide a reason or reasons specific to the accused why he or she believes it is justified to treat him or her mercifully. An unreasonable request cannot bring results. Thirdly, the victim's request for mercy for the perpetrator must be explicit, not implicit[51]. In practice, a request to show mercy to the perpetrator is combined with the declared support for him or her in breaking away from the crime or its causes (e.g. addiction). Promised help from loved ones, especially a life partner, often results in "justice being tempered with mercy"[52]. It happens that a merciful attitude towards the perpetrator of his or her life partner – and at the same time the victim of his or her illegal acts – becomes the sole reason for the court to show him or her mercy. For example, the court tempered justice with mercy in a case of beating up his partner, "only because" the injured had forgiven the accused and expressed her will to continue her relationship with him[53]. There are also cases where the court refuses to show mercy to the perpetrator because he has had no mercy for the victim before. As stated in one of the judgments, "The offender showed no mercy to this young woman. He merits none from this court"[54]. There are also situations when the court questions the impact of the victim's merciful attitude on the judgment against the perpetrator, pointing out that showing mercy by the injured does not change the fact that "the crime has still been committed and must be punished as it deserves"[55].

6. The Relationship Between Mercy and Justice

The relationship between justice and mercy in the context of the judicial process remains a highly controversial issue in scientific literature. It is no different when it comes to the courts' approach to this issue in judicial practice. There are three main positions on this matter.

Firstly, in some judgments the courts explicitly or implicitly expressed the belief that mercy, to one or another degree and extent, corresponds to justice. The statements most frequently mentioned in this context were that mercy "tempers" or "seasons" justice. Considering mercy is therefore not a departure from justice and the antithesis of the process of administering it. The court can be "loyal to the statute", "do full justice" and at the same time "exercise a proper degree of mercy". The "age-old principle that justice should be tempered with mercy" applies then[56]. However, when speaking about "loyalty to the statute", the courts do not necessarily mean faithfulness to its literal provisions. In the specific case, the court found that

[51] The People v. Duffy [2023] IESC 1_2, pts. 40-42.
[52] AG v. Louis [1998] UR 35; AG v. Wylie [2001] JRC 191, pt. 4.
[53] AG v. Barwise [2009] JRC 182, pt. 4.
[54] Ross, R v. [2009] EWCA Crim 2610, pt. 42.
[55] R v. Nunn [1996] 2 Cr App R(S) 136, 140.
[56] Nightingale, R. v. [2012] EWCA Crim 2734, pt. 5.

strict adherence to the statutory minimum sentence risks distorting the administration of justice and disproportionately limiting the ability to temper justice with mercy[57].

As Lord Lane put it in Attorney General's Reference No 4 of 1989 (1989):

> [It] must always be remembered that sentence is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature[58].

Sometimes it is even argued that only considering mercy allows justice to be realised. The England and Wales Court of Appeal (Criminal Division) stated in one case that

> by statute, a judge must have regard to the definitive guidelines issued by the Sentencing Guidelines Council. But in the end a judge has to do justice in the circumstances of an individual case. It is well established under the current legislation that, provided the judge has had regard to a definitive guideline, he is entitled, if he has reason to do so and is prepared to articulate his reasons, to disregard it if, by following it, an injustice would result. Sometime justice will require a more merciful sentence than a guideline level may indicate; sometimes a more severe one[59].

In other words, "a judge must be ready to be merciful when justice requires this"[60], or "the demands of justice may sometimes call for mercy"[61].

[57] *Ivi*, pt. 20. Cf. Barrett v. AG [2011] JCA 105, pt. 16, where the court emphasised that mercy cannot be used to modify the statutory limits of sentencing.

[58] Attorney General's Reference No 4 of 1989 (1989) 11 Cr App R(S) 517, 521. These words were cited approvingly in dozens of judgments of British courts, cf. for example, Meehan & Ors, R v. [2009] NICC 59, pt. 22 or Saultan, R. v. [2024] EWCA Crim 347, pt. 19. This position is even clearer in the judgments of courts in other Anglo-Saxon countries. The Supreme Court of South Australia states: "There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform". *R v. Osenkowski* (1982) 30 SASR 212. In turn, the New Zealand High Court recognises that it is "the fundamental right and responsibility of a trial judge, in appropriate cases, to allow the promptings of *mercy* to operate" in order to promote the correction of the perpetrator. R v. Wihapi [1976] 1 NZLR 422, 424.

[59] McMorris & Ors, R. v. [2009] EWCA Crim 1490, pt. 37.

[60] Attorney General's Reference No. 31, 45, 43, 42, 50 & 51 of 2003 [2004] EWCA Crim 1934, pt. 84. Cf. L.R. Meyer, *The Justice of Mercy*, University of Michigan Press, Ann Arbor, 2010.

[61] Hendry, R. v. [2022] NICA 77, pts. 57 and 58; McKenna & Sheridan, R. v. [2023] NICA 43, pt. 8; Ali, R. v. (Rev1) [2023] NICA 20, pt. 3 (with reference to: P. Taylor, *Taylor on Criminal Appeals*, Oxford University Press, Oxford, 2022).

Sometimes courts include mercy among the circumstances or factors weighed by the court in the sentencing process, alongside the goals of penal retribution and censure, specific and general deterrence, and rehabilitation. However, they stipulate that showing mercy is possible when there are grounds for doing it in the evidence. Other times, courts signal the need to balance justice and mercy, seeing its origins in the old days. "Today, as ever, the sentence of the court must address and balance the ancient principles of justice and mercy"[62].

Secondly, sometimes the courts emphasise that the sentence in a given form was issued "purely as an act of mercy" or is "only an act of mercy"[63], which thus suggests a departure from the principles of justice as a reference point for the sentencing process. This results in the defendant's avoiding punishment, especially imprisonment, which he or she "deserved"[64] and which would be "fully justified" to be imposed on him or her[65]. However, being guided by mercy rather than justice is not objectionable whenever the departure from the requirements of justice was of an extraordinary nature, justified by the specific circumstances of the case. In "exceptional cases", the court, as an "out of compassion or mercy", "departs from its usual sentencing policy"[66]. In emphasising that consideration of mercy is not standard, courts typically invoke "exceptional" or "highly unusual" circumstances, "exceptionally strong mitigation", a "uniqueness" or "true exceptionality" of the case[67], while adding that this approach is not "a precedent in any way at all"[68].

Thirdly, it happens that courts more or less categorically oppose mercy to justice. For some of them, "a merciful" or "a lenient sentence" is even "an old-fashioned word"[69]. Since the task of courts is to administer justice, hence they cannot be guided by mercy, even if judges are humanly empathetic towards the parties to the proceedings. This position is reflected in statements such as: "I am sympathetic to the plight of [the appellant] and would like to be merciful to him; but in my view justice requires that we dismiss his appeals"[70], or "I repeat my sympathy for the plight of the wife [the appellant], but I cannot act out of mercy and must apply the law as I believe it to be"[71].

Some courts, expressing scepticism or restraint before showing mercy, pointed out that a possible merciful resolution of the case is not a costless solution,

[62] Hussain & Anor, R. v. [2010] EWCA Crim 94, pt. 44. Cf. also Kenward v. AG [2000] JCA 137, pt. 11; Attorney General Reference No. 83 of 2001 [2001] EWCA Crim 2443, pt. 26.
[63] AG v. Schneider [2005] JRC 141, pt. 7; AG v. Andrade and Ors [2006] JRC 029, pt. 21; AG v. De Sousa [2019] JRC 147, pt. 5.
[64] AG v. De Sousa [2019] JRC 147, pt. 5.
[65] AG v. Appleyard [1998] UR 20.
[66] AG v. Richomme [2009] JRC 108, pt. 5.
[67] AG v. Ford [2004] JRC 062, pt. 3; Meehan & Ors, R v. [2009] NICC 59, pt. 49; Hussain & Anor, R. v. [2010] EWCA Crim 94, pt. 45.
[68] AG v. Cleaver [2016] JRC 080, pt. 3.
[69] Attorney General's Reference No 76 Of 2002 [2002] EWCA Crim 2344, pt. 17.
[70] Weth & Ors v. HM Attorney General & Ors [2001] EWCA Civ 263, pt. 63.
[71] Dukali v. Lamrani [2012] EWHC 1748 (Fam), pt. 54.

in the sense that the benefit achieved by the party experiencing mercy goes alongside with negative consequences for the other party to the proceedings or other entities. As noted in one case, the term "exercise of mercy" commonly refers to the release of a trustee from liability for breach of trust under section 61 of the British Trustee Act 1925 whenever he or she acted "honestly and reasonably". The court was critical of combining this provision with mercy. It held that when deciding to release a trustee from liability, it must balance fairness towards the trustee with the consequences of its decision for the beneficiaries. Therefore, in this case, "mercy lies not in the free gift of the court. It comes at a price"[72]. Similarly, in another case, the judge, explaining why he "has to apply justice and not mercy" in the matter of reimbursement of court costs, stated: "if I was merciful to you, I would be unjust to them [the other party]"[73].

The judicial decisions also raised the issue of the threat to the uniformity of law and judicial practice resulting from taking mercy into account. In one drug crime case, the appellate court overturned the merciful judgment of the first instance court as "unduly lenient"[74]. It cited the need for legal coherence, which would be undermined by different treatment of different perpetrators, whose personal situation could also be considered a mitigating circumstance. According to the court, each person has some mitigating factors. *In concreto*, the defendant's admission of guilt, remorse, and expression of concern for his parents did not help[75].

Other courts, without discrediting the idea of mercy in the justice system, rightly pointed out that showing it must be a reflective and reasonable act in which the court considers several factors and criteria. For example, in a case concerning the disciplinary liability of a doctor, the court stated that when justifying a second chance for the appellant, one must consider not only the risk that the person who has been shown mercy may harm other people, but also the issue of undermining public trust in a given profession and its representatives[76].

The reasons for some rulings indicate that the courts themselves experience some confusion when it comes to choosing an attitude towards the place of mercy in the judicial process. In one case, the court stated that "while I have the greatest sympathy with anyone faced with the predicament that [the appellant] and his family suffered on that day it is the task of this court to apply the law impartially and coldly vis-à-vis all citizens and unfortunately I cannot act to grant any relief to [the appellant] simply on the basis of a sympathy". However, contrary to this declared position, the court finally concluded that "sometimes the performance of

[72] Santander UK Plc v. RA Legal Solicitors [2014] EWCA Civ 183, pt. 34. Cf. also Lloyds TSB Bank Plc v. Markandan & Uddin (A Firm) [2012] EWCA Civ 65, pt. 61. In addition to the statutory requirements of honesty and reasonableness, the court also mentions caution and conscientiousness.
[73] Phillips v. General Dental Council [2017] EWHC 2587 (Admin), pt. 28.
[74] In another case, the court concluded that mercy spoke in favour of upholding the "unduly lenient" sentence. In its opinion, it was possible and appropriate to "temper the exercise of justice with mercy". Attorney General's Reference Nos 59, 60, 61 of 2004 [2004] EWCA Crim 2488, pt. 31.
[75] Abada, R. v. [2006] EWCA Crim 1182, pt. 16.
[76] Arunachalam v. The General Medical Council [2018] EWHC 758 (Admin), pt. 62.

justice in these courts has to be tempered with mercy" and therefore reduced the court costs payable by the applicant[77]. Similarly, the Supreme Court of Ireland pointed out that although

> the trial court is under an obligation to administer justice rather than mercy but very often the reasons given [by the victim, relative of the victim, relative of the accused] for the plea of mercy are reasons which are relevant to the assessment of a just sentence[78].

7. Showing Mercy as the Subject of a Dispute over the Competences of the Judiciary and the Executive

Most often, the courts addressed the issue of the relationship between justice and mercy in the context of the issue of the division of competences of the judiciary and the executive power. The distinction between the two concepts made at that time was more radical than when both categories were combined with the judicial process. In other words, the courts, stating that a given competence belongs to the executive power, not the judicial power, and its implementation is part of the prerogative of mercy and not the administration of justice, particularly emphasised the differences between mercy and justice.

The issue of the jurisdiction of the judiciary or the executive that was usually discussed in jurisprudence – at the same time involving the subject of justice and mercy – concerned such issues as: pardon[79], commutation of penalty[80], taking into account in the appeal process evidence of facts or events occurring after sentence by a trial court or the impact of the deterioration of the convict's health on his or her imprisonment service (remission of sentence or temporary release)[81].

As stated in one of the judgments of the Judicial Committee of the Privy Council,

[77] Welsh, R v. Watford Borough Council [2004] EWHC 1839 (Admin), pts. 9 and 40.
[78] DPP v. R. O'D. [2000] 4I.R. 361.
[79] Lewis and Others v. The Attorney General of Jamaica [2000] UKPC 35. Cf. also Lewis v. Attorney General of Jamaica [2001] 2 AC 50 .
[80] This institution involves replacing one penalty with another, milder one. It has its roots in the royal prerogative to show mercy. Unlike pardon, commutation of penalty does not abolish the conviction itself. Callan v. Ireland & Anor [2011] IEHC 190. Cf. also Brennan v. Minister for Justice [1995] 2 ILRM 206, 218.
[81] The EWCA assumes that the deterioration of an inmate's health condition and a reduction in his or her life expectancy are not grounds for the court to reduce the sentence "even as an act of mercy." Transferring a prisoner to hospital or releasing him or her on "compassionate grounds" is the domain of the Secretary of State and the prison authorities. The appellate court cannot then intervene out of compassion if the contested judgment was lawful, and the penalty was appropriate in the light of the evidence and the circumstances of the case at the time the judgment was issued. DM, R. v. [2021] EWCA Crim 203, pt. 32; Watson, R. v. [2021] EWCA Crim 1248, pt. 22. Cf. section 248 of the Criminal Justice Act 2003.

> Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility [...] It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions[82].

Similarly, in another Judicial Committee judgment it was emphasised that

> executive clemency is not part of the sentencing process; it is a separate power which falls to be exercised, where appropriate, independently of sentencing. There is no reason to doubt the general proposition that the exercise of mercy is distinct from the application of the sentencing process. There are clear differences between them. One is a judicial process; the other is not[83].

The Irish Court of Criminal Appeal also stipulates that it "does not exercise the prerogative of mercy" and "is no more a court of mercy than it is a court of vengeance", explicitly stating that "mercy is specifically a power of the executive", as in the case of the President's competence expressed in Art. 13 section 6 of the Constitution. In turn, "sentencing includes the concept of justice", so "the Court of Criminal Appeal is a court of justice"[84].

Both the Judicial Committee of the *United Kingdom Privy Council* and the Irish Court of Criminal Appeal admit that, to some extent, courts also consider mercy in the adjudication process, but in their opinion, this does not undermine the fundamental difference in the actions of the judiciary and the executive. As the UKPC notes, although "a sentencing court may be activated by mercy, amongst other considerations, that is not by any means its sole, or even principal, consideration"[85]. In turn, the Court of Criminal Appeals points out that it happens that the court, while administering justice, and the executive, while showing mercy, partially consider the same issues (circumstances), but in their case we should still talk about two separate processes. "Thus, under the separation of powers, the executive and its bodies exercise the prerogative of mercy. The courts, make the judicial decision of sentencing, decide in accordance with justice"[86]. While the role

[82] Reyes v. R (Belize) [2002] UKPC 11, pt. 44.
[83] Lendore & Ors v. The Attorney General of Trinidad and Tobago [2017] UKPC 25, pt. 19. Cf. A. Novak, *Comparative Executive Clemency The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective*, Routledge, London, 2015.
[84] DPP v. Cunningham [2002] IESC 64, pts. 36 and 34.
[85] Lendore & Ors v. The Attorney General of Trinidad and Tobago [2017] UKPC 25, pt. 19.
[86] DPP v. Cunningham [2002] IESC 64, pts. 36 and 34.

of the courts is to make factual findings and judicial assessment, "the function of the Executive which is to deal with questions of leniency and mercy"[87].

Mercy is presented as something outside the law. It is not "the subject of legal rights" but "begins where legal rights end"[88]. Therefore, the convicted person has no right to be pardoned[89]. Pardon is a common law extra-judicial power exercised by the Crown under the royal prerogative of mercy. It is vested in the Secretary of State for Justice as the minister responsible for those in detention. The royal prerogative of justice ended in the 17th century.

> The Prerogative of Mercy starts where the law finishes. When a lawful conviction and sentence have been arrived at, the convicted person can appeal to the mercy of the Crown […]. The prerogative is a flexible power and its exercise can and should be adapted to meet the circumstances of the particular case[90].

Nowadays, the distinction between judicial justice and executive mercy is not as definitive as it once was[91]. "Although on the merits there is no legal right to mercy there is not the clear cut distinction as to procedural matters between mercy and legal rights"[92]. The exercise of the prerogative of mercy by the executive is not entirely excluded from the scope of judicial review[93]. "If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so"[94].

[87] DPP v Walsh [1989] 3 Frewen 248, 250.
[88] de Freitas v. Benny [1976] AC 239, 247.
[89] Lendore & Ors v. The Attorney General of Trinidad and Tobago [2017] UKPC 25, pt. 29.
[90] Shields, R v. Secretary of State for Justice [2008] EWHC 3102 (Admin), pts. 22 and 24. A similar position is that the prerogative of mercy means suspending the validity of the law in a given case, cf. G. Campagna, "The Miracle of Mercy", in *Oxford Journal of Legal Studies*, 41 (2021), n. 4, pp. 1096-1118.
[91] In the context of the outdated position that the exercise of the prerogative of mercy by the executive is not subject to judicial review, cf. e.g. de Freitas v. Benny [1976] AC 239; Reckley v. Minister of Public Safety and Immigration (No. 2) [1996] AC. Cf. B. Harris, "Judicial Review, Justiciability and the Prerogative of Mercy", in *The Cambridge Law Journal*, 62 (2003), n. 3, pp. 631-660.
[92] Lewis and Others v. The Attorney General of Jamaica [2000] UKPC 35, pt. 52.
[93] Lewis and Others v. The Attorney General of Jamaica [2000] UKPC 35, pt. 108. Cf. J. Schweppe, Pardon me: The Contemporary Application of the Prerogative of Mercy, *Irish Jurist* 49 (2013), pp. 211-227; A. Perry, *Mercy and Judicial Review in the Commonwealth*, https://adamdperry.com/2015/02/18/mercy-and-legal-justice-in-the-commonwealth/ [Accessed: 20/03/2024].
[94] Reg.v. Secretary of State for the Home Department, Ex parte Bentley [1994] QB 349, p. 363. In turn, in the case of refusal to grant asylum and deportation, the court found that the Minister's duty was to "consider" the applicant's request for mercy, but by not taking it into account, he did not have to express it in specific words in his decision. FAF (Nigeria) v. The Minister for Justice and Equality [2019] IEHC 263, pt. 15. Similarly, Odeh & ors v. Minister for Justice and Equality [2016] IEHC 654, pt. 8.

> In this case justiciability concerning the exercise of the prerogative of mercy applies not to the decision itself but to the manner in which it is reached. It does not involve telling the Head of State whether or not to commute. And where the principles of natural justice are not observed in the course of the processes leading to its exercise, which processes are laid down by the Constitution, surely the court has a duty to intervene, as the manner in which it is exercised may pollute the decision itself[95].

Currently, the controversial issue in judicial decisions is not alone the matter of judicial control of the exercise of the prerogative of mercy by the executive, but the scope of this control[96].

Similarly, the prohibition by an appellate court to consider evidence of facts that occurred after a sentence – and which prove that the sentence is excessive or unduly severe – is currently not treated absolutely. On the one hand, the appellate court generally cannot consider the perpetrator's behaviour between the sentence and the appeal, because it is about invoking mercy or leniency, which the executive has the power to do[97]. On the other hand, it is assumed that these circumstances may be important for the court, although not *per se*, but because they throw a different light on the circumstances existing at the time of the sentence[98]. As Justice O'Donnell put it: "I do not think the existence of an executive power of clemency should preclude judicial consideration of a sentence [as to its excessive severity]. Mercy and justice are different concepts but they are not mutually exclusive"[99]. It also happens that the court, referring to itself, talks about the "prerogative of mercy"[100].

8. Summing-up

The study of the reasons for the judgments shows that it is impossible to talk about a uniform approach of the courts to the place and role of mercy in the judicial process. The subject of the discrepancies is primarily the question of whether courts are allowed to be guided by mercy when deciding the cases that they hear and the related issue of the mutual relationship between mercy and justice. The courts that have admitted to taking mercy into account in their judgments largely agree that the grounds for showing mercy lie in the perpetrator's personal circumstances, especially such as his youthful age, poor health, illness of someone close to him or

[95] Lewis and Others v. The Attorney General of Jamaica [2000] UKPC 35, pt. 53 (with reference to Yassin v. Attorney-General of Guyana, GY 1996 CA 3).
[96] Dunn, Re Judicial Review [2010] NIQB 54, pt. 18.
[97] DPP v. Cunningham [2002] IESC 64, pt. 36.
[98] DPP v. Cunningham [2002] IESC 64, pt. 44.
[99] DPP v. Colbert [2016] IESC 69, pt. 17.
[100] AG v. Santos [2015] JRC 077, pt. 25.

her, difficult family, or professional situation. Often, courts accepting the possibility of being guided by mercy drew attention to the importance of the request for mercy made by the victim or the defendant's relatives. Almost every time, when resorting to mercy, the courts emphasised that this solution was of an extraordinary nature, justified due to the exceptional circumstances of the case. Some issues raised in philosophical and legal literature are not the subject of further consideration in judicial decisions, in particular the concept of mercy itself. The analysis of judicial decisions shows that the tendency or readiness to take mercy into account varies in individual jurisdictions. It is significant that over ¼ of the considered judgments in which mercy was invoked come from the courts of the British dependency of Jersey.

Study of the judgments of British and Irish courts allows us to consider the thesis as empirically confirmed that courts, to a certain extent and to a certain degree, are guided by mercy. The courts perceive this as acceptable since they themselves admit this fact in the reasons for their judgments. Even if cases of taking mercy into account are rare or even sporadic in proportional terms, they nevertheless prove that mercy is, to some extent, judicially operationalisable. This, in turn, leads us to perceive doctrinal theories on court (judicial) mercy – formulated in legal and philosophical scholarship in various countries[101] – not in terms of pure academic fantasy, but as having a certain potential to shape the form of judicial practice. Further, more in-depth research on cases where courts invoke mercy may help legal scholars and philosophers formulate more realistic visions of incorporating *argumentum ad misericordiam* into the judicial process.

[101] G. Maroń, "Kategoria miłosierdzia w polskiej nauce prawa karnego i orzecznictwie", in *Prokuratura i Prawo*, 11 (2022), pp. 5-37.