

IS IT POSSIBLE TO DECLARE A QUALIFIED PARDON UNFOUNDED?

É POSSÍVEL DECLARAR INDEFERIDA UMA PERDÃO QUALIFICADO?

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the granting of this type of pardon. We conclude that it is possible to establish a presumption in favor of not granting these pardons as a rational strategy in relation to the principle of security. This is without neglecting to consider the principles of legality and human dignity in the weighing or balancing of principles.

Keywords: Qualified Pardon. Argumentation. Proportionality. Zero Tolerance Policy.

Resumo

Nesta pesquisa, analisamos a base jurídica para a concessão de indultos qualificados. O problema de pesquisa centra-se na concessão de indultos em casos em que os réus têm condenações anteriores por crimes graves em seus registros criminais. Para isso, procederemos de acordo com uma metodologia dogmática e jurisprudencial. Assim, em primeiro lugar, estudaremos os requisitos para indultos qualificados no sistema de justiça criminal chileno. Em seguida, na segunda seção deste artigo, apresentaremos os fundamentos dogmáticos, o raciocínio e o uso de princípios na concessão desse tipo de perdão. Concluimos que é possível estabelecer uma presunção a favor

Abstract

In this research, we analyze the legal basis for granting qualified pardons. The research problem focuses on the granting of pardons in cases where the defendants have previous convictions for serious crimes on their criminal records. To this end, we will proceed in accordance with a dogmatic and jurisprudential methodology. Thus, first, we will study the requirements for qualified pardons in the Chilean criminal justice system. Next, in the second section of this paper, we will present the dogmatic foundations, the reasoning, and the use of principles in

da não concessão desses perdões como uma estratégia racional em relação ao princípio da segurança. Isso sem deixar de considerar os princípios da legalidade e da dignidade humana na ponderação ou equilíbrio dos princípios.

Palavras-chave: Graça qualificada. Argumentação. Proporcionalidade. Política de Tolerância Zero.

Introduction

Due to the complexities currently surrounding pardons, the Chilean academic community is faced with the task of determining their requirements, becoming aware of the degree of discretion allowed in exceptional cases. This situation opens the door to questioning the possibility of controlling any constitutional defects in their issuance. Although legal scholars have attempted to provide political criteria to justify them, the issuance of pardons has sparked more than one debate among academics during President Boric's administration. Within this context, in December 2022, several pardons were granted, including one to the convicted individual Jorge Mateluna and six others involved in the social unrest: Eduardo Santana Torres, Luis Castillo Opazo, Brandon Rojas, Jordano Santander, Claudio Romero, and Bastián Campos. The Chilean prison service (Gendarmery) initially recommended not to pardon them, citing their involvement in events related to the social unrest, among other factors. According to the newspaper *El Mercurio*, Gendarmery's reports on Luis Castillo stated that "he is not deserving of the pardon" (*El Mercurio*, 2023, p. c8), noting further that "he fails to show awareness of the harm caused" and lacked "a mature and critical analysis of his criminal behavior" (*El Mercurio*, 2023, p. c8). Similarly, in the case of Brandon Rojas, the Gendarmery report stated that he showed "no reparation or willingness to change due to emotional immaturity and therefore presents no real possibilities for a successful social reintegration process" (*El Mercurio*, 2023, p. c8).

For its part, the Gendarmerie revealed that in the case of Bastián Campos Gaete, he presented "a high risk of recidivism" (*El Mercurio*, 2023, p. c8) and requires "criminological intervention" (*El Mercurio*, 2023, p. c8). Similarly, in the case of Jordano Santander Riquelme, it was stated that he is a "repeat offender" (*El Mercurio*, 2023, p. c8), assessed as having a "high risk of reoffending" (*El Mercurio*, 2023, p. c8) and shows "denial or distortion of the facts and a lack of self-criticism" (*El*

Mercurio, 2023, p. c8). Finally, he accused the Investigative Police of fabricating evidence in his arrest (El Mercurio, 2023, p. c8). Additionally, six other pardoned individuals (Luis Castillo Opazo, Eduardo Santana Torres, Jordano Santander, Brandon Rojas, Bastián Campos, Claudio Romero) have prior convictions listed in their criminal records (El Mercurio, 2023, p. c8). In the case of Mateluna, there are prior convictions for two cases of armed robbery and one for aggravated robbery (resulting in homicide) in the 1990s. In 2004, he was granted a pardon under the General Amnesty Law, and in 2013 he was convicted for robbing a bank in Pudahuel and for possession of a military-grade weapon (El Mercurio, 2023, p. c8).

In this context, senators filed a claim of unconstitutionality before the Constitutional Court, denouncing the omission of reports from the Gendarmerie in the reasoning behind the pardons. These senators, based on said reports, argued that some of the individuals who were pardoned would hardly be able to reintegrate into society. Among the senators involved were Matías Walker, Iván Moreira, Javier Macaya, Luciano Cruz-Coke, and Rodrigo Galilea (Constitutional Court, 2023, 1:38:26 min; Diario Constitucional, 2023). However, Minister Cordero, addressing this point on Televisión Nacional de Chile, stated that “The Gendarmerie has no authority to recommend or not recommend pardons, [as] that authority lies with the President of the Republic” (El Mostrador, 2023). Although, from a *de lege ferenda* perspective, the pardon as a ground for excluding criminal liability is rejected by some jurists due to the incorporation of the separation of powers, others defend its use in exceptional situations to avoid the excesses of a punitive regime. Thus, the foundations of the pardon lie in political reasoning.

Indeed, when literature seeks to discuss the concept of pardon, it is compelled to examine whether its issuance relies solely on the pure discretion of an act of government, or whether it depends on a structure of legal reasoning in accordance with the principles of Criminal Law. In other words, whether, in deciding to remit, commute, or reduce the sentence of the applicant, the decision must weigh or balance the principles of security and dignity (Guerra, 2022, pp. 324 ff.). In the first case (a purely discretionary act), the principle of security is disregarded, leading to an irrational application of this institution - so much so that, if accepted, it may endanger social stability. For this reason, we argue that this type of politico reasoning structure is essential in qualified cases of pardon.

In the first section of this paper, we will present the requirements for granting a pardon within the Chilean legal system. In the second section, we will examine the dogmatic foundation of pardons and briefly refer to certain considerations in the case of former Frente Patriótico member Mateluna. In the third section, we will analyze

the arguments that have been put forward regarding the constitutional review of the presidential decree that grants pardon. Fourth, we will present different criteria discussed in the literature for justifying the issuance of pardon from a political perspective. In the fifth section, we will study the importance of legal principles in the granting of a pardon. Finally, we aim to demonstrate that not only are political considerations relevant when granting a pardon, but that such pardons should also be guided by the principles of security, legality, and human dignity - principles that are, as a result, essential to justify a governmental act of this nature within the Chilean legal framework.

1. Legal requirements

Any convicted individual may request a pardon from the President, in accordance with the requirements established by Law 18.050 (hereinafter “the Law”). However, this pardon shall not be granted in cases where the person has been convicted of a terrorist act (Villegas, 2016). According to Article 93 No. 4 of the Penal Code, pardon results in the remission, commutation, or reduction of the sentence, meaning that the pardoned individual remains labeled as a convict for the purposes of determining aggravating circumstances in the case of recidivism. This is because pardon only applies in the case of a final and binding sentence. Therefore, the individual requesting the pardon must present the corresponding certification of such sentences, whenever possible. In this context, according to the Law, a pardon will be denied to a convicted individual “when they are not serving their sentence in the corresponding facility, if sentenced to imprisonment, incarceration, or confinement; or in the location designated in the sentence, if it imposed relegation as a penalty” (Law 18.050, 1981, art. 4 letter a); or “when the request is submitted before one year has passed since the date of the decree that resolved a previous request” (Law 18.050, 1981, art. 4 letter b).

Considering the foregoing, we can see that pardoning a person with previous convictions for murder or robbery with violence is a matter that requires a well-founded qualified pardon. Hence, the interaction between Articles 4 and 6 of Law 18,050 allows us to observe that the president, in the case of those convicted of homicide or other serious crimes such as robbery with violence and intimidation, may grant a pardon even if the requirements of Article 4 of the law are not met. For example, the convicted person must have served two-thirds of their previous sentences and must not have been convicted of two or more crimes that warrant effective punishment, among other requirements. However, these requirements were

not met in the granting of the pardons mentioned in the introduction. Beyond the previous records presented by some of the convicted individuals in the Introducción of this paper, the President Boric used his discretionary power to grant pardons in the case of Jorge Mateluna and six others involved in the social unrest: Eduardo Santana Torres, Luis Castillo Opazo, Brandon Rojas, Jordano Santander, Claudio Romero, and Bastián Campos.

Likewise, a pardon will be denied in cases involving “habitual offenders or individuals who have previously been granted a pardon” (Law 18.050, 1981, art. 4 letter c), or “when the convicted person has not served at least half of their sentence, in cases where they were convicted as perpetrators” (Law 18.050, 1981, art. 4 letter d), particularly in cases involving the embezzlement of public funds, fraud, and unlawful exactions, or in the case of crimes or other lesser offenses committed by public officials in the exercise of their official duties. The request will also be denied under the circumstances in cases of crimes against property, persons, sexual integrity, as well as in instances of robbery, fraud, arson, destruction, among others. However, individuals convicted of offenses to which the Law assigns a penalty no greater than minor degrees of imprisonment, incarceration, confinement, banishment, or relegation shall not be subject to this requirement (Law 18.050, 1981, art. 4 letter d, second paragraph).

On the other hand, a pardon will be denied in cases where the convicted person has not “served at least two-thirds of the sentence, in cases of repeat offenders, individuals convicted of two or more crimes punishable by afflictive penalties, and in cases involving parricide, aggravated homicide, infanticide, robbery resulting in death... and the production or trafficking of narcotics” (Law 18.050, 1981, art. 4 letter e). It will also be denied “if the individual was granted parole and that benefit was later revoked, and the person is not deemed eligible for a pardon by the Conduct Tribunal of the respective facility, which must, for this purpose, review the background and provide a report on the request” (Law 18.050, 1981, art. 4 letter f).

However, convicted persons who, in the cases mentioned in the previous paragraph, “have not served at least half of the sentence ... when they have not served at least two-thirds of the sentence in cases of recidivists, convicted of two or more offenses deserving afflictive penalties and for the crimes of parricide, qualified homicide, infanticide, robbery with homicide as provided in article 411 quáter of the Penal Code, and drug manufacture or trafficking” (Law 18.050, 1981, art. 4 letter e). Nevertheless, it will be plausible to consider a pardon request when at least five years have passed since the conviction. The computation of time for the purposes of the crimes “shall be done in accordance with the provisions of articles 14, 15, and

16 of decree No. 2,442 of October 30, 1926, on the Regulation of the Conditional Release Law"(Law 18.050, 1981, art. 4 letter f, third paragraph). It is important to note that recidivism "shall not be taken into account after ten years have passed since the commission of the act that led to the previous conviction, in the case of a crime; or after five years, in the case of a lesser offense" (Law 18.050, 1981, art. 4 letter f, third paragraph). If the convicted individual has multiple convictions, this rule shall apply individually to each one.

Additionally, "the determination as to whether the requirements are met shall be the responsibility of the President of the Republic" (Law 18.050, 1981, art. 4 letter f, final paragraph). Moreover, notwithstanding the previously stated provisions, a pardon may be requested - without any further requirements beyond not having been convicted of a terrorist offense - when a final and binding sentence has been issued, accompanied by certification of said sentence, in cases where "the individual has less than three months remaining on their sentence" (Law 18.050, 1981, art. 5). In this sense, Article 6 of the Law establishes that in exceptional cases - by means of a substantiated supreme decree - the President may waive the requirements set forth in this legal framework (Law 18.050, 1981, art. 6), provided the sentence is final and binding and does not relate to terrorist conduct. In such cases, the procedures for enforcement must follow the rules set forth in a supreme decree issued by the Ministry of Justice for the application of this Law.

Therefore, although the grounds for extinction of criminal liability are set out in Article 93 of the Chilean Criminal Code, which covers the death of the offender, the serving of the sentence, amnesty, pardon, forgiveness by the victim, the statute of limitations on criminal proceedings, and the statute of limitations on the sentence, it is important to note that we understand qualified pardon to mean those cases in which, by means of a well-founded supreme decree, the President of the Republic of Chile has the power to disregard the requirements established by Law 18.050 and the procedures indicated in its regulations in order to grant a particular pardon. Thus, provided that the beneficiary has been convicted by a final judgment and that the offense does not involve terrorist conduct. This is the definition we will use throughout this research and in the following sections.

Finally, it is important to note that a consistent distinction between criminal liability and pardon must be made before continuing with the following sections. Criminal liability is understood to be a judgment attributing criminal responsibility in which the agent demonstrates knowledge and control of the situation attributed to them at the normative level but also at the factual level in a first-level indictment (Sánchez-Ostiz, 2014, p. 39). However, in the case of a sentence, we understand

that we are dealing with a conviction which, once all the deadlines for filing appeals have passed, can be extinguished through a pardon. In other words, although the conviction remains on the convicted person's record, they do not have to serve the sentence if a pardon is granted.

2. Arguments in favor of granting qualified pardons

For instance, since pardons gained prominence under President Boric's administration - following his instruction to the then Minister of Justice to proceed with them - their justification becomes particularly relevant in this context. The argumentative strategy behind a pardon becomes essentially significant when weighed against the principles of legality, legal certainty, and human dignity. Indeed, one must explain: why does a citizen deserve to have their sentence remitted, commuted, or reduced despite being held responsible for a crime? In other words, why does the convicted individual deserve a pardon in the name of achieving a political objective?

The main argument in favor of granting pardons - specifically for some of those convicted in connection with the social uprising - lies in the reports prepared by the National Directorate of the Prison Service (*Gendarmería*). In this regard, the employment history, educational background, and reintegration prospects of these individuals provided sufficient grounds to justify the pardons granted in many of the supreme decrees issued in December 2022 under President Boric's administration (El Mostrador, 2023, Exempt Decree No. 3234 and Exempt Decree No. 3221). However, if these decrees are intended as acts of humanitarian recognition, why do they provoke such public controversy? The answer lies in the criminal records of those receiving pardons. While it may seem reasonable to support a pardon for individuals with prior convictions for minor offenses or misdemeanors, particularly when supported by reports demonstrating good conduct and positive reintegration potential, the public reaction appears to change significantly when applicants have prior convictions for serious crimes on their records. In this sense, it is important to state that, from a political perspective, it is not desirable to turn pardon into a general rule. As an exceptional measure, one might otherwise come to believe that the commission of any crime - during a period of social unrest - would fall within the acceptable boundaries of reasonableness provided by the pardon process.

For example, in the case of former *Frente Patriótico Manuel Rodríguez* member Jorge Mateluna, it can be noted that he was serving a prison sentence (at Colina I Penitentiary Center) for the crimes of unlawful possession of military-grade weapons and aggravated robbery with intimidation, in which he was deemed the perpetrator.

Nevertheless, the National Directorate of Gendarmería of Chile, in the report submitted to the Ministry of Justice, found it appropriate to grant the pardon based on the following elements:

“Record of the Conduct Tribunal of the Colina I Penitentiary Center, dated September 5, 2022, which recommends granting the benefit to the convict Mateluna, considering that the inmate maintains all his psychosocial reports as positive, with no issues limiting his capacity for social reintegration.”
(*Exempt Decree No. 3212, 2023*)

The pardon also referenced the social report dated September 5, 2022, which stated that the convict “presented a low level of risk for criminal recidivism” (*Exempt Decree No. 3212, 2023*). Additionally, the report noted that the applicant “has a stable support network that serves as a source of socio-emotional stability, in addition to having personal and financial resources in the event of release” (*Exempt Decree No. 3212, 2023*). The psychological report of the same date stated that the applicant exhibited “viable life projections, focused on resuming the resocialization process that had begun prior to serving the current sentence” (*Exempt Decree No. 3212, 2023*). Furthermore, according to this last report, Mateluna avoided the following:

“[a] criminalized contagion during incarceration, [as he] operationally understands the punitive context in which he finds himself and has shown a positive attitude toward intervention and supervision within a controlled environment. This is evidenced by 28 two-month periods of very good behavior while in prison. He demonstrates both intellectual and emotional intrinsic motivation, with genuine internal references for change (his wife and children), which predisposes him to assign greater value to family and society” (*Exempt Decree No. 3212, 2023*).

Regarding conduct monitoring, the pardon decree dated September 6, 2022, stated that Mateluna “has maintained a record of Very Good behavior, uninterrupted, from the May–June 2015 period through the July–August 2022 period” (*Exempt Decree No. 3212, 2023*). His health report, dated September 5, 2022, indicated that he “has no history of chronic illnesses or psychiatric disorders” (*Exempt Decree No. 3212, 2023*). The occupational report from the same date noted that Mateluna “had a work history prior to incarceration in the field of cultural management, and that his plans are connected to activities he engaged in prior to his current conviction.

Resuming this work constitutes a protective factor against participation in criminal or criminal-related activities” (*Exempt Decree No. 3212, 2023*). The employment report from September 5, 2022, further stated that the former *frentista* displayed “Very Good work conducts throughout all four two-month periods of the year 2022” (*Exempt Decree No. 3212, 2023*). In this context, the educational report dated September 2, 2022, showed that the convict “was exempt from educational obligations, yet, while incarcerated, enrolled in an online diploma program at the University of Santiago, Chile, which he successfully completed. He was congratulated by the University Director, Mr. Rodolfo Jiménez, and received a final grade of 6.5 for his submitted work” (*Exempt Decree No. 3212, 2023*).

All these considerations suggest that, in the case of Mateluna - as well as in that of other pardoned individuals - his release does not pose a risk to society. Therefore, based on the indicators from the social, occupational, psychological, and behavioral reports, the decision to grant a pardon would initially appear reasonable. However, the omission of prior convictions from his criminal record raises serious concerns. In this regard, we believe that the exclusion of previous convictions cannot be left out of the reasoning behind the pardon. Such an omission renders any pardon arbitrary and the result of inadmissible discretion. While Article 6 allows, in exceptional cases, the waiving of the prohibition established in Article 4 letter (e), regarding recidivism and prior convictions for serious crimes, we believe the situation still demands proper justification.

Thus, there is a significant difference between granting pardon for humanitarian reasons and doing so in cases involving recidivism or prior convictions for serious crimes. The granting of pardon requires political criterion that carefully weighs the risk of remitting, commuting, or reducing the sentence of a convicted individual. For this reason, it must go beyond the mere fulfillment of the formal legal requirements in qualified cases. A pardon, as an act of government, is the result of democratic processes and a policy guided by the balancing or weighing of fundamental principles. Accordingly, such policy aligns itself with an Enlightenment tradition in relation to those principles. Thus, the key question becomes whether, beyond mere compliance with the requirements set forth in the Law, the pardon meets the standard required by a discretionary rule such as the one provided in Article 6. In the following section, we will examine the constitutional oversight authority regarding a qualified pardon. Then, in the subsequent sections, we will present the various alternatives available to justify the issuance of a pardon.

3. Specification of the constitutional review procedures

Constitutional review refers to the powers held by the Constitutional Court or other courts (in a broad sense) to determine whether the application or existence of a rule is appropriate according to the parameters set forth by the Constitution (Garrote, 2020, pp. 362-368). This review incorporates key elements of the principle of prohibition of excess in the issuance of a supreme decree or other legislative act (Arnold, Martínez, and Zuñiga, 2012). Therefore, whether in the form of diffuse or concentrated constitutional review, there is a requirement for recognition of constitutional parameters when issuing a pardon.

Following this idea of control, the problem lies in the justification of pardon, as it entails not only compliance with the positive requirements of Law 18.050 but also a reasoned decision in qualified cases. In this regard, Article 4(e) of this Law establishes that pardon requests will be denied “when [the convicted individuals] have not served at least two-thirds of the sentence in cases of recidivists, those convicted of two or more offenses punishable by afflictive penalties, and for crimes such as parricide, qualified homicide, infanticide, robbery with homicide as provided in Article 411 quáter of the Penal Code, and the manufacture or trafficking of narcotics” (Law 18.050, 1981, art. 4 letter e).

For this reason, the term *reasoned* (*fundado*) acquires relevance from the theory of legal argumentation to meet an adequate standard in pardon decisions (Martínez, 2019). This is especially true in cases of pardoning individuals who have prior convictions for serious crimes on their criminal records. The pardon demands a burden of argumentation attentive to the parameters of a policy coherent with a liberal and democratic model. Although such a policy may be subject to criticism from some doctrinal perspectives (Mañalich, 2018), it seems to us that it provides rationality to legal decisions in accordance with the contributions of an Enlightenment tradition. In this way, the pardon becomes a discretionary act with limits.

The Chilean Constitution achieves a procedural and substantive balance in the control of private pardons because it not only recognizes the Constitutional Court’s jurisdiction to review the constitutionality of supreme decrees in the case of appeals on grounds of inapplicability, but also in substantive terms in the fundamental right of petition (by means of an action for protection before the court of appeals) and its link to the mandate prohibiting the issuance or adoption of arbitrary

acts, provided that such petitions are made in respectful and appropriate terms. As Ramón-Fernández points out, “the political nature of a government decision does not mean that the government can adopt it in any way it sees fit, disregarding the rules of procedure common to any type of activity,” adding that the “obligation to justify that is, to justify the decision to pardon (...) follows directly from the Constitution itself and, specifically, from the prohibition on arbitrary behavior by all public authorities” (Ramón-Fernández, 2014, p. 218).

However, despite the review of the decision to grant qualified pardons through an appeal of unconstitutionality, mentioned in the introduction to this paper, before the Chilean Constitutional Court. This Court, in its ruling Rol No. 13.965-2023, admitting the appeal for processing, refused to rule on the granting of these qualified pardons, since for the aforementioned Court any challenge against the supreme decrees for deviating from Law 18.050 would constitute a “mere legal reproach” (Constitutional Court Sentence, Rol No. 13.965-2023, 20), adding that it is not within the jurisdiction of this court “to rule on possible defects of illegality which, without leading to unconstitutionality, may be present in the decree in question” (Constitutional Court Sentence, Rol No. 13.965-2023, 20), since it is required “that what is violated be one or more provisions of the Constitution. In other words, it must contradict, transgress, or infringe upon constitutional norms, not infra-constitutional norms” (Constitutional Court Sentence, Rol No. 13.965-2023, 20). The Court held that, in its ruling 13.965-2023, in the case of qualified pardons, “the analysis seems to require even finer dissection, since the dichotomy between unconstitutionality and illegality does not always present clear and undisputed contours that lead to the unequivocal classification of a particular defect in one category or the other, without further ado.” (Constitutional Court Sentence, Rol No. 13.971-2023, p. 108). Hence, it is important to go into detail about the possibilities of sustaining a defect of unconstitutionality in a government act such as a specific pardon.

In this vein, pardons granted for socio-circumstantial reasons or other humanitarian causes serve to control the excesses of the punitive system. For example, a convict may suffer from a terminal illness; another may be paraplegic as a consequence of the commission of an unlawful act; a man could have been convicted for ideological reasons that made it impossible to respect due process; and a person might have been convicted for attacking the life of the individual who raped and killed his daughter, with the crime of the aggressor being confessed and time-barred. None of these examples, in principle, allow us to assert that granting a pardon would be arbitrary. In these cases, human dignity prevails over legality and security, and

this balance - which does not erase the conviction from the individual's criminal record - is hardly subject to being qualified as arbitrary. The pardon operates in qualified cases, which entails an analysis that goes beyond a mere exegetical exercise of certain positive requirements demanded by the legislator. Once it has been established that the pardon requires a reasoned supreme decree in qualified cases, this decision to grant a pardon creates a scope that demands not undermining security in favor of the dignity of the convicted person. Otherwise, merely considering legal control in its issuance may conceal an authoritarian logic that endangers the pillars of a democratic society.

The pardon cannot be decided based on a single principle, since principles are maxims that materialize in different forms. Although principles and rules are normative structures, they differ in function. Thus, the balancing of rules is possible through the operation of weighing or balancing between principles to reach a solution. This allows identifying rules that must be applied in a specific case. In this regard, concerning the interaction between principles and rules without succumbing to the temptation to resolve everything through the balancing of a single principle, as in the case of legality (Sánchez-Ostiz, 2012, pp. 59-60 and pp. 69-91; Alexy, 2001, p. 83). If the pardon meets the requirements of a principled argumentation structure, it is part of a true social policy. This means it ceases to be unjustified, and the applicant deserves not to suffer the consequences of the imposed penalty. In this way, the pardon recognizes the jurisdictional bodies' competence and mitigates the fulfillment of punishment. Thus, its control from political-criminal parameters - in cases of broad discretion - constitutes a reasoning guide to determine whether there is an adequate justification. This goes beyond the requirements of a standard case where no prior convictions appear in the applicant's criminal record.

Therefore, in cases of recidivism, previous pardons, or multiple prior convictions for crimes, it seems that the level of the burden of argumentation increases. Although the beneficiaries could not waive this, and one might think that declaring it unconstitutional would affect the fundamental guarantees of those who have benefited from the pardon, Article 6 of the Law presents a rule that could be reviewed by the Constitutional Court. Thus, Article 31 of the Organic Constitutional Law of the Constitutional Court provides that it shall have full jurisdiction to decide "on the constitutionality of supreme decrees, whatever the alleged defect, including those issued under the autonomous regulatory power of the President of the Republic" (Carmona, 2010, p.1). While it seems weak to argue that omitting Gendarmería reports in the issuance of pardons renders them unreasoned, the convictions on the applicants' criminal records must be considered when granting them. For this rea-

son, in qualified cases, broad discretion demands - in accordance with Article 6 of the Law - the balancing and compensation of the principles of security and human dignity.

4. Dogmatics, motivation, and principles in legal reasoning

In literature, some authors reject the institution of pardon as a ground for the extinction of criminal liability. For them, the pardon only made sense under a monarchical regime to limit the exercise of authority. However, legal doctrine today accepts the granting of pardon based on political grounds. For example, Cury justifies its existence by stating that it constitutes “an act of understanding and benevolence toward the offender’s personality, their living conditions, their motives, their character traits, etc.” (Cury, 2005, p. 792). Thus, it is logical that a pardon should be granted for humanitarian reasons rather than ideological purposes.

Thus, a pardon cannot result from an arbitrary power that undermines the authority of the courts. It only remits, commutes, or reduces an already imposed sentence “for reasons of State or due to the existence of a serious or irreversible health condition, duly certified, that entails an imminent risk of death or physical incapacity of such magnitude that the individual is unable to care for themselves” (Cury, 2005, p. 717). Although there are *de lege ferenda* arguments to reject the issuance of pardons, these are not applicable given the existence of Law 18.050. Such proposals for rejection merely help to outline the political importance of this decision. If we accept this idea, then our focus must shift to the arguments that justify the pardon itself.

Based on the foregoing, it is possible to consider that every act of government requires motivation, even when it concerns a pardon granted by the president. Thus, motivation constitutes the foundation and duty of every administrative act and a right of the citizenry in decisions that may have a broad impact (Cordero, 2017, pp. 249-250). Accordingly, the principle of security provides stability to the decisions adopted by any administrative body in qualified cases. Consequently, the principle of proportionality considers both the means used and the objective sought with the clemency granted by the authority, ensuring that a proper consideration of these factors is rational. Motivation entails proper management of decisions impacting the social system.

For this reason, the Constitutional Court may control the procedure adopted

to grant a pardon through three perspectives: a) the citizens' need to be informed about the pardon decision; b) the power to file a constitutional challenge against possible constitutional defects in the issuance of a supreme decree; and c) providing a space for an examination proper to the democratic process regarding its foundations. Thus, the first perspective requires the president to focus on the purpose of the controversy. The second demands that the decision weigh not only the factual premises of the case but also the dogmatic aspects involved concerning the discretionary rule in question. Finally, the third perspective requires that motivation is not a mere instrument of legality in the pardon decision.

In this sense, the term motivation in administrative and judicial decisions demands a reasoned pronouncement based on the contributions of legal argumentation theory, since mere compliance with the positive requirements imposed by the legislator is insufficient in discretionary norms. It is precisely the existence of these norms that allows a wide margin of discretion, which may be subject to constitutional review. In this context, sound criticism enables us to demand a certain standard of argumentation that is not limited solely to criminal procedural matters, and which we believe can be helpful as a guideline in cases of qualified pardons (Coloma, 2012). These preliminary considerations lead us to examine why pardons in cases of recidivism should be accepted. The reason is that these qualified cases require establishing coherent arguments grounded in a criminal policy that balances the principles of any enlightened society. Consequently, if a person is responsible for the commission of three crimes, it hardly seems that a pardon could be a mechanism for social reintegration.

However, this consideration would imply assuming some issues. Firstly, the person responsible for three serious crimes would appear to be undeserving of a pardon in the event of a fourth conviction, except in the case of serious illness. In that sense, rather than an absolute rule, we could say that it is a simple presumption that would admit evidence to the contrary. Certainly, this would partially nullify the discretion margin of Article 6 of the Law. Second, rejecting the pardon in cases of three prior convictions for crimes, while not binding for the president or the Constitutional Court, would serve as a reasonableness parameter for future pardon decisions. Nevertheless, various authors have conclusively argued that it is even unfeasible to constitutionally review a pardon if it suffers from any defect. From a criminal-constitutional legal point of view, if we accept a margin of discretion governed by political-criminal parameters, then within the Chilean legal system, "it is not enough to include a political review; we also deem imperative the existence of a legality examination conducted by the Constitutional Court, the body that by

autonomasia exercises constitutional control in our country" (Beca, 2013, p. 503).

In that regard, considerations of this nature demand unavoidable foundations, since, according to this decision, the principle of human dignity can never be an excuse to exclude the security of society from the equation (Madrid, 2018). Likewise, a criminal policy that deems valid the principles of Criminal Law appeals to considerations inherent to the prohibition of excess, and its recognition signals a truth that may be present both in the pardon and in cases of disproportionality, such as the issuance of precautionary measures where it is necessary to determine whether the adopted measure is suitable, necessary, and strictly proportional. A policy not only assists the president in granting pardons but also supports judicial bodies, as it provides a set of parameters that help make reasoned decisions according to the severity of the alleged facts and other background information in each applicant's criminal record. Therefore, these discretionary spaces in the Chilean penal system led us to question whether a reasoned pronouncement should be required.

Hence, part of criminal dogmatics indicates that the foundation for control is not only political but also proper to the theory of legal argumentation. In this regard, regarding the determination of penalties, with respect to the greater or lesser extent of the harm caused by the crime, one can observe a favorable position toward controlling this discretionary norm in Chilean legal literature. This occurs despite a majority jurisprudential tendency that holds the interpretation of this norm as facultative and beyond any kind of control (Couso, 2011, pp. 511-517). In sum, a policy aimed at applying the principles of Criminal Law is fundamental in resolving any legal-criminal conflict, although some criminal law scholars have questioned its formulation from conventional parameters (Guerra, 2022, pp. 333 ff.). Next, we present a proposal for policy to grant pardons in qualified cases.

A legal policy demands that the decision to grant a pardon results from the balancing or weighing of principles, rather than from the consideration of a single principle merely to fulfill the positive requirements of a standard pardon case. In this context, according to Professor Corral, "if the 13 decrees have complied with the law, they may be criticized for lack of justification or for being politically motivated measures, but not for being contrary to the legal system. It can be said that they are a bad sign or that, for not having endured abuse, they would have committed crimes, which would denote unjustified paternalism" (Mercurio Legal, 2023, A. 3).

Thus, in cases of recidivism or prior convictions for crimes, it is essential to consider that a qualified pardon involves a discretion that may be subject to review by the Constitutional Court. The problem with the use of principles is that they are difficult to apply within the framework of a system's rules. Their use is challenging

because principles tend to be associated with inherent ideas. However, principles, like rules, are normative structures that allow for optimizing the functioning of the rules of a system. Therefore, in complex cases, principles impact pardons from a policy perspective beyond the positive requirements established by law.

If we are operating within the boundaries of a legal system, we can apply rules only about three deontic contents: security, liberty, and dignity. These contents form the essence of the principles of legality, security, and dignity. Hence, it is difficult to accept that individuals with prior criminal convictions may be beneficiaries of a pardon. This is because sanctions serve a societal purpose, and pardons represent complex governmental decisions. For example, if a person kills a family member, one might think of self-help and retaliate by killing other family members of the aggressor, creating a vicious cycle without end. For this reason, the penal system seeks to punish the guilty party, promote remorse, maintain social order, and free society from revenge, thus avoiding a war of all against all (Ruiz Funes, 2021, pp. 22-24).

Given this, we pose the following questions: Is it possible to reintegrate a person with prior convictions? Should a person who previously committed three crimes be given a fourth chance after committing another? What would the victim's family think if the perpetrator of a fatal crime were pardoned? It thus seems desirable to adopt a political criterion that weighs the principle of security in the equation, i.e., in the case of three prior criminal convictions, the commission of a fourth crime should be punished. It seems unlikely that a person with three prior criminal convictions could magically transform into a law-abiding citizen.

Two opposing theses arise regarding the issue of pardons in qualified cases. On one hand, discretionary rules cannot be subject to review because there are no measurement standards to identify whether the argumentation is constitutionally deficient. On the other hand, discretionary norms could be controlled, with the answer lying in legal argumentation theory. This last path is where principles come into play in the foundation of a pardon decree. In other words, a policy allows us to respond to the wide discretion granted by pardons in qualified cases. It is thus an appropriate tool to motivate the granting of a pardon in political terms, recognizing the relevance of principles as mandates of optimization.

Different studies on the normative content of discretionary rules conceive the motivation of interpretation as the result of a rational argumentation strategy demanding a certain standard. Although there are various rules referring to the need to provide reasoning for judgments that apply some rule in the civil or criminal legal system (Romero, 2000, pp. 576 et seq.), this issue is seldom addressed regarding

pardons, since the literature largely leaves this decision exclusively to the executive branch. As generally occurs in Chile, pardons are issued swiftly, generating uncertainties about what standard of motivation is possible to require.

Recent pardons granted during President Boric's administration have caused social tension. Therefore, we have sought to address this issue by exploring the role of principles in interpreting the pardon rule in the Chilean system. Thus, this institution hardly can be interpreted without considering political criteria in its foundation. Otherwise, any argumentative complement would merely reflect a negligent will when granting pardon. In the following section, we will present lines of political argumentation that would justify rejecting pardons as unconstitutional when the pardoned individuals have prior criminal convictions in their criminal records.

5. Zero tolerance arguments

A recent study on the political foundations of a zero tolerance model accounts for its reception in comparative models. Although some authors currently express disagreement with this approach, one could highlight that, from this perspective, a person with three prior criminal convictions on their record could not be granted a pardon in qualified cases. Much of the criminal law literature rejects the application of a zero-tolerance model in society or three strikes models, partly based on criteria of general preventive nature and on criminological or sociological arguments regarding the effective reduction of crime rates. This is even though such models generally call for life imprisonment in the event of a third conviction for violent or serious crimes and that their objectives are focused on repeat offenders and deterring future offenders through severe penalties (Weidenslauffer, 2023, p. 1). However, in a recent monographic article exploring its foundations from a philosophical perspective, we addressed arguments related to liberty, whose pillars derive from the works of Bentham and Beccaria (Guerra and Madrid, 2024). Wilson proposes zero tolerance as a strategy to exert pressure both to reclaim urban centers and to equip the police with greater means of control, since, in his view, while a zero-tolerance model does not reduce crime rates, it provides greater (psychological) security to citizens in public spaces.

The reason for considering political arguments against granting a pardon in this context boils down to this: having three prior convictions for serious crimes cannot be irrelevant when granting a pardon, which demands that, except in humanitarian cases such as terminal illness or senile dementia, a pardon would seem to be

inadmissible as a presumption and not as an absolute rule. The political motivation behind the pardon frequently points to criteria of dangerousness that clearly align with offender-based criminal law, specifically the risk that pardoning a moral agent in qualified cases entails. These zero tolerance criminal policy considerations compel us to reconsider certain unpopular arguments in criminal law. Special prevention theories always carry the risk of incorporating ideological elements that are difficult to reconcile with liberal and democratic criminal law (Guerra, 2024). Nevertheless, a discretionary rule such as the pardon in qualified cases encourages reflection on the problem of depersonalizing agents who do not meet the requirements of a law-abiding citizen. The possibility of motivating decisions aligned with the nature of deserving behavior exceeds the cognitive and normative expectations of any citizen, particularly in cases where alternative sentences or reduced penalties have been applied previously due to mitigating factors.

Such reflections on the motivation especially demanded in pardons for qualified cases are echoed in political literature, and their omission should be subject to control if challenged on constitutional grounds before the Constitutional Court. Indeed, these political foundations regarding the possibility of granting pardons in qualified cases provoke discussion and tension in various comparative legal systems. They rest on applying special preventive criteria that allow control tools in situations that are certainly risky for society based on concrete antecedents a person or moral agent may present in their record. The executive's reasoning is key to overcoming a mere mechanical application dominated by political agreements in the pardon process. Every decision on pardons in qualified cases should be accompanied by ideas that uphold the institution's intended purposes.

Certainly, if the premises of a zero-tolerance model predominated in public government policies, denying a pardon in qualified cases - namely, those with three prior convictions for serious crimes and no humanitarian justification - would not pose a difficulty, since such a pardon would only be justified positively as a discretionary rule not subject to control. However, grounding pardon in political terms reveals its function as an interpretive activity that cannot be exclusively subject to the president's argumentative strategy in each case. In effect, even if the decision is granted to the president, it cannot be overlooked that it must be founded and cannot simply arise from the positive fulfillment of certain requirements, as the Law on Pardons in Qualified Cases demands motivation.

Nonetheless, a more flexible use of pardons can be observed initially in literature, justifying their foundation outside criminal policy. The purpose of any pardon would be to adequately apply the rule according to the risk indicators present in

each case, expanding the notion of offender-based criminal law in these instances. The problem lies in determining the boundary between the principle of security (considering the accused's prior convictions), the principles of legality, and human dignity to present an appropriate argumentative strategy planning on the matter.

The requirement to justify a pardon arises from the need to go beyond the mere reflexive application of the rule. It essentially results from an assessment, a reasoning that, legally speaking, cannot be completed without considering the political criteria that allow for the reintegration of a convict in qualified cases. The pardon decision cannot be a product of axiomatically neutral discretion, as it inevitably entails a societal risk if the security principle is not considered. The president cannot impose a despotic reasoning that suits their convenience. The pardon decision must stem from a perspective consistent with the principles of criminal law - that is, one that aligns as much as possible with the limits of the zero-tolerance model: especially in cases of pardoned individuals with prior convictions for socially significant crimes. In any case, it is a complex problem to resolve, with questionable constitutional controls within the Chilean legal system.

Final considerations

In conclusion, we can observe that pardon entails a discretionary margin aimed at fulfilling the principle of prohibition of excess to protect citizens from abuses of authority in the enforcement of a sentence. However, upon examining the rule established by the Law on Pardons in Qualified Cases, we find that it requires motivation that provides stability to the decision. Thus, legal policy aids in the refinement of the pardon process, ensuring coherence through a balancing or weighing of the principles of legality, security, and human dignity. Such a policy can be established as an appropriate instrument to adequately present the factors considered in granting the pardon, avoiding omission of the convicted person's prior sentences in the reasoning. This demands an argumentative strategy in accordance with the standards of the principles of security, legality, and human dignity to prevent arbitrary decisions in a discretionary act of government.

A policy oriented by principles allows for an appropriate balancing between the positive requirements contemplated in the Pardon Law and humanitarian reasons that involve assessing the suitability of the measure, the necessity to select the least harmful means to avoid alternatives that undermine the capacities of the criminal justice system, and proportionality between the security of the legal system and the dignity of the convicted individual. The pardon is an act that, although it

may or may not be subject to constitutional review according to some, cannot leave the door open to any line of argument that affects the foundations of liberal and democratic criminal law. The lack of motivation in granting a pardon places fundamental matters for society at the mercy of the president's authority and mere discretion. These are issues that could transgress the rights of other citizens from the parameters of restorative justice.

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