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## **On the political-criminal effects of the bill that grants a general pardon for humanitarian reasons in the social outbreak**

### **1. Executive summary**

The purpose of this article is to analyze, in political-criminal terms, the bill for general pardon for humanitarian reasons to the persons indicated and for the crimes indicated<sup>1</sup> in bulletin 13.941-17 in the Chilean legal system. With this objective, the report focuses on the political-criminal aspects of the bill in accordance with the principle of legality, human dignity and legal security. But he also makes some considerations about the state of necessity in the context of the social outbreak.

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<sup>1</sup> “Articles 121, 126, 261, 262, 268 e, 268 f, 269, **391 frustrated**, 474 to 481, 484, numbers 1, 6, 7 and 8 of article 485, 486 and 487, numbers 1, 4 and 21 of article 495, numbers 1 and 5 of article 496; and those that are included in the figures of 449 b, 449 c and the final paragraph of 450 of the Penal Code; in Decree 400, which establishes the Consolidated, Coordinated and Systematized Text of Law No. 17,798, On Arms Control, and its modifications; in articles 416 a, 416 b and 417 of the Code of Military Justice, those of Law No. 12,927 on State security, whether or not they are subject to formalized or de-formalized investigation, charged or sentenced, and if they meet the conditions established in the following articles 2 and 3 in a copulative manner.\_\_\_\_ Also, the aforementioned general pardon will be granted to adolescents who have committed the crimes indicated in the previous paragraph and are being investigated in accordance with Law No. 20,084 on Adolescent Criminal Responsibility.” Bulletin 13.941-17, [media.elmostrador.cl/2021/08/Boletin-indulto.pdf](http://media.elmostrador.cl/2021/08/Boletin-indulto.pdf) [access on: 14.09.2022].

In order to study the legislative proposal, the report focuses on the articles presented by the bill that aim to confront “**a disproportionate state response followed by mass arrests and the opening of multiple criminal proceedings, abuses and violations of procedural guarantees** of the accused, which has meant the preventive deprivation of liberty in unjustified terms that would not take place under normal circumstances”. State response “**questioned by national and international institutions** that have reported the existence of serious abuses and massive human rights violations committed by Law Enforcement and Security, which have been reflected in reports of international organizations.”

Hence, we will analyze the articles of the bill according to the aims of a criminal policy oriented to principles.<sup>2</sup> In this context, we will observe how the provisions of the bill in question, using criminal policy as a strategy of argumentation,<sup>3</sup> injures the “**procedural guarantee**,”<sup>4</sup> while the bill questions pre-trial detention measures or convictions for crimes of threat to authority, public disorder, qualified property damage and even **intentional homicide**, among other cases, “**that would have occurred between October 7, 2019, until the day of the presentation of the bill that gives rise to this rule.**”

Judges must be able to issue resolutions or sentences against the will of the citizens, when there are qualified records of the existence of a crime, of the participation of an accused as author, accomplice or accessory and the need for caution that specifically provides for the measure of pre-trial detention. Thus, it does not depend on the *consensus of the majority to dictate a measure of pre-trial detention or conviction for the crimes set forth in article 1 of*

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<sup>2</sup> Our reasoning finds support in the structure of legal conflict resolution that Sánchez-Ostiz exposes as an argumentation strategy, in the development of a principles-oriented criminal policy, see: P. Sánchez-Ostiz, *Fundamentos de Política criminal. Un retorno a los principios*, Madrid 2012, *passim*.

<sup>3</sup> It can be pointed out that one of the authors who has contributed the most to the development of this theory of argumentation through the principle of proportionality has been Robert Alexy. Much of his work focuses on delivering “a rational argumentation scheme for the application of principles based on the maxim of proportionality,” G. P. Lopera Mesa, *Los derechos fundamentales como mandatos de optimización*, “Doxa. Cuadernos de Filosofía del Derecho” 2004, No 27, p. 2, [www.cervantesvirtual.com/obra/los-derechos-fundamentales-como-mandatos-de-optimizacin-0/](http://www.cervantesvirtual.com/obra/los-derechos-fundamentales-como-mandatos-de-optimizacin-0/) [access on: 24.04.2012].

<sup>4</sup> The “popular consensus, on which the totalitarian systems had undoubtedly been based, is not, in effect, a guarantee of the quality of democracy in the face of the degenerations of political power. Thus, the value of the constitution is rediscovered as a set of meta-rules imposed on the holders of public powers, even if they are majority, bound by them to reciprocal separation and respect for the fundamental rights of all,” L. Ferrajoli, *El juez en una sociedad democrática*, p. 2, [biblioteca.cejamerica.org/bitstream/handle/2015/1887/eljuezenunasociedaddemocratica.pdf?sequence=1&isAllowed=y](http://biblioteca.cejamerica.org/bitstream/handle/2015/1887/eljuezenunasociedaddemocratica.pdf?sequence=1&isAllowed=y) [access on: 07.03.2021].

*the bill*. In this sense, reviewing the judges' decisions in the social outbreak seems unacceptable to us.

We are convinced that this revisionist bill affects the role of judges in criminal matters in a democratic system. The judge “should not represent majorities or minorities ... [and] it would even be dangerous for the correct exercise of his/her functions of determining the truth and protecting the fundamental rights of the people tried by him.”<sup>5</sup> The subjection of the judge to the parameters of the legal-criminal system “forces him to decide against the orientations of the majority ... when they conflict with the evidence acquired by him and with the rights of the defendants entrusted to his protection.”<sup>6</sup>

Approving this bill implies a breakdown of the institutional framework, as it enables the *popular consensus* to question the parameters of the exercise of the “principle of prohibition of excess”<sup>7</sup> in criminal matters, through a recursive formula that avoids the means currently provided by the criminal system. In this context, a statistical analysis permeated by *abolitionism* does not seem to us to be a sufficient justification in terms of **proportionality**.<sup>8</sup>

## 2. Purpose of this report

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<sup>5</sup> Ibidem, p. 8.

<sup>6</sup> Ibidem, p. 9.

<sup>7</sup> In this context, the bases of the principle of prohibition of excess are found “in Prussian police law, where proportionality fulfilled a guiding function with respect to interventions on individual liberty. The jurisprudence of the Higher Administrative Court of Prussia (*preussisches OVG*) argued that this principle was binding on the executive branch, for which it coined the concept of ‘prohibition of excess,’ ‘as a criterion of control over the discretionary powers of the administration and as a limit to the exercise of police power.’ However, these manifestations of the principle of proportionality correspond to a time when constitutionalism did not meet the current standards, since the legislator was not subject to the Constitution, and therefore proportionality applied only to the executive branch,” R. Arnold, J. I. Martínez Estay, F. Zúñiga Urbina, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional*, “Estudios Constitucionales” 2012, vol. 10, No. 1, p. 67, [www.cecococh.cl/docs/pdf/revista\\_10\\_1\\_2012/07%20\(065-116\)%20EL\\_PRIN.pdf](http://www.cecococh.cl/docs/pdf/revista_10_1_2012/07%20(065-116)%20EL_PRIN.pdf) [access on 10.03.2013].

<sup>8</sup> In this context, in proportionality, the examination of suitability is complemented by that of necessity, which is correlated with determining whether the means used is the least harmful or damaging among all those available to the agent to achieve the purpose of avoiding a serious harm to his person, rights or those of a third party. Thus, the examination of necessity in the legislative intervention in criminal matters is filled with content, see G. P. Lopera Mesa, *Principio de proporcionalidad y ley penal. Bases para un modelo de control de constitucionalidad de las leyes penales*, Madrid 2006, p. 67. It should be recalled that the principle of proportionality enjoys considerable acceptance within international dogmatics as well as in the jurisprudence of the constitutional courts, see G. P. Lopera Mesa, *Los derechos fundamentales como mandatos...*, p. 2. This “maxim or principle of proportionality may well be defined as a particular development of the theory of argumentation aimed at guiding the application of rules with a principled structure,” *ibidem*.

The purpose of this report is to illustrate the consequences of the bill granting general pardon for humanitarian reasons in the social outbreak. In particular, as we can observe in the following sections, this bill will cause legal effects in Chile contrary to legality, security and human dignity. Thus, article 3 of the bill allows benefiting, with a general pardon, “persons accused or convicted, for events that occurred in protests, demonstrations or social mobilizations, or on their occasion.” In this way, only “circumstantial evidence or any other means of evidence” will be sufficient to prove the above and, likewise, “the resolution rejecting the request will be subject to appeal.”

Article 4 of the bill provides that “in the case of those persons subject to **any precautionary measure depriving or restricting liberty, by the mere fact of requesting its review,**” it will be revoked “until the judge of the case decides on the request.” The resolution that revokes the precautionary measures “in accordance with the previous paragraph, shall not be subject to appeal,” provided that the following elements are present: a) any of the criminal figures of article 1 [of the bill], b) an individual charged with or convicted “for acts occurring between October 7, 2019, until the day of the presentation of the bill that gives rise to this rule,” and c) “persons charged with or convicted for acts occurring in protests, demonstrations or social mobilizations, or on their occasion.”

First, a synthesis of the background of the social context in which this bill is inserted. Secondly, it studies its provisions and emphasizes the jurisprudence that guides the use of pre-trial detention in terms of proportionality. Finally, it considers the political-criminal effects of the legal provisions contemplated in the bill in question.

In this report we have taken into consideration not only the words of the message of the Code of Criminal Procedure regarding proportionality, but also the jurisprudence of the Supreme Court in the jurisdictional control of precautionary measures, in case Rol N° 5044-09, for the issuance of a precautionary measure of art. 155 letter d) -related to the prohibition to leave the country-, RUC N° 0700709466-8, of the Guarantee Court of Valparaíso, and also in case Rol N° 6663-07, of December 10, 2007, in the filing of a protective action in favor of Danilo Alejandro Herrera Hidalgo.

### 3. General Background

When we examine the bill, it reveals the obstinacy of attacking the exercise of criminal jurisdiction by means of a whimsical reading of a series of social events that Chile has experienced to date and that sociology is unable to explain. Without resorting to the parameters of natural law, we can see the need to reinstate its contributions in the critical study of this bill. Thus, we consider in our study the radicals of freedom, dignity and security, as we will inquire into the purpose of a bill that is the legacy of the “revolution phenomenon.”<sup>9</sup>

The bill has a symbolically efficient discourse, which is presented by politicians authorized in the study of dialectical and historical materialism, with the purpose of undermining the bases of the institutionalism of the recursive system. However, the academy can, through the recognition of hierarchies by competence, make explicit the problems of identity politics of this nature.

The bill makes it possible to review the decisions of the judiciary and this affects the principle of legal certainty. It is enough to think of the way in which a pardon is granted to “individuals charged with or convicted for acts occurring in protests, demonstrations or social mobilizations, or on their occasion,” to admit a final judgment permeated by ideological considerations.

To understand the bill in terms of its threat to equality, dignity and legal security, it is necessary to integrate the model in a postmodernist perspective. Thus, this seeks to overcome the spheres of competence provided by the judiciary, in favor of a justice in which a supposed dignity of the people prevails, without taking charge of the factual and normative assumptions of each case in the context of the social outbreak.

The bill does not analyze the problem of proportionality in the use of pre-trial detention. In a highly differentiated society, the principle of proportionality must be studied. In our society, the legal-criminal and constitutional doctrine contributes to the scientific production that limits an excessive use of these instruments. With this, it is not possible to sustain a systematic violation of rights, without analyzing in detail each of the sentences handed down

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<sup>9</sup> J. Habermas, *Perfiles filosófico-políticos*, Spain 2019, p. 229.

in this context. Otherwise, there is a *material error* that seeks to generalize cases<sup>10</sup> isolated in the social fabric.<sup>11</sup>

Within the framework of the rules of the penal system, there is an equality of arms that is categorical in criminal procedure reform. As an example, the reopening of lawsuits is plausible in situations qualified in comparative systems and, in the Chilean system, only the review action is admissible to face the problem.

Now, to understand the institutional breakdown that this bill entails, it is necessary to break with its ideologically permeated structure from a principles-oriented criminal policy, and that subordination to the imperatives of the legal system is not the result of mechanical obedience. Thus, there are more suitable, necessary and proportionate tools to face the excesses of authority through the appeal in the case of pre-trial detention measure or the appeal for annulment in the event of a final sentence.

However, it is not possible to overcome the neo-Kantian tradition without suffering the consequences of insubordination to the legal order, whose democratic results are part of a historical evolution. The legal system allows the satisfaction of the interests of the intervening parties, without imposing cognitive structures on the decisions of its members. Thus, it seems to us that its rules are the result of various spheres of competence. Eradicating them highlights the danger of believing that submission to order is the result of a *false awareness* “of the agreement between the cognitive structures that collective (phylogenesis) and individual (ontogenesis) history have inscribed in bodies and in the objective structures of the world to which they apply.”<sup>12</sup>

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<sup>10</sup> In this sense, the issuance of pre-trial detention against a mathematics teacher who destroys a subway turnstile and who is not involved in the crime of arson, is not enough to indicate that there was always disproportion in the dictation of pre-trial detention measures in the social outbreak. However, the bill uses this case to support its proposal. Regarding the case, see *Por un torniquete: Fiscalía pide 8 años de cárcel para profesor acusado de destrozos en el Metro*, [radio.uchile.cl/2021/04/20/por-un-torniquete-fiscalia-pide-8-anos-de-carcel-para-profesor-acusado-de-destrozos-en-el-metro/](http://radio.uchile.cl/2021/04/20/por-un-torniquete-fiscalia-pide-8-anos-de-carcel-para-profesor-acusado-de-destrozos-en-el-metro/) [access on: 22.08.2021].

<sup>11</sup> See: H. Corral Talciani, *Cómo hacer una tesis en derecho. Curso de metodología de la investigación jurídica*, Santiago 2008, p. 53.

<sup>12</sup> P. Bourdieu, *Razones prácticas. Sobre la teoría de la acción*, Barcelona 1997, p. 118.

#### 4. Some considerations on necessity defense

Extrapolating the conflict of Chilean society to a situation of global danger is complex. Thus, it revives the problem of reconciliation between individual and collective interests in society. In the social outbreak, the judges faced the task of condemning and issuing pre-trial detention measures in cases in which civil agents have attacked private property.<sup>13</sup>

Now, if all people in Chile are threatened by a global danger, does the state of necessity exemption from liability allow restricting the guarantees of citizens who do not respect the social order? In this way, is this exemption from liability a means to sustain that violence constitutes a means to achieve non-violence?

For some, in the doctrine, the social order is above legality and even the constitution in the case of assumed terrorists. In other cases, some even indicate that it would be possible against a tyrant in power to use the state of necessity to use violence, even if it is not backed by an official branch.<sup>14</sup> Thus, necessity defense can operate with the objective of facing a serious evil to protect the rights of the needy or those of a third party in the Chilean Penal Code according to article 10 number 11.

Hence, the state of necessity requires an actual or imminent evil, the non-existence of other less harmful means, the evil caused may not be substantially greater than the one to be avoided and, likewise, the evil is not provoked or there is no duty to avoid it. One might think that the use of the state of necessity would give rise to abuses by the Executive branch, as it is an imprecise general clause, such as a rule of exemption from liability.

However, the danger of abuse by authority is controllable, since the actions of the Armed Forces and the Executive branch are subject to strict judicial controls that require them to explain their behavior. In any case, the question remains regarding the interests that the legal system protects at the social level and how the exercise of preponderance of any of these can

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<sup>13</sup> Data from CIPER Chile and LaBot.cl indicate that 29% of crimes related to the social outbreak respond to the crime of robbery in an uninhabited place, see *Primera estación: los presos de la revuelta*, [www.ciperchile.cl/2021/07/09/%F0%9F%A4%96-primera-estacion-los-presos-de-la-revuelta/](http://www.ciperchile.cl/2021/07/09/%F0%9F%A4%96-primera-estacion-los-presos-de-la-revuelta/) [access on: 15.09.2021].

<sup>14</sup> This possibility is upheld in cases of tyrannicide in the context of the atomic state in G. Anders, *Estado de necesidad y legítima defensa (violencia sí, o no)*, Ciempozuelos, Madrid 2008, p. 24.

violate the principle of autonomy of the agents in society, regardless of the preponderance of an interest at the international level.

The autonomy of people in society reflects their dignity in society. A concept that must accommodate demands whose practice is associated with an assessment from a philosophic level.<sup>15</sup> However, the political significance of the concept as a right of self-determination is expressed in a liberal and democratic organization that, with the support of the rule of law, within the level of tolerance, cannot deny the value of freedom.<sup>16</sup> In this vein, self-determination as a right is related to human dignity “as the basis of all human rights.”<sup>17</sup>

In this context, cases of constitutional state of exception are collective dangerous situations that have specific regulations in Chile through Law 18.415 that limit recourse to the state of necessity of the Chilean Penal Code. In these exceptional situations, it is recognized that “**the exercise of the rights and guarantees that the Constitution assures to all people can only be affected under the following exceptional situations:** external or internal war, internal commotion, **emergency** and public calamity, and when they seriously affect the normal development of State institutions”. However, although “**the Courts of justice will not be able to qualify the grounds or the factual circumstances invoked by the authority to decree states of exception** ... there will always be a guarantee of recourse to the judicial authorities through the appropriate remedies,” according to article 45 of the Constitution.

Although the necessity defense of art. 10 number 11 could take place in a context of generalized danger for citizens, there is a specific regulation that must be addressed in states of exception before resorting to a rule such as that of art. 10 number 11; otherwise, people’s autonomy could be massively affected. Hence, it is appropriate to consider that the provisions around the state of exception are a means to give primacy to the “existence of society.”<sup>18</sup>

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<sup>15</sup> J. L. Guzmán Dalbora, *Estudio preliminar*, [in:] K. Engisch, *La teoría de la libertad de la voluntad en la actual doctrina filosófica del Derecho penal*, trans. J. L. Guzmán Dalbora, Valparaíso 2006, p. 21.

<sup>16</sup> *Ibidem*, pp. 21-22; M. Rivacoba and Rivacoba, *Configuración y desfiguración de la pena*, Santiago 1980, pp. 13-14; G. Radbruch, *Introducción a la Filosofía del Derecho*, trans. Wenceslao Roces, México, DF 1985, p. 166.

<sup>17</sup> U. Klug, *Problemas de la Filosofía y de la pragmática del derecho*, en *Biblioteca de Ética, Filosofía del Derecho y Política, N° 1*, trans. E. Garzón Valdés and R. Vázquez, Mexico 2002, p. 91.

<sup>18</sup> R. von Ihering, *El fin en el Derecho*, trans. D. Abad de Santillán, Granada 2000, p. 176.

When the law is not capable of offering stability, would it apparently cease to operate? In accordance with Art. 10 N° 11 of the Chilean Penal Code, it could be argued that the law apparently ceases. However, this alternative would lead to unlimited military violence in the social outbreak. The life of the citizens is above the right of necessity.<sup>19</sup>

## 5. Bill provisions

For the purposes of this bill,

individuals charged with or convicted for acts occurring in protests, demonstrations or social mobilizations, or on the occasion of them, shall be beneficiaries of the general pardon and other benefits of this law. In order to prove the foregoing circumstance, circumstantial evidence or any other means of proof shall be sufficient. Notwithstanding the general rules on appeals, the resolution rejecting the request may be appealed (Article 3).

In context, “individuals subject to any precautionary measure depriving or restricting liberty, by the mere fact of requesting its review invoking the concurrence” of any of the crimes listed in Article 1 of the bill, who have been charged with or convicted for “acts occurring in protests, demonstrations or social mobilizations, or on their occasion” that “would have occurred between October 7, 2019, until the day of the presentation of this bill,” may **revoke the precautionary or restrictive measure of liberty**, “in each case, until the judge of the case decides on the request.” This “notwithstanding the general rules, the resolution that revokes the precautionary measures in accordance with the previous paragraph, will be final.”

The objection to this provision is obvious. Although the decision of a Guarantee Court is forced to deliver an articulation of its thought in the issuance of a pre-trial detention measure, it would have as a counterpoint questioning its operation in the Chilean penal system. In favor of this alternative, militates the fact that in most cases when the prosecutor requests a pre-trial detention measure, it is granted by Guarantee Courts. On the contrary, these measures are dictated in the social outbreak in a large number of cases related to the crime of robbery with forced entry in an uninhabited place.

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<sup>19</sup> In accordance with Art. 54 of the German CP, before the 1974 reform, it could have been argued that the law ceases. However, von Ihering opposed this alternative to avoid unlimited military violence. For him, life is about law. Thus, faced with the decision to save one’s life, the law cannot doubt, *ibidem*, pp. 176-177.

And in these cases, the granting of the pre-trial detention measure is not whimsical. This requires compliance with certain elements to be determined by the Chilean criminal system: a) qualified records that prove the existence of the crime; b) qualified records that allow one to reasonably presume the participation of the accused as perpetrator, accomplice or accessory, and, likewise; c) the necessity of caution that addresses both the severity of the penalty assigned to the crime and the purposes of the process (danger to the success of the investigation, danger to society, danger of flight of the accused, danger to the victim, among others).

The excessive use of the pre-trial detention measure is prior to the social outbreak.<sup>20</sup> Rather, this bill is based on circumstantial events, which do not respond to possible violations of fundamental rights in the use of pre-trial detention. The foundation of this legislative bill is reduced to the false belief that there are prisoners of the social revolt who have been arrested for their ideological convictions against a neoliberal system. This last hypothesis is an artifice. In Chile there are no political prisoners in the social outbreak,<sup>21</sup> but their arrests are part of the arbitration of the judges in each case according to the requirements of the legislator.

In the case of sentenced individuals who meet the requirements already set forth, “it will correspond to the competent court [according to article 5], the respective case heard, to rule on compliance with the conditions established in this law, ex officio or upon request of a

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<sup>20</sup> In this sense, “the probability that an innocent person ends up in prison in Chile increased. In the last 10 years, the number of people subjected to pre-trial detention and then acquitted has increased by 90%. An experience that impacts on many levels. Researchers Nicolás Grau and Jorge Rivera measured how it affects working life. Once released, the salary of those who went through pre-trial detention was reduced by around 10% and their possibility of obtaining a job with a contract fell by 6%. This is a call to review the intensive use of pre-trial detention that, among other things, is making a group that is already poor poorer,” see the report of 04/06/2018 on the *Abuse of pre-trial detention and its impact: it impoverishes the poor – CIPER Chile*. N. Grau, *Abuso de la prisión preventiva y su impacto: empobrece a los pobres*, [www.ciperchile.cl/2018/04/06/abuso-de-la-prision-preventiva-y-su-impacto-empobrece-a-los-pobres/](http://www.ciperchile.cl/2018/04/06/abuso-de-la-prision-preventiva-y-su-impacto-empobrece-a-los-pobres/) [access on: 03.05.2021].

<sup>21</sup> In this context, the director of Human Rights Watch (HRW), José Miguel Vivanco, “ruled out that those detained by the social outbreak in Chile are political prisoners and considered that it would be a ‘serious mistake’ to offer them a generic pardon,” see El Mostrador, “*No hay presos políticos en Chile*”: director de HRW rechazó proyecto de indulto a detenidos del estallido social, [www.elmostrador.cl/dia/2021/05/28/no-hay-presos-politicos-en-chile-director-de-hrw-rechazo-proyecto-de-indulto-a-detenidos-del-estallido-social/](http://www.elmostrador.cl/dia/2021/05/28/no-hay-presos-politicos-en-chile-director-de-hrw-rechazo-proyecto-de-indulto-a-detenidos-del-estallido-social/) [access on: 03.03.2021].

party and after a hearing where the evidence [circumstantial evidence or any other means of evidence] will be heard” as provided in Article 3 of this body of law.

This possibility is what calls into question the discretion of Chilean judges according to the parameters of the legislator in the issuance of precautionary measures. The provision of article 5 of the bill clings to the conviction that it is not possible to use jurisdiction as a guarantee.

Now, if the discretionary power of the judges is anchored in the populist beliefs of the majority, then it would be possible to admit the existence of a collective conscience in the dictates of precautionary measures. If so, the judicial decisions would be in the recognition of dangerous social claims.

Finally, according to article 6, “the individuals benefited by this law may be charged with or convicted of any of the crimes in article 1 and will not be considered convicted for all legal purposes.” However, this pardon would have the nature of amnesty, that is, it would completely extinguish the crime committed and its legal consequences. Well, as is known, the pardon only commutes the sentence, but does not eliminate the sentence in the criminal records of the convicted person for the purposes of recidivism.

## **6. On the violation of guarantees in case of approving the bill**

### **a. Infringement of jurisdiction as a guarantee**

As we have observed, proportionality is the guiding criterion for pre-trial detention. Before exposing the difficulties that its use can generate in the crimes of threat to authority, public disorder or damage to property in the social outbreak, among other criminal figures, it is necessary to specify why it is a challenge to treat it as a jurisdictional guarantee. And it is necessary to do so because the answer is not clear in the context of the social outbreak.

Thus, it is relevant to consider the rules that allude to the impartiality of the judge in the use of pre-trial detention. These rules are embedded in a dynamic in which there is a guarantee of jurisdiction. The proportionality of the pre-trial detention measure is not something that is at the sole discretion of the guarantee judge; after verifying the basic normative parameters

and carrying out a review of the copulative requirements of the provisions of article 140 of the Code of Criminal Procedure, the judge can make use of the jurisdiction to dictate it.

It seems to us, from a general reading of the constellation of cases in the social outbreak, the guarantee of criminal jurisdiction is questioned by different actors of the criminal system. For this reason, it is interesting to explore what the criteria have been for the issuance of pre-trial detention measures in the Guarantee Courts. It is also interesting to be able to distinguish the positions of those who consider that the guarantee of criminal jurisdiction is preferential to those who follow only the tenor of the rules of the criminal legal system.

In this sense, in the first position, it seems to us that there is the purpose of highlighting which parameters of rational argumentation lead to the issuance of the pre-trial detention measure. On the other hand, in the second position, there is a rather ideological reading that seeks to question the competence of the bodies of the legal system.

The most emphatic defense of jurisdiction as a criminal guarantee is observed in Ferrajoli. His lines of argument, not focused on the pre-trial detention measure, are as follows:

First, there would be the independence of the judge when issuing a decision, regardless of the necessary evidence in light of the facts of the case.

Second, it would be illogical for the issuance of pre-trial detention measures to remain under the scrutiny of public opinion as a conventional guarantee. Thus, it would be the subject of various practical conflicts. Pre-trial detention is limited by the qualification made by the prosecutor in the formalization hearing, but also by the factual assumptions that are presented in the detailed account of the facts. Hence, the precautionary measure of pre-trial detention is governed by the principle of prohibition of excess.

Third, from the same words of the legislator in the Code of Criminal Procedure, it is possible to infer a normative compression of the principle of proportionality. This message indicates that it is not proportional to issue a pre-trial detention measure in the event that the accused may be subject to a substitute penalty in the event of being convicted. In this context, there is an approximation to proportionality linked to the restriction of its excessive use. Pre-trial detention can only be used in extremely serious cases such as the crime of arson, homicide, among others. Otherwise, in the event of non-compliance with the material budgets and the

need for caution, only precautionary measures of less intensity contemplated in article 155 of the Code of Criminal Procedure will proceed.

Fourth, and finally, there would be difficulties in ignoring the copulative requirements of article 140 of the Chilean Code of Criminal Procedure in the sentences that are intended to be revoked. Some dogmatic problems must be added to this normative consideration in relation to the material assumptions of pre-trial detention: those accused in the social outbreak were the subject of a communication in the formalization that accredited, with qualified records, the existence of a crime and the participation founded as author, accomplice or accessory. The defense of the accused can question these records presented by the prosecutor, and even these may be carefully reviewed in the development of the oral trial.

On the other hand, although the dogmatic view seems to accept that the qualified records presented in the formalization could only be the first glimpse of unlawful behavior, guilt can be dealt with in its entirety in the oral trial. A trial in which there is the possibility of counter-examining the evidence according to the rules of sound criticism.

In this context, it seems to us that it is not feasible to demonstrate, from the perspective of substantive criminal law, that the interpretation of the qualified records of the existence of a crime is sufficient to indefinitely restrict the rights of the accused for the maximum conventional term of pre-trial detention. The guarantee of jurisdiction must be respected as a guiding principle in the issuance of pre-trial detention measures.

In summary, there are various sentences in the social outbreak in which it is observed that proportionality restricts the use of the pre-trial detention measure. In this way, the principle of prohibition of excess is compatible with the guarantee of jurisdiction in criminal matters. The words of the legislator in the message of the Code of Criminal Procedure are clear on the matter, and a rational argumentation strategy is necessary that allows its dictation in the system.

The correct interpretation of the principle of proportionality allows for compensation and weighting of the principles of dignity, security and legality according to the factual assumptions of the case. Hence, proportionality is understood as an argumentation strategy guided by deontic content that is consistent with the use of this principle in the issuance of

pre-trial detention measures. In this line, the rights of the accused can only be affected if the guarantees of the process or the budgets contemplated by the legislator for the use of the pre-trial detention measures are not respected, with the necessary resources to face this possible violation of rights.

b. Some considerations regarding proportionality

The judgment of the Supreme Court in the jurisdictional control of pre-trial detention measures has deemed the principle appropriate in an amparo action, in case Rol N° 5044-09, for the issuance of a precautionary measure of art. 155 letter d) –relative to the prohibition to leave the country–, RUC N° 0700709466-8, of the Valparaíso Guarantee Court, in the following terms:

That furthermore, the appropriateness of the restriction order is subject to the same requirements and controls as pre-trial detention, in such a way that they imply effects on the presumption of innocence and, in this sense, a strong and credible foundation is required, a subject that the legal system and the criminal procedural subsystem are necessarily in charge of highlighting, by estimating that the principles that sustain the precautionary measures are: legal, jurisdictional, exceptional, instrumental, provisional and proportional. The consistency of how these essential postulates to the new criminal process are combined is presented in the presence of three sub-principles: a) The adequacy or suitability of the means; b) Necessity, and c) Proportionality in a restrictive sense. All three operate copulatively, that is, for the purposes that their attendance is required, they must attend jointly.

The judgment of the Court also explains each of the elements of proportionality in the following terms:

The first refers to the adequacy of the means with respect to the end or ends to be achieved, which excludes any means that is conducive to the legitimate end pursued. Thus, any restrictive legal rule must be suitable to the constitutional purpose it seeks to achieve; if the rule contravenes express or implicit purposes or values in the constitutional text, it will be unconstitutional and illegitimate. The subprinciple of necessity requires that the restrictive

measure be indispensable for the preservation of a right and that it cannot be substituted by another equally effective but less burdensome measure. Basically, it is required that the legal rule emanating from the legislator be indispensable to ensure the validity or exercise of a constitutional right or legal right, restricting another to the least possible degree when there is no other possible alternative, always choosing the lesser evil, the least restrictive means, all this without affecting the essential content of the constitutionally protected rights. Finally, proportionality in the strict sense implies weighing, in a cost-benefit relationship, the advantages or disadvantages resulting for individuals from the means used by the legislator to obtain the ends pursued by the constitutional rule. The damages caused by the adoption of the measure are weighed against the results that will be achieved, in other words, the disadvantages of the means are weighed against the advantages of the end to be obtained. In this way, the legislator must always use adequate means that are not disproportionate.

On the other hand, the Supreme Court, in Case N° 6663-07, of December 10, 2007, also includes the application of the principle, expressly referring to the CPP regulations, in the filing of an amparo action in favor of Danilo Alejandro Herrera Hidalgo in the following terms:

that the proceeding of the precautionary measure of pre-trial detention has as a limitation the rule indicated in article 141 of the Procedural Code of the branch, which indicates that pre-trial detention does not proceed when the crime charged is punished only with pecuniary penalties,

adding, in the fifth recital, that

thus, the precautionary measure of pre-trial detention decreed by the Judge of the 10th Guarantee Court of this city on November 21 of the present year, appears not only disproportionate but also inadmissible with respect to the crime formalized in this case, taking into consideration the provisions of Article 124 of the Code of Criminal Procedure, which excludes the possibility of issuing a precautionary measure other than the summons when the charge refers to misdemeanors, *for which the remedy of amparo attempted will be accepted.*

These sentences highlight two relevant aspects. The first illustrates the link between the pre-trial detention measure and the principle of proportionality. As we can see, the two sentences

allude to the coexistence of proportionality with a jurisdiction as a guarantee. It is about determining whether the jurisdictional guarantee in criminal matters in the issuance of pre-trial detention measures is always available, regardless of the lack of factual assumptions that establish the lack of qualified records of the existence of a crime or its inadmissibility for the sake of the need for caution.

The problem thus arises, as Hassemer has suggested, in the application of the principle of prohibition of excess in the use of pre-trial detention. This measure is limited in its application and, only exceptionally, extends beyond the margins established by the legislator in Article 140 of the Code of Criminal Procedure, without considering, then, the possible participation of the accused in the facts and the need for caution.<sup>22</sup>

Thus, the problem may be presented in the following terms: if there is a guarantee of jurisdiction in criminal matters, can the judge resort to the measure of pre-trial detention in cases of public disorder, threats against the authority and qualified damages against property in view of the particularities of the social outbreak? Or, would there be particularities of the outbreak that would provide inputs that would prevent the use of the precautionary measure in question in the cases mentioned? Next, we will develop the conceptual platform of jurisdiction as a guarantee in the dictation of pre-trial detention measures.

#### c. Infringement in the specific case

Thinking of the bill in an axiomatic logic allows us to derive a maxim from it: **Any legal-criminal decision that would have led to a pre-trial detention measure or a final sentence during the outbreak is questionable in the context of protests, demonstrations or social mobilizations.** Hence, the rules of the legal-criminal system must be subject to this maxim in the context of the social outbreak. However, it does not allow to deduce all the

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<sup>22</sup> An application of the principle in abstract terms devoid of any formal limit would turn not only “all the pillars of criminal procedural law into devices,” but also those of substantive criminal law, W. Hassemer, *Crítica al derecho penal de hoy: norma, interpretación, procedimiento, límites de la prisión preventiva*, trad. P. D. Ziffer, Buenos Aires 1998, p. 89. We must also take into consideration that we cannot ignore the danger of a dogmatic based only on abstract principles. Thus, the judge in defense of this can fall into a mechanical execution of the concepts that circumvents the factual assumptions of the case, J. M. Silva Sánchez, *Aproximación al Derecho penal contemporáneo*, (2nd ed.), Montevideo 2010, p. 70.

rules of the system in a logical-material field.<sup>23</sup> Although it is possible to argue that legal concepts are not determined in advance, their choice is not arbitrary in a criminal policy that shapes their interpretation.

Our penal system presents a systematic construction whose permissive, prohibitive and prescriptive rules are deduced from the deontic contents of the principle of proportionality. Although we could think that proportionality is free from any axiological consideration, its roots allow us to indicate that we must consider safety, legality and dignity when creating a bill.

The bill is not capable of demonstrating that the pre-trial detention measures or final sentences handed down during the social outbreak are arbitrary. Analysis of a single case **is not a sample representative of the phenomenon**. This is valid in a factual (material assumptions of the case) and legal sense, since it is necessary to prove what the parameters are to justify the granting of a pre-trial detention measure.

## 7. Conclusions

In the first place, the pre-trial detention measure and the sentence in criminal matters are protected by the jurisdiction as a guarantee. In other words, there is a margin of discretion that does not reduce to a mere normative pattern. Thus, there is a theoretical and practical recognition of the principle of proportionality or prohibition of excess in criminal matters.

Second, the arguments of proportionality that justify the dictation of a pre-trial detention measure are persuasive in accordance with a principled criminal policy. Thus, the crime of threat to authority, the finding of public disorder and the difficulties present in qualified damage to property may be subject to the precautionary measure of pre-trial detention according to the factual assumptions of the particular case.

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<sup>23</sup> In this context, it is important to indicate that in axiomatic thinking all rules can be derived from a fundamental truth that is not susceptible to foundation. However, we must warn that although this logic “is capable of realization in the field of pure formal logic ... it is not, on the other hand, in the field of material logic and, therefore, not in Law,” M. Kaser, *En torno al método de los juristas romanos*, México 2013, p. 13.

Third, the mere fact of paying attention to the penalty for the criminal conduct enunciated in article 1 of the bill is not sufficient to reject the use of the pre-trial detention measure and it is necessary to recall the practical difficulties that can be observed regarding partial confinement and the prognosis of the penalty in the case of repeat offenders for security reasons (danger to the victim, to society or to the success of the investigation).

Fourth, the rulings of the Supreme Court allow us to argue that there is not only a margin of discretion in the dictation of a pre-trial detention measure but also an express recognition of proportionality, which, at least in the area of threats to authority, public disorder and qualified damage to property, has been considered reasonable in this report. A different matter is, of course, that in the national discussion there is the impression that this matter is the object of a social consensus to submit against the decision of a guarantee judge or oral criminal court to arbitration.

Finally, reviewing the practical difficulties encountered in attacks on property due to the intervention of a multiplicity of agents, the jurisprudence is right in opposing the issuance of pre-trial detention measures due to lack of qualified records as in the case of the hurricane operation. But the presence of these difficulties in the indictment does not constitute an argument to justify the inappropriateness of pre-trial detention in qualified cases during the social outbreak. It is a possible argument, on the other hand, to justify the rejection of a pre-trial detention measure by considering the principles of legality, security and human dignity in terms of jurisdictional guarantee.

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## Summary

The purpose of this article is to analyze, in political-criminal terms, the bill for general pardon for humanitarian reasons to the persons indicated and for the crimes indicated in bulletin 13.941-17 in the Chilean legal system. With this objective, the report focuses on the political-criminal aspects of the bill in accordance with the principle of legality, human dignity and legal security. But the author also makes some considerations about the state of necessity in the context of the social outbreak.

**Keywords:** criminal proceedings, human, political criminal effects, criminal law