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PRESIDENTIAL PARDON: BOLSONARO'S CLEMENCY IN THE CARANDIRU MASSACRE

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ABSTRACT: Decree No. 11.302/2022, issued at the end of former President Jair Bolsonaro's term, granted clemency to public security agents, directly impacting the Carandiru Case. The measure sparked legal controversy and led to the filing of Direct Action of Unconstitutionality (ADI) 7.330/DF, which challenges the decree's constitutionality in light of domestic law and Brazil's international human rights commitments. This article analyzes the normative construction of clemency in Brazil, the regulatory framework of decrees under Bolsonaro's administration, the Federal Supreme Court's stance on clemency, and the central arguments of the debate. From a legal positivist perspective, it examines the absence of clear limits on the President's discretionary power to grant pardons and highlights the paradox of clemency being used as a tool for state non-accountability. This article's main findings and conclusions are: (i) according to a survey of Supreme Federal Court (STF) rulings (1930–2024) on presidential pardons, debates on the scope and limits of this legal-political instrument of criminal policy are recent; (ii) the Carandiru Case demonstrates how clemency and pardons can serve as instruments of arbitrariness in a context that should be guided by republican legal principles; (iii) the existence of clemency and pardons in the Brazilian legal system entails a fundamental tension within our Democratic Rule of Law; (iv) the STF, through the exercise of judicial discretion, can limit the scope of presidential pardons.

KEYWORDS: Presidential pardon; Carandiru Massacre; presidential discretionary power.

PERDÃO VINDO DE CIMA: O INDULTO DE BOLSONARO NO CASO DO MASSACRE DO CARANDIRU

RESUMO: O Decreto nº 11.302/2022, editado no final do mandato do ex-presidente Jair Bolsonaro, concedeu indulto a agentes de segurança pública, impactando diretamente o Caso Carandiru. A medida gerou controvérsia jurídica e levou ao ajuizamento da ADI 7.330/DF, em que se questiona a constitucionalidade do decreto à luz da legislação interna e dos compromissos internacionais de direitos humanos. Este artigo analisa a construção normativa do indulto no Brasil, a disciplina normativa dos decretos no governo Bolsonaro, o posicionamento do Supremo Tribunal Federal (STF) sobre indulto e os argumentos centrais do tema.

A partir de uma perspectiva juspositivista, examina-se a ausência de limites claros ao poder discricionário do presidente da República na concessão do perdão e o paradoxo da concessão de indulto como instrumento de não responsabilização estatal. Os principais achados e conclusões desta pesquisa são: (i) conforme levantamento de julgados do STF (1930-2024) sobre indulto, debates sobre o alcance e limites do instituto em questão como instrumento político-jurídico de política criminal são recentes; (ii) o Caso Carandiru evidencia como a graça e o indulto podem ser instrumentos de arbitrariedade em um contexto que deveria ser pautado em princípios jurídicos republicanos; (iii) a existência da graça e do indulto no ordenamento jurídico brasileiro implica uma tensão fundamental no interior do nosso Estado Democrático de Direito; (iv) o STF, por meio do exercício da discricionariedade judicial, poder limitar o alcance do perdão presidencial.

PALAVRAS-CHAVE: Indulto presidencial; Massacre do Carandiru; poder discricionário presidencial.

1. Introduction

On December 22, 2022, in the final days of his term, then-President Jair Bolsonaro enacted Decree No. 11,302/2022, granting a Christmas pardon (indulto natalino) to individuals convicted of various crimes, with particular emphasis on offenses committed by public security agents and members of the Armed Forces during law and order operations, in cases of negligent excess. The Decree drew special attention for its Article 6, which expressly referred to Article 144 of the Federal Constitution, listing the agencies responsible for ensuring public security. This provision was notable for its effect: granting a pardon to the military police officers convicted for the killings that occurred on October 2, 1992, at the São Paulo House of Detention – a date marked by the Carandiru Massacre, when 111 people were killed by state agents, according to official records[1].

Through this Decree, the then-President once again placed himself in direct conflict with the Brazilian judiciary, especially the Federal Supreme Court (STF). In

1 Regarding the Carandiru Massacre, see the collection edited by Machado and Machado (2015), which, in addition to presenting the initial stages of the criminal proceedings brought against the military police officers, analyzes the case from different perspectives. See also: Machado, Machado, Ferreira and Ferreira (2013); Machado, Machado and Ferreira (2016); Machado, Machado, Barros, Melo and Amaral (2020); and Machado, Machado and Fonseca (2021).

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November 2022, the Court had rejected appeals filed by the defense of the police officers involved in the Carandiru Massacre, and, with the finality of the judicial decision (res judicata), had affirmed the convictions of the public security agents. The intent to extinguish, by decree, the convictions of the Carandiru case police officers was made explicit in a specific provision, drafted as follows:

> Art. 6. A Christmas pardon shall also be granted to public agents who are part of the public security bodies referred to in Article 144 of the Constitution and who, in the exercise of their functions or as a result thereof, have been convicted, even provisionally, for acts committed more than thirty years prior to the publication date of this Decree, and which were not classified as heinous crimes at the time they were committed.
> Sole paragraph. The provision in the caput also applies to individuals who, at the time of the act, were members of the public security bodies referred to in Article 144 of the Constitution, in the capacity of public agents.

Furthermore, Article 7, §3, was drafted to allow the granting of the pardon to the police officers involved in the Massacre:

> Art. 7. The Christmas pardon granted under this Decree does not cover crimes:
> [...]
> II - Committed by means of serious threat or violence against the person, or with domestic and family violence against women;
> [...]
> § 3. The prohibition set forth in item II of the caput of this article does not apply in the situation provided for in Article 6.

It should be noted that the Decree concerns (i) public security agents who, by reason of their office, were convicted (ii) for crimes committed "over 30 years ago" – a period that covers October 2, 1992 – (iii) when qualified homicide was not yet classified as a heinous crime, as it would only be included with Law No. 8,930/1994[2]. The media

2 It should be noted that, although the provisions of the Decree were intended for the military police officers involved in the Carandiru Massacre, the wording of Article 6, *caput* and sole paragraph, as well as Article 7, §3, of Decree No. 11,302/2022, encompasses any public agents who are part of the public security agencies covered by the relevant provisions – in other words, the Decree does not refer exclusively to the officers held responsible for the Massacre.

impact was immediate, and the police officers' own lawyer recognized that the "convicted parties fit 'perfectly' into one of the articles of the text" (Ortega, 2022).

It is important to emphasize that, although the Decree's provisions were directed at the military police officers who participated in the Carandiru Massacre, the wording of Article 6, its sole paragraph, and Article 7, §3, of Decree No. 11,302/2022, encompass any public agents within the public security bodies fitting those provisions – in other words, the Decree is not limited exclusively to those police officers held responsible for the Massacre.

Just days after the issuance of Bolsonaro's normative act, the Office of the Prosecutor General (Procuradoria-Geral da República, PGR) challenged Articles 6 (caput and sole paragraph) and 7, §3, of Decree No. 11,302/2022, through a Direct Action of Unconstitutionality (ADI 7,330/DF). In its claim, the PGR questioned whether "a pardon decree can cover heinous crimes which, at the time of the criminal act, were not so classified by law, and whether the pardon may be granted to those convicted of crimes considered crimes against humanity under international law" (Brasil, 2022, p. 10). The claim also included a request for a preliminary injunction suspending the effects of Articles 6 (caput and sole paragraph) and 7, §3, of the Decree.

The PGR seeks a declaration of

> [...] the unconstitutionality of the expression 'at the time it was committed', contained in Article 6, caput, of Decree 11,302/2022, establishing the thesis that the pardon does not cover heinous crimes as defined by law at the date of the presidential decree granting it [...]. (Brasil, 2022, p. 32).

Moreover, the PGR aims to exclude from the Decree's scope

> [...] crimes against humanity, especially those committed in the Carandiru Massacre, whose prosecution and effective punishment the State is obliged to undertake as a result of international commitments voluntarily assumed by the Federative Republic of Brazil (Brasil, 2022, p. 32).

The debate over the (un)constitutionality of Decree No. 11,302/2022 centers on two principal issues. The first concerns the standard for "heinousness": whether a crime should be considered heinous based on its legal classification at the time it was committed, or at the time the pardon decree is issued. At the time of the Massacre, the

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police officers' acts could not be legally classified as heinous crimes. However, at the time of Decree No. 11,302/2022, qualified homicide had already been classified as a heinous crime.

The second issue concerns the legal feasibility of granting a pardon to those convicted of serious human rights violations, given Brazil's international obligations. Specifically with regard to the Carandiru Massacre, the report of the Inter-American Commission on Human Rights (IACHR) established the duty of the Brazilian State to investigate and effectively punish those responsible (IACHR, 2000).

On January 16, 2023, then-Justice Rosa Weber of the STF issued a preliminary injunction suspending "(i) the expression 'at the time it was committed' at the end of Article 6, caput, of Presidential Decree 11,302/2022 and (ii) Article 7, §3, of Presidential Decree 11,302/2022" (Brasil, 2022, p. 31). As a result, the granting of the pardon to the police officers convicted in the Carandiru Massacre was suspended, and it was left to the full bench of the Supreme Court to decide on the (un)constitutionality of Decree No. 11,302/2022.

The criminal proceedings regarding the police officers involved in the massacre are peculiar and complex, marked by a series of twists and turns across the different judicial instances. Although this study does not intend to provide a detailed account of this trajectory, it is necessary to point out that ADI 7,330/DF had not been decided by the conclusion of this text. Simultaneously with the progress of the constitutional action before the STF, the São Paulo Court of Justice (TJSP) remained responsible for sentencing (sentencing phase) the convicted police officers.

Before the São Paulo court, during consideration of the case (Case No. 0338975-60.1996.8.26.0001), the constitutionality of the aforementioned provisions of Decree No. 11,302/2022 was raised. Consequently, an incident of unconstitutionality was initiated, and the case files were sent to the Special Body of the Court. However, in an order dated June 17, 2024, Justice Luiz Fux determined that the TJSP should proceed with the judgment of the incident of unconstitutionality, regardless of developments in ADI 7,330.

Accordingly, on August 8, 2024, the Special Body decided, by 18 votes to 6, that the provisions of Decree No. 11,302/2022 are constitutional (Pagnan, 2024). And, on October 2, 2024 – exactly thirty-two years after the Massacre – the Fourth Criminal Chamber of the TJSP partially granted the appeals filed by the defense, declaring the extinction of criminal liability for the defendants, based on the pardon granted by

former President Bolsonaro. The Public Prosecutor's Office subsequently filed an extraordinary appeal to the Supreme Court (São Paulo, 2014). The STF must now decide, in the abstract review of constitutionality, whether Articles 6 (sole paragraph) and 7 (II, §3) of Decree No. 11,302/2022 are constitutional, and whether the pardon granted to the police officers was legally valid[3].

The criminal proceedings in the Carandiru case spanned three decades, characterized by prolonged periods of inaction and controversial judicial decisions that resulted in the effective impunity of the state agents involved in this grave human rights violation. It should also be noted that the agents remained at liberty throughout the proceedings, and even after their convictions became final – an unusual situation in Brazil, where provisional imprisonment pending appeal is common[4]. The pardon ultimately proved to be the last among several legal mechanisms deployed to prevent the accountability of the police officers involved.

This study delves into this latest chapter in the battle for accountability in the Carandiru case, which, after decades of protracted litigation, saw another twist as a result of the pardon decree issued by former President Bolsonaro. Section 1 addresses the main sources on the pardon (indulto) in current Brazilian law, as well as the rationale for the absence of a conceptual discussion of the institute in this article. Section 2 examines the decrees issued by the Bolsonaro administration concerning pardons. Section 3 analyzes Supreme Court decisions on pardon decrees, outlining the Court's jurisprudence on the matter. Section 4 discusses the legal issues raised in ADI 7,330/DF, which underpin the debate over the constitutionality of Decree No. 11,302/2022. Section 5 presents and addresses certain questions about the lack of legal limits on the President's discretionary power to grant pardons. In the final considerations, the paper offers a perspective on the juspositivist character of this study and how this theoretical lens is useful for describing the legal problem relating to presidential discretion in granting pardons (indulto or graça).

3 As of the drafting of this article, the admissibility of the extraordinary appeal was still pending, and according to the procedural status of ADI 7,330, the case has been pending before the reporting Justice since June 2024, with no scheduled date for judgment by the full bench of the Court.

4 According to data from the first semester of 2024, produced by the National Secretariat for Penal Policies (SENAPPEN), there were 663,906 individuals incarcerated in physical prison cells in Brazil – this figure includes convicted prisoners serving sentences in closed, semi-open, or open regimes, as well as individuals subject to security measures and outpatient treatment. According to these data, there were 183,806 individuals held in pretrial detention. This figure does not include those under house arrest, with or without electronic monitoring. The information cited here can be verified in the database provided by SENAPPEN (2025).

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2. Main legal provisions on pardon (indulto) in current Brazilian law

This section addresses the presidential prerogative, exercised by decree, to grant a pardon (indulto), presenting the main legal provisions relating to the pardon in current Brazilian statutory law. These details are particularly useful to demonstrate the conceptual vagueness fostered by the Brazilian legal system regarding the modalities of state pardon – especially the indulto – and the lack of doctrinal development on this topic.

The constitutional foundation for the institute is found in Article 84, XII, of the Federal Constitution: "It is the exclusive competence of the President of the Republic: (...) XII – to grant pardons and commute sentences, after consulting, if necessary, the bodies established by law."

Article 5, XLIII, of the Constitution establishes a substantive limitation on the granting of pardons, which is especially relevant for the analysis of ADI 7,330/DF in this article. The provision states:

> The law shall regard as heinous crimes and not eligible for bail, grace, or amnesty the practice of torture, illicit drug trafficking, terrorism, and those defined as heinous crimes, and such crimes shall be prosecuted against both perpetrators and those who, having the ability to prevent them, omit themselves.

The Penal Code (CP), in Article 107, II, includes pardon among the causes for the extinction of criminal liability.

The Code of Criminal Procedure (CPP), in Articles 734 to 742, addresses pardon as well as two other similar institutions (grace and amnesty). However, the procedural law does not provide a definition of pardon, limiting itself, in Article 741, to prescribing that "[i]f the defendant is granted a pardon, the judge, either ex officio or upon the request of the interested party, the Public Prosecutor's Office, or the Penitentiary Council, shall proceed as provided in Article 738" – which, in turn, establishes that "[w]hen the grace is granted and a copy of the decree is attached to the records, the judge shall declare the sentence(s) extinguished or adjust the execution according to the decree, in cases of reduction or commutation of sentence."

The Law of Criminal Executions (LEP), in Articles 187 to 193, refers to amnesty, pardon, and grace (individual pardon). As in the Constitution, Penal Code, and Code of

Criminal Procedure, the LEP does not offer a clear definition of pardon. Article 193 of the LEP is noteworthy: "If the convict is granted a collective pardon, the judge, either ex officio, at the request of the interested party, the Public Prosecutor's Office, the Penitentiary Council, or the administrative authority, shall proceed as established in the preceding article."

Article 192 of the LEP, in turn, provides that, once the pardon is granted and a copy of the decree is attached to the execution records, "the judge shall declare the sentence extinguished or adjust the execution according to the terms of the decree, in cases of commutation."

The pardon is one of the forms of state pardon, similar to grace[5] and amnesty[6], or even to judicial pardon, although the margin of discretion for its granting is less than for other modalities[7]. The constitutional and legal provisions make it clear that the pardon is a prerogative of the President of the Republic, but without clear limits as to its scope – except for the express prohibition found in Article 5, XLIII, of the Constitution.

Within the realm of public law, this normative vagueness deserves particular attention, especially in cases involving state-perpetrated violence and lethality, such as the Carandiru case. For this reason, the legal framework on pardon is essential for a legal analysis both of the institution itself and of its application in this context.

2.1 Why does this article not conceptualize pardon?

The normative provisions of the Constitution and the relevant criminal laws do not clearly define pardon, nor do they set forth the situations in which the institute may be applied. This raises the question: why does this article not propose a definition or enumerate doctrinal concepts that have already been established?[8]

5 According to Dimoulis (2012, p. 207), Brazilian legal doctrine attributes an individual character to the graça (presidential pardon), which distinguishes it from the indulto (general pardon), the latter being directed at a group (collectivity). As with the indulto, the power to grant a graça lies with the President of the Republic and aims at extinguishing criminal liability (Ferreira, 2011, p. 25), while the other effects of the criminal conviction remain unchanged.

6 Anistia (amnesty) requires the approval of an ordinary law by the National Congress. According to Ferreira (2011, p. 24), it is "the broadest form of clemency" and, once granted, becomes irrevocable (Bitencourt, 2018, p. 955). As Dimoulis (2012) explains, "amnesty extinguishes the legal consequences of the crime, also eliminating the effects of any criminal conviction."

7 In some cases, the legal system allows the judge to grant a judicial pardon. See, for example, Article 121, §5 of the Penal Code, and Supreme Court of Justice Precedent (Súmula) No. 18.

8 For definitions and conceptualizations regarding the indulto (general pardon), see Magalhães Noronha (1972, p. 461); Dimoulis (2012, p. 207); Ribeiro (2015); Santos (2017, p. 645); Figueiredo (2020, pp. 110-111).

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To answer this, it is necessary to clarify that, in this study, the voluntarism inherent to presidential pardon makes indulto an exceptional institution within the context of a Democratic State governed by the rule of law. This is because the President, regardless of criminal classifications enacted by the Legislature and convictions imposed by the Judiciary, and guided solely by his or her will, may pardon individuals at discretion, without being required to provide justification. Here, voluntarism refers to the imposition of the will independently of any need for justification.

The exceptional nature of the institute stems from the very statutory law, as demonstrated by the above-mentioned normative provisions of the Brazilian legal system, according to which the discretion attributed to the Executive becomes the constitutional vector for the realization of virtually any will of the President – the only express limitation being the prohibition contained in Article 5, XLIII, of the Constitution.

By addressing pardon through the lens of the Carandiru case, this article seeks not to delimit the concept of the institute, but rather to investigate its exceptional character and the implications of such exceptionality within a Democratic State governed by the rule of law.

It can be said, doctrinally, that pardon is presented as a cause for the extinction of criminal liability, directed to a collectivity defined in a presidential decree (Dimoulis, 2012, p. 207). However, going further in proposing a detailed concept would mean disregarding a legal problem: Brazilian statutory law is vague – and, in certain respects, silent – regarding presidential limits in granting pardon.

Such vagueness and normative silence leave room for doctrine to construct its own guidelines regarding the supposed limits for the application of pardon. However, to take these constructions as descriptive of what the institute actually is would be to assign a normative power to doctrine that it does not have.

For instance, Santos (2017, p. 644-645), when discussing grace, argues that the institute is designed to remedy "injustices or excessive severity in the application of the law," even though no valid normative provision regarding presidential pardon establishes this objective. Similarly, Damásio de Jesus (2012, p. 737) asserts that grace, as a rule, depends on a request for it to be granted by the President, though no legal provision prohibits the President from granting pardon ex officio. Bitencourt (2018, p. 955) contends that pardon applies to "an indeterminate group of convicts," although

statutory law does not prohibit granting a pardon to a specific group of people or, at the limit, to a single individual[9].

While doctrine aims to suggest ways in which legal institutions may be applied, it is understood here that an overly detailed concept of pardon may obscure the wide discretion legally granted to the President. To adhere to doctrinal propositions seeking to define pardon would take this work away from its aim of investigating that which gives the institute its exceptional character, and the core of the legal problem would thus be lost. For this reason, this article chooses to approach pardon as a presidential power to grant forgiveness that is subject to few limitations, even though there are doctrinal attempts to suggest restrictions on this power.

These pages aim to present the current state of the debate on pardon according to the STF and then address the issues raised by Bolsonaro's pardon of those responsible for the Carandiru Massacre. Thus, this study does not intend to guide the application of the pardon in future decrees. What is offered is a distinctively legal portrait of the problems that pervade the institute[10].

3. The normative construction of Bolsonaro's pardon decrees

The exploratory research conducted by Ferreira and Ferreira (2020) analyzed 38 pardon decrees issued between 1984 and 2019, identifying the consistency of a structure and normative concepts in these decrees, with incremental changes over the years. This repetition of patterns and concepts was named by the authors as a "normative drafting pattern" – a theoretical model that synthesizes all the requirements necessary for the granting of pardon in the analyzed decrees. In other words, the authors examine the sub-legal elements that delineate the scope of the institute.

According to the proposed analytical model, a pardon is permitted if six cumulative legal requirements are met, related to the crime, the sanction, and the convicted person. The first requirement concerns the crime: a pardon can only be granted if there

9 The Brazilian legal system provides for graça (individual pardon), which is directed toward a specific individual. Through a systematic interpretation, there appears to be no reason why, on the one hand, the individual pardon (graça) can be granted to a determined person, while, on the other hand, the collective pardon (indulto) must necessarily be addressed to groups whose members are indeterminate.

10 Evidently, alternative approaches from other fields of knowledge – such as Political Science or Sociology – would likely offer different, albeit not necessarily divergent, perspectives.

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is no constitutional, legal, or sub-legal prohibition (including an express prohibition in the decree itself). The next three requirements relate to the sanction: (a) the type of sanction (prison sentence, fine, alternative sentence, or security measure); (b) the amount of the sentence imposed by the judge in the specific case; and (c) the amount of the sentence served by the individual.

The final two requirements refer to procedural elements of the criminal conviction – such as recidivism – and personal elements, such as belonging to a vulnerable group (elderly, minor, women, persons with illness or disability, or of indigenous ethnicity) (Ferreira; Ferreira, 2020). All six requirements are present in the 38 decrees analyzed by the authors and must be observed by the judge.

The pardon decrees issued by then-President Bolsonaro, between 2019 and 2021, broke with the "normative drafting pattern" identified by the authors (Ferreira; Ferreira, 2020), and were also significantly more restrictive in scope. Decree No. 11,302 of 2022 partially returned to the normative drafting pattern found in decrees from previous governments and, as this paper will show, significantly expanded its scope.

Drawing on the analytical model proposed by the authors (Ferreira; Ferreira, 2020), we turn to the decrees issued from 2019 to 2021. With respect to the first requirement, Bolsonaro's decrees considerably expanded the list of excluded offenses, including crimes related to criminal organizations, money laundering, extortion, active corruption, and bodily injury against a public security officer or relative, among others.

The requirements relating to the sanction were omitted from these decrees, which represents a clear rupture with the pattern of previous decrees. There is no provision authorizing pardon for persons sentenced to a certain amount of penalty and/or who have served a portion of their sentence.

Decrees prior to 2018 contained specific provisions regarding the amount of sentence served by the convicted person. For example, pardon could be granted to individuals who had continuously served 15 years – if first-time offenders – or 20 years – if recidivists – in a closed or semi-open regime. It was also allowed for those sentenced to a prison term of more than eight and up to twelve years, for a crime committed without serious threat or violence against a person, provided that one third of the sentence had been served if not recidivist, or one half if recidivist. Both situations required the serving of a minimum portion of the sentence (15 or 20 years; one third or one half of the sentence). Nothing similar exists in Bolsonaro's decrees.

As for requirements concerning the convicted person, all previous decrees included various criminal policy indicators – attention to persons who had served long sentences, indigenous people, minors under 21 or elderly, persons with minor or infant children, pregnant women, victims of torture, among others. Bolsonaro's decrees retained only the hypotheses of pardon for persons with disabilities, serious permanent illnesses requiring continuous care, or those in a terminal state.

The only novelty was the provision for granting pardon to public agents who are part of the national public security system, in cases of (i) negligent excess or (ii) the commission of negligent crimes, even off duty, "in view of the risk arising from their functional status or by reason of their duty to act." It also covers Armed Forces members convicted of crimes with negligent excess during law and order operations (Article 142 of the Constitution; Complementary Law 97/1999) (Arts. 2 and 3, Decree 10,189/2019).

Decree No. 11,302/2022 retained the structure of previous decrees from the same administration but introduced two significant innovations. The first is the provision of pardon to public agents who committed crimes over 30 years ago that were not classified as heinous crimes at the time, which is the object of this study.

The second innovation is the provision applicable to "persons convicted of crimes for which the maximum prison sentence, in the abstract, does not exceed five years" (Art. 5, Decree 11,302/2022). Unlike previous decrees, there is no requirement to have served a minimum amount of the sentence, but only that the conviction is for a crime with a maximum sentence of up to five years.

To some extent, this provision can be seen as a return to the theoretical model of pre-2018 pardons, with requirements linked to the type of sanction and the maximum sentence. Curiously, however, by not requiring that a minimum portion of the sentence be served, the provision is much broader than those found in pre-2018 decrees – which required fulfillment of a certain portion of the sentence – and in Bolsonaro's later decrees, which restricted pardon to persons with disabilities, illness, the elderly, and public security agents.

Streck and Berti (2023) warn of the enormous breadth of this provision, "encompassing more than 150 types of crimes, ranging from negligent homicide, simple theft, misappropriation, fraud, and legal possession or carrying of permitted firearms, among many others" (Streck; Berti, 2023). Beyond the debate on the practical

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application of the decree, the authors highlight the irony and contradiction in the effects of this provision. On November 28, 2018, just after being elected President of the Republic, Bolsonaro posted on Twitter – now X:

> I was elected President of Brazil to meet the aspirations of the Brazilian people. Taking a hard line on violence and crime was one of our main campaign commitments. I guarantee you, if there is a pardon for criminals this year, it will certainly be the last[11].

By issuing the 2022 pardon decree, Bolsonaro "may have enacted the most generous pardon decree in the country's history" (Streck; Berti, 2023)[12].

It is not possible to precisely determine the number of people benefited by pardon decrees. Pre-2018 decrees required the central agencies of the prison administration to prepare a statistical report listing beneficiaries, to be published by the Ministry of Justice. There is no known publication of official data on pardons in Brazil, which highlights the difficulty of producing and consolidating these data.

Despite the humanitarian hypotheses for granting pardon to ill, elderly persons or those needing special care, it is nearly impossible to know the exact number of beneficiaries of a pardon decree, especially regarding the aforementioned broad provision that covers a substantial number of crimes with a maximum sentence of up to five years[13].

The normative provision that grants pardon to the Carandiru police officers is reminiscent of pardon decrees issued through the 1930s, which were aimed at a specific

11 Available at: https://shorturl.at/bHA5e.

12 The authors of this article requested, through a procedure under the Access to Information Law, the complete records concerning Decree No. 11,302/2022 in order to identify the possible origin of the provisions in question. The only document found in the administrative file was the legal opinion of the Office of the Attorney General (Advocacia-Geral da União), which, without addressing the merits of the provisions, stated that the possibility of granting pardon to public security agents "constitutes a political decision within the purview of the President of the Republic, who is ultimately responsible for defining the requirements and scope of the constitutional act of clemency, based on criteria of convenience and opportunity." Regarding the pardon without any minimum time served, the opinion stated that "the same line of reasoning applies: this is a matter of merit on which this Legal Advisory Office is not competent to opine, since the contours of the pardon are constitutionally assigned to the President of the Republic."

13 In February 2025, the Supreme Federal Court (STF) dismissed ADI 7,390/DF, upholding the constitutionality of the provision, and in May of the same year reaffirmed this understanding in the context of general repercussion (Theme 1267), on the grounds that the institution of pardon is, in exceptional cases, subject to judicial review, but the judgment of convenience and opportunity belongs exclusively to the President of the Republic (Brasil, 2025a; 2025b).

number of people[14]. The next section discusses the STF's interpretation of some topics related to the institute.

4. The positions of the Supreme Federal Court (STF) on pardon

The STF's jurisprudence on the topic of pardon dates back to the 1930s, with 335 decisions handed down up to 2023. This number was obtained through a search for the term "indulto" in the Court's case law database in April 2024. Of the 335 decisions, we considered that 35 did not directly address issues related to pardon and were therefore excluded, resulting in an analysis of 300 decisions, which are discussed in this section[15].

The vast majority of cases (99%) reached the Court to seek recognition, in concreto, of compliance with the requirements of the decrees, through petitions for habeas corpus, appeals in habeas corpus, writs of mandamus, and extraordinary appeals. There are only three decisions rendered in the context of abstract constitutional review, which address: the unconstitutionality of granting pardon to persons convicted of heinous crimes, torture, terrorism, or illicit drug trafficking (ADI 2795); the limits of the President's discretion in defining the grounds for pardon (ADI 5874); and the configuration of abuse of purpose in the granting of grace (individual pardon) to former congressman Daniel Silveira (ADPFs 964, 965, 966, and 967, in a joint decision).

In fact, in 42% of the cases, it was not possible to identify a specific issue related to pardon, but only the request for its application to the particular case. Admissibility and granting of the order are exceptional (0.04% of decisions), limited to the overturning of unlawful lower court decisions or release in cases of illegal constraint.

14 The first pardon decree was issued during the imperial period, in 1847. Subsequent decrees were published sporadically, with no regularity in form or content. However, up until 1932, pardons were mainly granted to specific groups within the Armed Forces. For example, the 1847 decree stipulated: "to pardon those convicted for first-time desertion, and for second simple desertion in the Navy, and among the Corps of Imperial Sailors and Artillerymen of the Navy, provided they present themselves within three months from the date of publication of this Decree in each Province, also including those already sentenced or awaiting sentencing" (Decree No. 534, of September 7, 1847).

15 The judicial decisions analyzing appeals in concrete cases were classified according to the content of their summaries. The authors acknowledge the limitations of relying on the content available in judicial summaries. Nevertheless, we consider this strategy to be an exploratory approach for identifying the main topics submitted to the Court's review.

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The topics under review vary depending on the provisions of each pardon decree, particularly regarding the legality and scope of specific requirements established in the normative acts. As a rule, pardon decrees are issued annually by the Presidency, and the inclusion or exclusion of different requirements each year is frequent, resulting in successive analyses of recurring topics in various decrees.

A substantive number of decisions (19.5%) challenge the constitutionality of the prohibition of pardon for heinous crimes (Art. 2, Law No. 8,072/1990), which the STF has upheld in several decisions. Another recurring issue is the possibility of granting pardon to persons convicted of heinous crimes committed before the law that defined them as such. This matter is, in fact, central to the debate on the constitutionality of the pardon for police officers in the Carandiru case, as will be discussed in Section 4 of this study.

Some rulings fluctuate on the application of the principle of non-retroactivity[16]. Some decisions establish that the nature of the crimes covered by pardon should be assessed at the time of the decree granting the benefit (HC 117938, HC 74534). Thus, the moment of commission would be irrelevant. Others hold that the commission of the crime defined as heinous refers to the date on which it was committed (RE 452991, HC 99727, HC 104817). Recently, the Court discussed the applicability of pardon for those convicted of "privileged" drug trafficking – which is not considered a heinous crime by the Court, thus allowing pardon (HC 118533). The table below presents the main topics analyzed by the STF during the period:

16 In its submission in the ADI 7,330 proceedings, the Office of the Prosecutor General (PGR) presented the following reasoning: "[...] what matters is not the penitentiary policy in force at the time of conviction, nor even at the time the offense was committed; rather, what is decisive is the reality – and the assessment of that reality – at the time the pardon is granted. It is at this moment that one must determine how society perceives and evaluates the crime for which the perpetrator will be relieved of punishment. [...] At the time of the decree, it must be verified whether the act that led to the punishment to be remitted falls within what the legal order considers to be of the utmost gravity, such that it qualifies as a heinous crime and, therefore, is ineligible for clemency. For this reason, the principle of non-retroactivity of the more severe criminal law does not apply. What is at stake here is the assessment of how a fact is legally qualified at the moment the act of clemency is issued. That is the appropriate time to determine whether the constituent's intention not to relieve from sanction those who committed an act that, at the time of the pardon, is regarded as heinous, applies. Any other reasoning would frustrate the will of the original constituent." (Brasil, 2022, doc. 82).
The PGR's reasoning disregards the literal text of the constitutional provision prohibiting the retroactive application of more severe criminal law, by asserting that it is necessary to evaluate a sort of "spirit of the times," as reflected in legislation, in order to conclude that heinousness should be assessed at the time the decree is issued. This line of argument relativizes something that is – or should be – absolute in the legal order: the guarantee of non-retroactivity of harsher criminal law, which only produces effects ex nunc.

TABLE 1 • TOPICS OF PRESIDENTIAL PARDON (INDULTO) DECISIONS IN THE BRAZILIAN SUPREME FEDERAL COURT (STF) BETWEEN 1930 AND 2024

Topics related to pardon	Number of decisions	Percentage
Requirement of reparations and good prison conduct	6	2,0%
Extinction of secondary effects of conviction	6	2,0%
Requirement of criminological examination	7	2,5%
Proof of dependents or serious illness	7	2,5%
Extension to military or persons under security	15	5,0%
Applicability during conditional suspension of sentence	17	5,5%
Requirement of final and unappealable conviction	17	5,5%
Extension of effects to fines	18	6,0%
Applicability to recidivists	20	7,0%
Applicability to heinous or equivalent crimes	58	19,5%
Not specified	124	42,0%
Other	5	0,5%
TOTAL	300	100%

SOURCE: ELABORATED BY THE AUTHORS.

The survey of decisions indicates that the more substantive debate regarding the scope and limits of pardon as a political-legal instrument of criminal policy is recent, with two judgments concerning Bolsonaro's decrees: the Daniel Silveira case and the constitutionality of the pardon for those convicted of crimes with an abstract maximum sentence of up to five years.

Former congressman Daniel Silveira was convicted by the STF to eight years and nine months in prison in a closed regime for acts against the Democratic Rule of Law and coercion during a proceeding in April 2022. The day after the judgment, then-President Jair Bolsonaro issued a decree granting him grace (individual pardon) (Brasil, 2022a), arguing that there was social commotion regarding the conviction, since "freedom of expression is an essential pillar of society in all its manifestations" (Galvani, 2022). The pardon was unconditional, granted irrespective of the finality of the conviction, and covered both prison sentences and fines.

In the review of the unconstitutionality of this decree, the Court's majority recognized that there had been an abuse of purpose in an apparently lawful act by a competent public official – in this case, the President of the Republic – aimed at achieving

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an end other than that provided for by law. The "granting of pardon to a political ally based solely on political-ideological affinity is not compatible with the guiding principles of Public Administration" (Brasil, 2023, p. 3). The dissenting Justices, Nunes Marques and André Mendonça, argued mainly that the decree was a political act of the President, limited only by the Constitution and not subject to judicial review (Brasil, 2023, p. 122).

In RE 145.0100/DF, the constitutionality of the pardon granted to persons convicted of crimes with an abstract maximum sentence of up to five years – provided for in Decree No. 11,302/2022, which also authorized the pardon of the police officers involved in the Carandiru case – is under discussion.

The constitutionality of this provision was quickly challenged by state Public Prosecutor's Offices in criminal enforcement proceedings after its issuance. The Public Prosecutor's Office of the Federal District (MPDFT) filed an extraordinary appeal before the STF, challenging lower court decisions that granted pardons under this rule.

The extraordinary appeal against this decision has not yet been judged by the STF, which accepted the appeal and recognized the general repercussion of the issue, given its potential widespread impact on other courts. The core question before the Supreme Court is whether the criterion for declaring pardon based on the abstract maximum penalty of the crime (without requiring a minimum portion of the sentence to be served) is compatible with the constitutional limits on the President's discretionary power regarding pardon. As of the date of writing this article, the appeal has not been adjudicated.

The third relevant decision regarding pardon is ADI 5874, the main precedent in abstract review concerning the judiciary's limits on matters of pardon.

The pardon decrees issued by former President Michel Temer in 2016 and 2017 introduced significant changes compared to previous decrees. Decree No. 8,940/2016, for example, was marked by restrictions and tightened rules, notably the removal of the possibility of commutation and restricting pardon to vulnerable, sick, and/or inmates engaged in external work or educational activities, in addition to differentiated criteria for pardon of crimes involving violence or serious threat (Brasil, 2016). Then-Minister of Justice Alexandre de Moraes justified: "it is a signal, whether to criminals, to those incarcerated, or to society, of what is truly intended to be combated more harshly and what is set as a priority" (Boehm, 2016).

The creation of distinct requirements for pardon of crimes committed with violence or serious threat drew the attention of the Federal Prosecution Service (MPF).

The decree was issued in the context of the Lava Jato operation, and such requirements could potentially benefit, in the future, those convicted in that operation for corruption offenses. Weeks before the publication of the 2017 decree, federal prosecutors from the Lava Jato task force requested that the National Penitentiary and Criminal Policy Council (CNPCP) not extend the scope of pardon to crimes of corruption, money laundering, and criminal organization, arguing that it could "dilute the deterrent effect of punishment" (Rodas, 2017).

The 2017 decree reinstated the possibility of commutation, extended pardon to fines, and modestly broadened coverage for more vulnerable persons, but maintained distinct requirements for crimes committed with violence or serious threat compared to other offenses. The prosecutors' concern was largely unfounded; of the 22 people convicted in the operation to that date, only one could potentially benefit from the pardon (Brasil, 2017). Nevertheless, the PGR filed ADI 5874, challenging the President's prerogatives and limits regarding pardon.

According to the initial petition, the decree would promote impunity by "exempting from serving judicial sentences precisely those convicted of crimes with a high degree of social harm and incalculable moral and social consequences, such as corruption, money laundering, and related crimes" (Brasil, 2019, p. 9).

The text of the decree made no express reference to these crimes, stating only that pardon could be granted to those who "have served one-fifth of the sentence, if not recidivists, and one-third, if recidivists, in crimes committed without serious threat or violence against a person" (Brasil, 2017).

By 7 votes to 4, the STF Plenary upheld the constitutionality of the 2017 Christmas pardon decree – a decision marked by arguments both for and against judicial self-restraint in the face of the scope and limits of the pardon decree, "under penalty of rendering the institute meaningless" (Brasil, 2019, p. 65).

5. ADI 7.330 and the Bolsonaro decree: heinousness and Brazil's international commitments

ADI 7.330, still pending a final decision by the Supreme Federal Court (STF), advances two main arguments to sustain the unconstitutionality of Articles 6 and 7, §3, of Decree No. 11,302/2022. In this section, both lines of argument are addressed to clarify

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the specifically legal issues that have come to define the convictions of the police officers involved in the crimes of October 2, 1992.

4.1 The heinousness timeline: the Carandiru Case and Law No. 8,930/94

ADI 7.330, filed by the Office of the Prosecutor General (PGR), argues for the impossibility of granting pardon to police officers held responsible for the Carandiru Massacre, based on Article 5, item XLIII of the Federal Constitution, which provides that:

> the law shall consider as non-bailable and not subject to pardon or amnesty the practice of torture, illicit drug trafficking, terrorism, and those defined as heinous crimes, with the perpetrators, instigators, and those who, being able to prevent them, fail to do so, being held accountable.

According to the PGR, the Christmas pardon granted by former President Bolsonaro exceeded constitutional material limits by directing the pardon to heinous crimes committed in the Carandiru case.

Under Brazilian law, heinousness is defined by inclusion in the list under Article 1 of Law No. 8,072/90. At the time of the Massacre, neither homicide nor aggravated homicide were included in that statute – a change only brought by Law No. 8,930 of 1994.

As noted in the initial ADI 7.330 petition, the final part of Article 6 of Decree No. 11,302/2022 expressly sought to circumvent the issue of the current heinous character of aggravated homicide by granting pardon "for acts committed more than thirty years ago, counted from the date of publication of this Decree, and not considered heinous at the time of their commission" (Brasil, 2022, p. 17).

By contrast, the PGR argued that the provision violates the constitutional order by disregarding the fact that, at the time of the decree's issuance, aggravated homicide was legally characterized as heinous and therefore not subject to pardon[17]. In this sense,

17 "If the crime is classified as heinous at the time the decree is issued, it must necessarily be excluded from the scope of the pardon, under penalty of violating the material limit expressly set forth in Article 5, XLIII, of the Federal Constitution, which does not take into account the date of the offense, but rather whether the crime is defined as heinous in the legal system at the time the Christmas pardon decree is issued." (Brasil, 2022, p. 15).

the PGR cited two STF decisions indicating that the heinous nature of a crime should be assessed at the moment the pardon decree is issued, not at the time of the crime[18].

In the records of ADI 7.330, on December 30, 2024, the Office of the Attorney General (AGU) submitted a statement regarding the PGR's request for a preliminary injunction suspending Articles 6, caput and sole paragraph, and 7, §3, of Decree No. 11,302/2022.

Arguing against the injunction, the AGU raised points relevant to the merits of ADI 7.330 (BRASIL, 2022, doc. 9), including: (i) the President of the Republic's discretion in granting pardon would allow such forgiveness; (ii) the legal impossibility of other branches reviewing the presidential pardon act, as held by the STF in ADI 5.874; and (iii) the impossibility of classifying the crimes committed in the Carandiru Massacre as heinous, given the principles of strict legality in criminal law (Article 5, XXXIX, CF) and the non-retroactivity of more onerous criminal law (Article 5, XL, CF)[19].

It is noteworthy that the issue before the STF, regarding the heinousness of the Carandiru crimes, is not fundamentally about the separation of powers, even though the AGU has raised the issue of the judiciary's review over executive normative acts. Rather, the specifically legal question raised by ADI 7.330 concerns the precise meaning of the term "criminal law" in Article 5, XL, of the Constitution. According to that constitutional provision, "criminal law shall not be retroactive, except to benefit the defendant." Through ADI 7.330, the STF must determine whether Law No. 8,930/1994 – which included aggravated homicide among heinous crimes – constitutes "criminal law." If so, the constitutional prohibition in Article 5, XL, against retroactive harsher criminal law would allow the police officers convicted in the Carandiru Massacre to be pardoned under Bolsonaro's decree, since the event took place in 1992, two years before Law No. 8,930/94, which made aggravated homicide a heinous crime.

On the other hand, if the STF finds that Law No. 8,930/1994 does not qualify as "criminal law," then the legal consequence would be that the heinous nature of a crime must be assessed at the moment of the pardon's grant, making unconstitutional those provisions of Decree No. 11,302/2022 that seek to absolve the police officers of their sentences.

18 This refers to HC 117.938/SP, judged by the First Panel of the Federal Supreme Court (STF) in 2014, and HC 94.679/SP, judged by the Second Panel of the STF in 2008.

19 In this regard, the Office of the Attorney General (AGU) cites Supreme Federal Court (STF) precedents, such as HC 97.700/SP, decided by the Second Panel of the STF in 2014.

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As indicated in this section, both the PGR and the AGU cited STF precedents to support their arguments. However, those decisions were not rendered in the context of abstract constitutional review. Thus, as noted by former Justice Rosa Weber, ADI 7.330 presents a unique opportunity for the STF to determine whether, for the purposes of granting pardon, the heinous character of a crime should be situated at the time of the offense or at the time of the pardon decree (Brasil, 2022, p. 24).

Ultimately, this is a matter of constitutional jurisdiction in defining the meaning of "criminal law" under Article 5, XL, of the Federal Constitution: in ADI 7.330, the STF will decide, expressly or implicitly, whether Law No. 8,930/1994 falls within the scope of "criminal law" contemplated by the cited constitutional provision.

5.2 Human rights violations in the Carandiru Case and the Inter-American Commission on Human Rights Report

The ADI 7.330 initial petition also raised issues of international law. According to the petition, "the President's decree granting pardon, in the context of international law, constitutes an act of the Brazilian state subject to the limitations imposed by human rights treaties to which the Federative Republic of Brazil is a party" (Brasil, 2022, p. 19).

Specifically, reference is made to Brazil's accession to the American Convention on Human Rights (ACHR or Pact of San José, Costa Rica)[20] and submission to the jurisdiction of the Inter-American Court of Human Rights.

The petition's argument stresses the need for compatibility between Brazilian law – and presidential acts – and international law, especially the ACHR. In this sense, it was argued that "Decree 11,302/2022, by specifically allowing, in the case of the Carandiru Massacre, that convicted military police officers benefit from the Christmas pardon, affronts human dignity and basic and elementary principles of international public law" (Brasil, 2022, p. 23). According to the PGR, the crimes committed during the Massacre would qualify as "serious human rights violations" (crimes against humanity), and, for this reason, international public law – customary or conventional – would prohibit the granting of pardon in this case[21].

20 In addition to the American Convention on Human Rights, the initial petition also refers to "other regional treaties or conventions on the matter" (Brasil, 2022, p. 21).

21 On this point, the Office of the Prosecutor General (PGR) cites the precedents of Barrios Altos and La Cantuta v. Peru, decided by the Inter-American Court of Human Rights, in which a decision of the Peruvian Constitutional

The PGR's argument that Decree No. 11,302/2022 is incompatible with international law is supported by reference to Report No. 34 (2000) of the Inter-American Commission on Human Rights (IACHR, 2000), which specifically addressed the Carandiru Massacre and concluded "that the State failed to comply with its obligation to prosecute and punish those responsible" (IACHR, 2000, §102). Furthermore, one of the recommendations made by the IACHR to Brazil at the end of the report was the need for "a complete, impartial, and effective investigation to identify and prosecute the authorities and officials responsible for human rights violations" (IACHR, 2000).

Therefore, according to the PGR, Bolsonaro's normative act, as regards the involved military police officers, "represents a reiteration by the Brazilian State of the failure to fulfill its international obligation to seriously and effectively prosecute and punish those responsible for the crimes against humanity committed at the Detention Center on 10.02.1992" (Brasil, 2022, p. 27).

In summary, the PGR claims that the pardon granted to the convicted officers "ignored inherent human rights, such as the right to life and physical integrity" (Brasil, 2022, p. 27), thereby violating both national and international legal orders, including Article 7 of the Transitional Constitutional Provisions Act (ADCT)[22]. For these reasons, the PGR requested:

> [the] declaration of unconstitutionality, without reduction of text, of Art. 6, caput and sole paragraph, in conjunction with Art. 7, §3, of Decree 11,302/2020, to exclude from its scope crimes against humanity, notably those committed in the Carandiru Massacre, the prosecution and punishment of which the State undertook by international commitment voluntarily assumed by the Federative Republic of Brazil.

It is noteworthy that, according to the wording of the excerpt quoted here, the PGR's request may be interpreted as not being limited to crimes against humanity committed during the Carandiru Massacre, since the term "notably" was used. That is, the request does not refer exclusively to the Carandiru case, but may encompass any other crimes against humanity covered by Articles 6, caput, and 7, §3, of Decree No. 11,302/2022.

Court granting a humanitarian pardon to former President Alberto Fujimori – who had been convicted of crimes against humanity – was suspended (Brasil, 2022, p. 24).

22 "Art. 7. Brazil shall advocate for the establishment of an international human rights court."

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6. Difficult questions: pardon and the presidential discretionary power

This article does not aim merely to chronicle the development of the Carandiru case within the institutions of the Republic (notably the Presidency and the Supreme Federal Court). Its focus is to address issues that, though embedded in a specific political context, can be viewed from a distinctly legal perspective. The inherent drama of a case involving state violence, such as this one, intensifies the discomfort regarding the extent of the President's discretionary powers, especially considering that, in Bolsonaro's case, such powers were used to affirm that a massacre could be forgiven.

6.1 Imbalance in the system of checks and balances of the Republic

At this point, the legal problem addressed in this work should be clear. On the one hand, pardon and clemency are institutions grounded in constitutional and legal provisions. On the other, the President's discretionary power to grant pardon finds virtually no limits in the legal system, except for the prohibition set forth in Article 5, XLIII of the Constitution – a provision which, while certainly not irrelevant, does not definitively resolve the problem of the broad discretion enjoyed by the President. From these established points arises the question: Does the existence of pardon grounded solely in the will of the President of the Republic, detached from any requirement of justification, offend the system of checks and balances sought by the separation of powers in a Rule-of-law democracy?

On this topic, Ferreira (2011, p. 126) argues that "the restriction or abolition of the power to grant pardon by means of constitutional amendment limiting the Executive's decision-making margin" would lead to the "hegemony of the Legislative and Judicial Branches within the penal system, to the detriment of the Executive Branch and fundamental rights." Furthermore, the author asserts that the "suppression or limitation" of the presidential pardon power would entail "an affront to the principle of ultima ratio and, consequently, to human dignity, the foundation of the Rule-of-law democracy" (Ferreira, 2011, p. 126).

Pascoe and Novak (2021, p. 7), also in defense of clemency, maintain that in many States, pardon, despite its origins outside the democratic tradition, has gradually been

transformed into a power compatible with democracies. According to the authors, "[a]s long as criminal laws remain imperfect and are applied and interpreted by human beings, pardon will continue to be a necessary remedy for achieving milder punishments" (Pascoe & Novak, 2021, p. 1)[23].

Conversely, it may be argued that, considering the ideal of harmony pursued by a legal-political system of checks and balances in a Rule-of-law democracy , an imbalance arises from the vague provisions concerning pardon and clemency, due to the arbitrariness enabled by the broad scope of the presidential pardon power, which may, without justification, contradict the policy decisions of the Legislature and the legal decisions of the Judiciary.

Given that the Brazilian constitutional order governs a Rule-of-law democracy, the problem posed by the scope of presidential pardon is aggravated, since, in the words of Dimoulis and Dias (2022):

> [i]f everything depends on the will of one person, there is neither rule nor limit. In the institutional engineering of the Rule of Law, the link between law and democracy, between legality and legitimacy, is materialized by the institutional and temporal division of the legislative production and reproduction instances, so that no one holds exclusive power over the law.

The authors point out that the President has veto power over laws passed by the Legislature, as well as the power to appoint judges to certain courts, such as the Supreme Federal Court (Dimoulis & Dias, 2022). The exceptional nature of pardon and clemency is, in itself, a sign of the aforementioned imbalance among the Branches, a persistent "feudal remnant" which, according to Dimoulis and Dias (2022), should be abolished from the constitutional order.

Examining the origins of the pardon institution requires departing from the parameters of the Rule-of-law democracy and returning to notions of absolute power of ancient monarchs (Carrasco, 2017, p. 117-118)[24]. The pardon granted by a ruler, in this sense, proves to be, by definition, a king's power to administer justice at his discretion or arbitrarily, which clashes with the ideal of harmony among Powers in a Republic. Carrasco (2017, p. 126) notes that pardon was based on "reasons that, even if not

23 "So long as criminal laws remain imperfect, and are enforced and interpreted by human beings, clemency will persist as a necessary remedy to achieve more lenient punishments" (Pascoe; Novak, 2021, p. 24).

24 In a similar sense, see Arias and Kouroutakis (2021, p. 58).

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illogical within the absolutist foundations of the monarch's concentration of power," would hardly be accepted in a Rule of Law[25].

It cannot be denied that the presidential power to grant pardon has been embraced by the current Brazilian constitutional order. This does not prevent, however, the identification of the imbalance this Executive prerogative can cause, with the Carandiru case serving as an example of how broad presidential power enabled even the pardon of extreme state violence.

Based on these considerations, in light of the effects caused by Decree No. 11,302/2022, this article contends that the institution of presidential pardon (both clemency and pardon) has the potential to deviate from the constitutional ideals of checks and balances and the upholding of fundamental rights – including those of the people detained at the Detention Center on October 2, 1992.

Thus, while acknowledging that the legal system currently allows the discretionary exercise of pardon by the President, it is deemed appropriate to critique the institutions of clemency and pardon, especially in the context of a Rule-of-law democracy. The critique advanced here is mainly directed at the very existence of these institutions, whose current normative provisions preserve the traces of arbitrariness from their monarchical roots. Even so, a relatively milder critique could be conceived, not against the existence of these institutions, but against the lack of stricter limits and normative demands for justification for the exercise of presidential pardon. We leave it to the reader to judge these critical perspectives, emphasizing that the Carandiru case demonstrates how clemency and pardon can be instruments of arbitrariness in a context that should be guided by republican legal principles, according to which there would be no room for presidential voluntarism.

6.2 Pardon under the Scrutiny of the Supreme Federal Court

Can the STF exercise abstract judicial review over a normative act of the President of the Republic, considering that the legal order confers on the Chief Executive the exceptional and discretionary power to grant pardon?

25 Free translation of Carrasco (2017, p. 126): "Its exercise was grounded in reasons that, while not illogical in responding to the absolutist foundations of power concentrated in the monarch, would conflict with any attempt to transfer or accept them within a Rule of Law."

The first way to answer this question is through a legal-positivist lens, with emphasis not on the Executive's discretion, but on that of the STF. According to this view, any court decision can create new legal norms, thus transforming the legal order. In this way, the STF, when deciding a given case, exercises its competence so as to create law through "authentic interpretation" – that is, the interpretation imposed in a decision by a competent judicial body[26].

It is worth noting that this first way of answering the issue raised in this subsection is descriptive: it does not seek to prescribe how the Judiciary should decide a given case, but rather, based on the legal-positivist thesis of judicial discretion from Kelsenian theory[27], asserts that what a competent court decides, in a specific case, is what determines the contours of the law itself.

In other words, based on the legal-positivist thesis of judicial discretion, it is asserted – again descriptively – that the STF has the last word on the meaning and scope of normative statements. With this theoretical-descriptive perspective on STF cases regarding clemency and pardon, it is understood that the STF may limit the scope of presidential pardon, despite the lack of such limitation in the constitutional and legislative texts of the Brazilian legal order.

This assertion, it should be emphasized, is descriptive, not prescriptive: the proposition is that the STF has the legal-political power to define the scope of presidential pardon through authentic interpretation, which became possible in the context of ADI 7.330. As Guastini (2022, p. 311) explains, "the 'authentic' interpreters of every normative text are the bodies competent to apply it: especially those competent to apply it in the last instance, whose interpretive decisions cannot be challenged or reviewed by anyone."[28]

However, the description of the STF's powers based on legal-positivist theory does not answer whether the STF should or should not exercise abstract judicial review

26 On authentic interpretation and the creation of law by the Judiciary, see Kelsen (2005, pp. 353-355).

27 See, for example, the eighth chapter of Kelsen (2005). Also on the thesis of judicial discretion, see Hart (2011, pp. 335-339); Dimoulis (2022, p. 239); Barros (2023, pp. 49-52).

28 Similarly, Dimoulis (2011, p. 231) states: "Most contemporary theorists regard decisionism as a mistaken option for those unwilling to undertake painstaking research on what is correct and adequate in law, dismissing the problem by saying 'someone decides' and 'it is valid because it is valid.' In reality, however, decisionism is the main form of decision constitutionally admitted. There are countless cases of legally binding decision because someone willed it, from a child buying chocolate at the school canteen to the approval of a bill by Congress. Theorists should not disparage decisionism, but rather indicate, in a well-founded manner, who, when, and within what limits decisionism may be exercised."

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to delimit presidential pardon. Put differently, the legal-positivist description does not provide a prescriptive judgment about the STF's action.

At the time of writing, one element of ADI 7.330 stands out: the STF, when judging the constitutional action, must determine, expressly or implicitly, whether Law No. 8,930/94 is a criminal law and thus subject to the prohibition of retroactive harsher criminal law (Article 5, XL, CF). This statute amended the list of heinous crimes under Law No. 8,072/90, so that homicide became legally classified as heinous, resulting in harsher penalties.

At the time of this article's writing, it seems difficult, in dogmatic terms, to argue that Law No. 8,930/94 is not a criminal law, considering it transformed certain ordinary crimes into heinous crimes – that is, it significantly altered the classification of offenses in the Brazilian legal system. If the STF finds that the substance of that law makes it criminal, it cannot be retroactively applied, pursuant to Article 5, XL, CF. As a consequence, the crimes committed during the Carandiru Massacre would not, in legal terms, be heinous and could thus be subject to the pardon granted by Bolsonaro in 2022, as the prohibition in Article 5, XLIII, CF would not apply in the case.

On the other hand, the STF could provide reasons to distinguish Law No. 8,930/94 from criminal laws, and thereby circumvent the constitutional prohibition of retroactivity in Article 5, XL, CF. The court could argue, for example, that a criminal law is characterized by the creation of a new offense or reform of an existing one – leading to a restrictive interpretation of "criminal law" that could be applied in a less protective way in other cases after the judgment in ADI 7.330. Should the STF decide that Law No. 8,930/94 is not a criminal law, it could be retroactively applied, and consequently Bolsonaro's decree in favor of the convicted police officers would be unconstitutional.

Another possible framing by the STF would be one in which the court establishes constitutional interpretation criteria for the application of clemency and pardon, excluding the legal viability of arbitrary presidential grants of pardon. To this end, the court could rely both on constitutional principles – such as those governing Public Administration, under Article 37 of the Constitution – and on rules of international law, especially the American Convention on Human Rights, already mentioned in this paper. However, it should be recognized that this approach does not obviate the need to address the (non)retroactivity of Law No. 8,930/94.

Beyond these hypothetical scenarios for the STF, it is necessary to return to a point already mentioned: the exceptional and discretionary nature of presidential

pardon. In the current configuration of checks and balances among the Branches of the Republic, the statutory law grants the President the power to pardon any person not subject to the prohibition in Article 5, XLIII, CF, as no other provision imposes limits on presidential pardon.

One may argue, as Dimoulis and Dias (2022) have done, that the constitutional and legal provisions on clemency and pardon are unnecessary and, therefore, should be repealed. Even so, the problem persists: while the abolition or even reform of such institutions has not occurred, the Presidency remains vested with an exceptional and discretionary power, conferred by the Constitution itself.

For this reason, from a prescriptive perspective, it is difficult to sustain the legal viability of the STF, in abstract judicial review, limiting the power of the Chief Executive to grant pardon – something asserted in ADI 5.874 itself. The Court's judgment, whether express or implied, as to whether Law No. 8,930/94 falls within the constitutional prohibition on the retroactivity of harsher criminal law (Article 5, XL, CF) may be a way to address the issue posed by ADI 7.330 without altering the limits of presidential pardon.

5.3 The State pardons the State: a fundamental tension

The conclusion of this section seeks to address the fundamental tension brought about by Decree No. 11,302/2022. The former President, by granting pardon to the military police officers held responsible for the Carandiru Massacre, commanded the State to pardon the State.

This pardon gave rise to the aforementioned fundamental tension. On one hand, in the Brazilian Democratic State under the Rule of Law, the State has the duty to safeguard basic rights, among them life and physical integrity. Any unlawful violation of such rights must be met with legal sanctions, observing due process. In this sense, the police officers involved in the Carandiru case were punished for having offended the foundations of the constitutional order.

On the other hand, still within the Brazilian Rule-of-law democracy, authorities enjoy powers conferred by the Constitution, under the principle of legality – another foundation of the Republic, ideally intended to control and limit the actions of state agents. As outlined in this work, the current constitutional order does not include rules

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that would have prevented Bolsonaro from pardoning the homicides committed in Carandiru, given that, at the time, there was no law classifying them as heinous.

Here, then, lies the fundamental tension: in the Brazilian Rule-of-law democracy, the Constitution both strictly prohibits arbitrary and lethal violence and authorizes the President to pardon those who perpetrated it in Carandiru in 1992. Even if the judgment on the constitutionality of Decree No. 11,302/2022 eventually results in the annulment of the pardon, it is important not to lose sight of the origin of the legal issue addressed here: the tension (the conflict) exists within our State under the Rule of Law, rooted in the arbitrariness granted by the Constitution to the President.

At this point, the deeper problem emerges: the former President was complicit and morally sanctioned the Carandiru Massacre through valid, current statutory law, due to the voluntarism that permeates the institutions of clemency and pardon.

Barros (2023), from a critical perspective, asserts that statutory law, in some cases, may be marked by a "legal void" that enables authorities to commit arbitrariness endorsed by broad and vague normative provisions, even in the context of a Rule-of-law democracy. In this sense, the author contends that the letter of the law, when marked by a "legal void," serves two distinct and opposing functions: on one hand, statutory law aims at the "ideal of binding authorities to the letter of the law"; on the other, statutory law so marked becomes a "license for violence" under the banner of legality (Barros, 2023, p. 134).

From this idea, it is understood that the constitutional and legal permission for the exercise of presidential pardon encompasses the possibility of pardoning that which, in light of the legal order of a Rule-of-law democracy, should be unpardonable. The letter of the law, in all its silence, both binds the President to the Constitution and its fundamental rights and, at the same time, allows him to pardon a Massacre based on the arbitrariness of his own will.

Although the STF, in its discretion, may limit the scope of presidential pardon, it is recognized that Brazilian statutory law harbors an essential contradiction by granting the President an exceptional power that is guided, predominantly, by the unrestrained will of the Chief Executive. The Carandiru case serves as a disturbing example of how such power can be used for the State to pardon the State – an example that could be repeated in future governments guided by anti-democratic and anti-human rights projects, such as Bolsonaro's.

7. Final considerations

This research allows us to draw the following conclusions: (i) the review of STF case law (1930–2024) indicates that institutional debates about the scope and limits of presidential pardon are recent; (ii) the pardon granted by former President Bolsonaro to the police officers responsible for the Carandiru Massacre demonstrates how clemency and pardon are institutions susceptible to the arbitrariness of the Chief Executive – a kind of arbitrariness sanctioned by the Brazilian legal order; (iii) the existence of clemency and pardon in the Brazilian legal order implies a fundamental tension within our Rule-of-law democracy; and, finally, (iv) the STF, by exercising judicial discretion, may limit the scope of presidential pardon granted by Bolsonaro, but must, for that purpose, address difficult issues related to the (non)retroactivity of Law No. 8,930/1994.

At the time of the closing of this text, the STF's judgment of ADI 7.330 was still pending, and thus, no final word had yet been issued on the constitutionality of the provisions of Decree No. 11,302/2022 discussed in this work. Nevertheless, it is important not to lose sight of the purpose of this article: to show how the Brazilian legal order allowed a President to pardon the police officers held responsible for the Carandiru Massacre.

The aim was to bring to light a profound legal issue: even in a Rule-of-law democracy, the legal order can enable the arbitrariness of authorities. In the case of the pardon for the police officers of the Carandiru Massacre, an exceptional institution – one animated by the virtually unrestricted will of the President – was used to send a message: the State pardons the State's lethal violence.

These pages should not be read as an expression of conformity, but as a critique shaped by close attention to the normative provisions of the Constitution and the law, which ought to restrain and limit the conduct of authorities, so that the exercise of political power is not confused with the mere manifestation of a President's will – or that of any other authority of the Republic.

The reader may accuse this work of being formalistic, for focusing mainly on the letter of the Constitution and the law. However, as seen, the treatment accorded to the normative provisions was accompanied by attention to the STF's role in analyzing pardon decrees. This approach is permeated by a legal-positivist outlook that perceives discretion in both the actions of the President and the STF. It is not, then, formalism

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in the sense of detachment from reality, but rather a dedicated attention to the broad decision-making power extracted from constitutional and legal texts.

It is emphasized that, from a descriptive legal-positivist perspective, the STF may create legal criteria to delimit the scope of the presidential pardon power. Even so, it is appropriate to stress: the central legal problem addressed in this article concerns the paths left open by a legal order that, even in a democracy, enabled the enactment of a decree that officially conveyed state approval of police lethality in the Carandiru Massacre.

Even if, at some point in the near or distant future after the completion of these pages, the Supreme Federal Court (STF) finds the provisions of Decree No. 11,302/2022 unconstitutional, it would be a mistake to overlook how essential contradictions may arise within a Democratic State governed by the Rule of Law, safeguarded by statutory law that ought to prevent them. This work has presented that problem through the specific lenses of legal scholarship, and between its lines lies the recognition that state violence persists not only through acts contrary to statutory law, but also by means of it.

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