The criminal statute of limitations in Chile

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Abstract: The following research paper aims to explain the tackling of the criminal statute of limitations in Chile, regarding both the prescription of criminal action and its punishment. In this essay, the doctrinal debates, as well as the jurisprudential positions on various critical points of the legal status of the criminal prescription, will be presented.

Keyword: statute of limitations; prescription of the criminal action; prescription of the penalty.

I. Introduction: foundation and legal nature

In Chile, the statute of limitations on criminal matters is regulated from two perspectives: as prescription of the crime (more precisely of criminal action) and as prescription of the penalty, in both cases considered as a cause for the extinguishment of the criminal liability (art. 93 N°s. 6 and 7 of the Penal Code, hereinafter "PC"). "Its existence is based on the recognition that, once certain deadlines have been met, the state's claim to pursue criminal conduct or to enforce a punishment that has already been established, but which has not been fulfilled or has been violated, can no longer be made effective"[1]. Therefore, even though two types of the statute of limitations are studied, the truth is that "it is a single institute: prescription of the responsibility, and this because it is the responsibility that is extinguished; only due to its immediate consequences is it possible to differentiate, but its nature is unique"[2].

In historical terms, the Chilean PC (1874) has the Spanish PC of 1870 as its primary source, registering only a minor modification under statute N°

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[1] G. Balmaceda, *La prescripción en el Derecho penal chileno*, on *Revista de Ciencias Penales*, Sexta Época, Vol. XLIII, Nº 1 (2016), p. 107.

[2] M. Garrido Montt, *Derecho penal. Parte General*, Santiago, Editorial Jurídica de Chile, t. I, 2010, p. 389.

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11.183 of 1953 that slightly modified its terms, in these 147 years of validity, so there is still no concept of a statute of limitations[3].

The foundation and legal nature of the statute of limitations have been the subject of a lively doctrinal discussion that seeks justification from both procedural and substantive perspectives.

From a *procedural perspective*, the basis of the statute of limitations consist in the "evidentiary issues that the timeframe between the commission of the crime and its prosecution would entail a situation that could result in wrongful rulings"[4]. As Balmaceda explains, this argument is inadmissible because, on one hand, the evidentiary difficulty is not an issue that is necessarily related to the passage of time (for example, a homicide committed years ago can be credited more easily than a proximate one). In the second place, this perspective fails to explain the existence of different statutes of limitations, established according to the seriousness of the crime, without considerations regarding evidentiary issues; and, finally, it could only be explained from this perspective, the existence of the prescription of the criminal action but not of the penalty, where there is no evidentiary problem (criminal responsibility was already proved in the trial that determined the liability of the defendant)[5].

Among the procedural variants, another thesis affirms the justification of the statute of limitations on the protection of the defendant's right to a trial without an undue delay. However, this approach neither responds to cases of imprescriptible crimes nor explains the cases in which the statute of limitations operates even though the delay was caused by the attitude of the defendant[6]. It has also been stipulated that the prescription would be based on the defendant's right to a legal defense, as the production of suitable evidence to exercise it would weaken over time, a stance that can be criticized for the same reasons outlined above.

However, from a substantive focus, a first thesis holds that the basis of the prescription lies in the State's *withdrawal* of the prosecution and punishment crimes, by virtue of the passage of a certain period[7]. Nevertheless, it is criticized for not considering the inalienable nature of the exercise of criminal action, as an aspect that subtracts it from the complete discretion of the competent

[3] C. Cabezas, *Prescripción de la acción penal. Herencia y desafíos político-criminales*, Santiago, 2021, p. 29 s.
[4] M. Garrido Montt, *Derecho penal. Parte General*, cit. p. 388, with criticism.
[5] G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 110.
[6] G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 108 s.
[7] E. Gandulfo, *El inicio de la suspensión de la prescripción de la acción penal en el nuevo ordenamiento para el proceso penal*, in *La Razón del Derecho*, on *Revista Interdisciplinaria de Ciencias Jurídicas*. N° 1 - 2010, pp. 1-32.

government authorities[8]. Furthermore, this thesis also does not address the possibility that the need for punishment simply disappears over time and that as a corollary the State is obliged to the punishment abandoned.

For others, the grounds of the statute of limitations have been supported as a *sanction to the inactivity of the public authorities and its officials*. However, this criterion does not explain the assumption of imprescriptible crimes, which neither entail a sanction nor explain why the sanction would be more serious for minor crimes such as misdemeanors, in consideration that the deadlines are established in relation to the seriousness of the incident (10 or 15 years for crime; 5 years for a felony and 6 months for misdemeanors).

Thirdly, the majority considers the protection of *legal security* as the basis of the prescription in the sense of prioritizing the preservation of social peace through the consolidation of the legal situation over the social need for punishment[9]. However, it would not be possible to conceive from this perspective the existence of imprescriptible crimes, since they would represent an attack *per se* to this principle.

For another sector, the prescription is related to the *purposes of the penalty*. In this sense, Garrido Montt considers special prevention criteria, consisting of the fact that the offender has not been punished and has not incurred in the repetition of similar behaviors; It would mean that his social reintegration would have occurred, making it inadvisable to modify this state of affairs[10].

For Balmaceda[11], the true foundation of the statute of limitation of criminal responsibility is found in the *purposes of criminal law*, particularly the offense, fragmentation, and ultima ratio principles: meaning, to invoke its application only to punish those behaviors that disturb society in a, particularly severe degree. Thus, the assumption in which the event loses all its capacity to negatively affect the present social model has been pointed out. Following this logic, imprescriptible crimes could be satisfactorily explained - due to their seriousness - it is understood that the need for punishment never ceases.

Recently it is possible to find a thesis according to which the justification of the institute must be found in the *principle of humanity*. For Cabezas, the classic foundations of prescription are rhetorical formulas that are difficult to verify, which do not offer satisfactory explanations for this extinctive phenomenon. For this reason, the principle of humanity is contemplated as a foundation based

[8] J.L. Guzmán, *Comentario a los artículos 93 a 105*, in Politoff, Sergio and Ortíz, Luis (Dirs.), *Texto y Comentario del Código Penal chileno*, t. I, Santiago, 2002, p. 461.
[9] E. Cury, *Derecho Penal. Parte General*, 7ª edition, Santiago, Ediciones Universidad Católica de Chile, 2005, p. 798. Also, J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 462 and A. Etcheverry, *Derecho Penal. Parte General*, 3rd edition, Santiago, Editorial Jurídica de Chile, t. II, 1998, p. 256.
[10] M. Garrido Montt, *Derecho penal*, cit., p. 388.
[11] G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 111.

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on respect for human dignity so that the application of justice which may cause the loss or limitation of the fundamental rights, is verified within a reasonable and pertinent period[12].

Regarding the legal nature of the criminal statute of limitations, it is possible to identify three theses that seek to explain it. First of all, some consider it as a *procedural institution*, inasmuch as what is suppressed by the passage of time is the action to prosecute the crime or the execution of the sentence, and not the elements of the crime. Guzmán Dálbora[13] criticizes this argument by considering that the aforesaid institute is closely related to substantive aspects, namely: the statute of limitations depends on the seriousness of the offense and, where appropriate, on the nature of the penalties; the term is computed from the date of commission of the incident, and the commission of a new crime or misdemeanor interrupts the sequence of all kinds of prescription.

Secondly, the unanimous position of the Chilean doctrine follows a *material theory*, according to which the statute of limitations belongs to criminal law, insofar as "it is possible to notice in it a resignation of the State to exercise its penal power when a certain time has elapsed since the perpetration of the crime"[14]. All of the foregoing are without the debate on whether what it prescribes is the action or the crime. In fact, for Cury, it prescribes the felony, because, in his opinion, "this form of a prescription cannot extinguish the criminal responsibility when its existence has not yet been legally declared, but only prevent it from being established or dismissed"[15]. On the other hand, for the dominant doctrine, "the felony is an event that is not erased over time: what ends is the right to pursue its punishment"[16].

Finally, others have said that has a *mixed* legal nature since it is "considered that the prescription has a material and procedural nature, because the passage of time, along with affecting the need for punishment, creates

[12] C. Cabezas, *Prescripción de la acción penal*, cit., p. 29 s. y 127 s. The genesis of this approach can be found in: J.L. Guzmán Dálbora, Arts. 93-105, cit., P. 462, who criticizes the existence of imprescriptible crimes. In his opinion, "keeping a citizen indefinitely under the yoke of an accusation or the imminence of a sentence, contrasts with an urgent demand of *humanity*, an aspect of the idea of law on whose importance for contemporary criminal law it is needless to insist".

[13] J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p .462.

[14] G. Oliver, *La aplicación temporal de la nueva regla de cómputo del plazo de prescripción de la acción penal en delitos sexuales con víctimas menores de edad*, on *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso XXIX*, Valparaíso, Chile, 2° Semester of 2007, p. 259. Also E. Cury, *Derecho Penal. Parte General*, 7th ed., Santiago, Ediciones Universidad Católica de Chile, 2005, p. 797 ss.; M. Garrido Montt, *Derecho penal*, cit., p. 388 s.

[15] E. Cury, *Derecho Penal. Parte General*, cit., p. 800.

[16] A. Etcheverry, *Derecho Penal*, cit., p. 257. In the same way, M. Garrido Montt, *Derecho penal*, cit., p. 388, highlights that "a human behavior is indelible as an event of factual reality".

difficulties of an evidentiary nature. However, to give a dual character to this cause is to place it in a situation of ambiguity regarding its possible consequences"[17].

As Guzmán Dálbora explains, the determination of the legal nature of the prescription is relevant to define the temporal validity of the norms that establish, modify or nullify the limitation timelines of criminal responsibility, which means, it has implications on the problem of its retroactivity[18]. According to Oliver Calderón, on the other hand, for the solution of the problem, it is not important to determine its legal nature, "but to analyze whether the application of a more unfavorable statute of limitations to events that occurred before it entered into force, do violate or not the basis of the principle of non-retroactivity in criminal matters. If it is attacked, then it must be concluded that such an application is prohibited. Otherwise, the prohibition does not affect it"[19]. Indeed, if we consider its procedural nature, the rules that regulate or modify it would apply *in actum*, without distinctions regarding their favorability, and the deadlines of the statute of limitations may then be altered to the detriment of the accused or even revived terms that have already expired. On the other hand, if we deem it as a criminal institution, the provisions that regulate or modify it will be subject to the principles of criminal law, in what interests us, the principle of retroactivity of the most favorable criminal law[20].

However, in Chile, this discussion is resolved in article 11 of the Criminal Procedure Code by expressly providing that "criminal procedural laws shall be applicable to proceedings already initiated, except when, in the opinion of the court, the previous law contains provisions more favorable to the defendant".

II. Prescription of criminal action

The prescription of criminal action constitutes "an institution by virtue of which, by the mere passage of time, the power to pursue criminal responsibility through the exercise of the corresponding criminal action extinguishes"[21].

According to article 94 of the Chilean Penal Code, the prescription of criminal action -in the case of adults- will be fifteen years for crimes punishable by imprisonment, seclusion, or relegation; ten years for other crimes; five years

[17] M. Garrido Montt, *Derecho penal*, cit., p. 388 s.
[18] J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 463.
[19] *temporal de la nueva regla de cómputo del plazo de prescripción de la acción penal en delitos sexuales con víctimas menores de edad*, on *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso XXIX*, Valparaíso, Chile, 2nd Semester of 2007, p. 260 s.
[20] For all, E. Cury, *Derecho Penal*, cit., p. 799.
[21] V. Bullemore and J. Mackinnon, *Curso de Derecho Penal. Parte General*, Santiago, Lexis Nexis, 2005, t. I, p. 170.

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for felonies; and six months for misdemeanors[22]. Its second paragraph adds that, if the penalty is compound (several penalties or several degrees), the restrictive of liberty will prevail when for the application of the aforementioned terms; if there are no custodial sentences, the highest of those assigned will apply.

According to Garrido Montt, the situation may be doubtful when it comes to penalties composed of various degrees, since such wording noted does not assimilate the restrictive penalties from the custodial ones, creating a possible interpretive problem. Thus, it should be understood that when the penalty assigned to the criminal act is a custodial or restrictive one, if it has more than one degree and the highest corresponds to a crime, it must be qualified, respectively, with that category. In the case of other types of sanctions, on the other hand, (disqualifications, disenfranchisement, etc.), it will be the highest as determined by the scale of art. 21 of the Penal Code[23].

Finally, the final paragraph of article 94 refers to the existence of special short-term prescriptions contained in other parts of the Penal Code and special statutes. In effect, in matters of adolescent criminal responsibility, Article 5 of statute No. 20,084 provides that "the prescription of criminal activity and the penalty shall be two years, except for conduct constituting crimes, which term will be of five years, and in misdemeanors, that will be of six months"[24].

Among other relevant cases of special deadlines, there is a period of one year in the crimes of libel and slander, "counted from the time the offended had or could rationally have knowledge of the offense" (art. 431 of the Penal Code); or the term of one year in the felony of fraudulent checks, counted from the rejection of the document (articles 33 and 34 of D.F.L. No. 707 of the year 1982). Especially important is the case of art. 369 quarter of the Penal Code, by virtue of which the statute of limitations for criminal action to prosecute sexual crimes committed against minors, begins to run from the moment they reach the legal age of majority, that is, eighteen years[25].

It is discussed in our doctrine if for the prescription of the criminal action the penalty should be considered *in abstract or concrete*. According to Cury, the

[22] Crimes are felonies punishable by custodial sentences of five years and one day to twenty years; those who are sentenced to a penalty of sixty-one days to five years are simple crimes; and offenses punishable by imprisonment from 1 to 60 days or only with pecuniary penalties.
[23] M. Garrido Montt, *Derecho penal*, cit., p. 390.
[24] Court Appeals Ruling, hereinafter CAR, of Santiago, 23/03/2010, Rol Nº 1743-2009, applies this provision for the benefit of the defendant, by application of the principle of retroactivity of criminal law.
[25] In full, G. Oliver, *La aplicación temporal de la nueva regla de cómputo del plazo de prescripción de la acción penal en delitos sexuales con víctimas menores de edad*, on *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso XXIX*, Valparaíso, Chile, 2nd Semester of 2007, p. 257 ss., who - rightfully - manifests itself against its application to the acts committed before its entry into force.

penalty should be considered in the abstract, because otherwise, it would be necessary to prove in the procedure the circumstances that eventually modify criminal responsibility[26]. On the contrary, Mera, following Guzmán Dálbora, believes that a teleological interpretation demands to consider the degree of participation and the degree of development in the execution process, including the accidents of the crime, as the mitigating factor for irreproachable previous conduct. It is indicated that "otherwise, an anomalous and unfair situation would be reached, such as maintaining the same limitation period for the perpetrator of a consummated crime as for the accomplice or abettor to the same crime in an attempted degree and to deem the prescription as more severe than the punishment itself"[27].

1. Calculation of time limits

The accounting of the limitation periods, in the absence of an express rule, should be done in accordance with the provisions of article 48 of the Civil Code, namely, by using continuous days[28]. Then, to determine the start of the count, article 95 of the Penal Code indicates that it "begins to run from the day the crime was committed." Nonetheless, this formula has given rise to multiple questions.

A first problem occurs with the determination of the beginning of the term regarding crimes *of result* and those that require the concurrence of an objective condition of punishment. For a sector of the doctrine, "if a period has elapsed between the action itself and the result, the moment of commission 'should be considered the one in which the action is executed"[29].

[26] E. Cury, *Derecho Penal*, cit., p. 800. Also: G. Yuseff, *La prescripción penal*, 2nd edition, Santiago, Editorial Jurídica de Chile, 1994, p. 79. In jurisprudence CAR of Santiago 15/04/2016, Rol N°1015-2016.

[27] J. Mera, *Título V De la extinción de la responsabilidad penal. Comentario previo artículos 93 a 105*, en J. Couso and H. Hernández (editors), *Código Penal Comentado. Libro Primero (arts. 1° a 105). Doctrina y Jurisprudencia*, Santiago, Legal Publishing Chile, 2011, p. 725; J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 467. See: CAR Puerto Montt 14/02/2012, Rol N°40-2012; CAR Valparaíso 04/09/2015, Rol N°1358-2015; ; CAR San Miguel 29/04/2019, Rol N°144-2019; CAR Santiago 01/09/2018, Rol N° 1835-2018; CAR Santiago 04/03/2020, Rol N°700-2020; CAR Santiago 01/07/2020, Rol N°2894-2020; CAR San Miguel 17/09/2020, Rol N°2956-2020; CAR Santiago 15/03/2021, Rol N°844-2021;S CA Santiago 29/09/2021, Rol N°3158-2021; CAR Santiago 08/09/2021, Rol N°2939-2021.

[28] By all, E. Novoa, *Curso de derecho penal chileno. Parte general*, 3rd edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. I, p. 403.

[29] A. Etcheverry, *Derecho Penal*, cit., p. 257. On the same subject, E. Cury, *Derecho Penal*, cit., 2005, p. 801 y M. Garrido Montt, *Derecho penal*, cit., p. 390 s.; y RODRÍGUEZ COLLAO, Luis, Prescripción de la acción penal en el delito de bigamia, on *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, Nº 9, (1985), p. 293.

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For others, on the other hand, the total realization by the offender must be considered, so if in a crime with the external result it takes a long time to occur and is temporarily separated from the action in an appreciable way, the crime must be understood to have been committed at the time of that such result occurs[30]. In this sense, if the respective criminal type requires a material result of an objective condition of punishment, there will only be a typical event when the result is produced or the condition is met, only then the respective limitation term must begin to run. In crimes of mere activity, on the other hand, since the production of material results is not required, it must be at the moment when the subject carries out the corresponding criminal action[31].

A second difficulty arises from the lack of distinction on the degree of development of the crime and the participation of the subject in the criminal act. For Politoff/ Matus/ Ramírez in case of imperfect development (attempt or frustration), the prescription must run from the moment the offender's activity ceases, that is: from the last act of execution prior to the interruption, in the attempt; and since the action has been completely carried out in the frustrated crime. In his opinion, this prescription applies equally to all participants, including the mediate perpetrator, except for the abettor, whose post-crime action sets for him only the moment when his prescription begins to run[32]. On the contrary, Cury understands that the count must be started at the same time for both the completed crime and the frustrated one. Only in the event of an attempt, it should be counted from the last act of execution before the interruption[33].

Regarding *permanent crimes*, the establishment of the *die a quo* has also been discussed, indicating that, since its consummation is prolonged in time, "the day that marks the beginning of the prescription will be the day when the criminal activity ends"[34].

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[30] E. Novoa, *Curso de derecho penal chileno. Parte general*, 3ª edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, p. 404. También J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 469 s.; J.E. Vargas, *La extinción de la responsabilidad penal*, 2ª edition, Santiago, ConoSur, 1994, p. 147; G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 115; S. Politoff; J.P. Matus; M.C. Ramírez, *Lecciones de derecho penal chileno. Parte general*, 2ª edición, Santiago, Editorial Jurídica de Chile, 2004, p. 584; G. Yuseff, *La prescripción penal*, cit., p. 61.

[31] G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 115.

[32] S. Politoff; J.P. Matus; M.C. Ramírez, *Lecciones de derecho penal chileno*, cit., p. 584. Furthermore: M. Garrido Montt, *Derecho penal*, cit., p. 391.

[33] E. Cury, *Derecho Penal*, cit., p. 801.

[34] A. Etcheverry, *Derecho Penal*, cit., p. 257. Also: G. Labatut, *Derecho penal*, 9th edition at expense of J. Zenteno, Santiago, Editorial Jurídica de Chile, 1989, t. I, p. 298; E. Novoa, *Curso de derecho penal chileno. Parte general*, 3rd edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, p. 404; E. Cury, *Derecho Penal*, cit., p. 801; M. Garrido Montt, *Derecho*

In *continuing crimes*, on the other hand, the statute of limitations of the criminal action for a sector of the doctrine, "begins to run when the perpetrator finishes performing the last of those acts that comprise it"[35]. However, for Politoff / Matus / Ramírez such a solution is not entirely correct "since their treatment as a single criminal figure results from a doctrinal or legal fiction that benefits the defendant, the prescription of each crime that constitutes them separately must be considered separately"[36]. A similar arises regarding *habitual crimes* since assuming the repetition of certain unlawful conduct by the same active subject for criminal incrimination, the majority doctrine considers that the term " counted the last wrongdoing of them all"[37], and such a solution is often to the same criticisms above presented for the continuing crime.

Finally, in the *instantaneous crimes of permanent effects*, as in the felony of bigamy, the term is counted simply from when the instantaneous crime was committed[38].

2. Interruption and suspension of the statute of limitations of the criminal action

According to article 96 of the PC, "This prescription is interrupted, losing the time that has elapsed, whenever the offender commits a crime or simple crime

penal, cit., p. 392; J.E. Vargas, *La extinción de la responsabilidad penal*, cit., p. 148; G. Yuseff, *La prescripción penal*, cit., p. 71; S. Politoff; J.P. Matus; M.C. Ramírez, *Lecciones de derecho penal chileno*, cit., p. 584; V. Bullemore and J. Mackinnon, *Curso de Derecho Penal*, cit., p. 171. In jurisprudence: SCR, 22/01/2009, Rol Nº4329-2008. For an in-depth analysis, see: F. Parra, *Prescripción penal y delito permanente*, on *Revista de la Facultad de Derecho*, (47), jul_dec, 2019, 38 pp.

[35] M. Garrido Montt, *Derecho penal*, cit., p. 391. On the same subject, A. Etcheverry, *Derecho Penal*, cit., p. 257; V. Bullemore and J. Mackinnon, *Curso de Derecho Penal*, cit., p. 404; E. Cury, *Derecho Penal*, cit., p. 801; J.E. Vargas, *La extinción de la responsabilidad penal*, cit., p. 150; G. Yuseff, *La prescripción penal*, cit., p. 70.

[36] S. Politoff; J.P. Matus; M.C. Ramírez, *Lecciones de derecho penal chileno*, cit., p. 584; J.P. Matus and M.C. Ramírez, *Manual de Derecho Penal Chileno. Parte General*, Valencia, Tirant lo Blanch, 2019, p. 159 (today they add to the crimes of entrepreneurship). On the same subject, J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 471.

[37] E. Cury, *Derecho Penal*, cit., p. 801. On the same subject, A. Etcheverry, *Derecho Penal*, cit., p. 257; and M. Garrido Montt, *Derecho penal*, cit., p. 391.

[38] E. Cury, *Derecho Penal*, cit., p. 801; A. Etcheverry, *Derecho Penal*, cit., p. 257; V. Bullemore and J. Mackinnon, *Curso de Derecho Penal*, cit., p. 171. In jurisprudence, see on the subject of bigamy: SSCR 05/05/1992, Rol Nº239.026; 07/05/1990, Rol Nº 26.469; y 21/12/1987, Rol Nº 26.175; CAR of Rancagua, 18/11/2005, Rol Nº 983-2005; 30/08/2005, Rol Nº 880-2005; y 2/11/2003, Rol Nº 216273. However, some judgments have erroneously considered that the prescription does not begin to run as long as the state of illegality (second marriage) is maintained. For an extensive analysis, see: L. Rodríguez, *Prescripción de la acción penal en el delito de bigamia*, on *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, 9 (1985), pp. 289-301.

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again, and it is suspended as soon as the procedure is directed against him; but if his prosecution is paralyzed for three years or is terminated without conviction, the prescription continues as if it had not been interrupted [*rectius*: suspended[39]]".

In this way, for the interruption of the prescription, misdemeanors are excluded[40] and, consequently, also short-term prescriptions[41]. According to jurisprudence, also technical-offenses.

According to Etcheberry, if the offender commits a crime or felony again, "the elapsed time is wasted and they begin to prescribe again, from the same date, the criminal action for the previous offense and the new one"[42]. However, this would not be entirely accurate, since "the interruption only occurs if the execution of the new crime or simple crime and the consequent responsibility is declared by final judgment; in the cases of acquittal or definitive dismissal[43], on the contrary, it will not take place, and the term must be calculated normally unless a suspension has occurred"[44].

Admittedly, successive interruptions of the prescription of the criminal action are possible and, as the law does not establish a limitation in this regard, they can determine an almost indefinite prolongation of the state of legal uncertainty[45], even to become eternal, making a crime imprescriptible[46].

"The suspension is an institute through which the course of the limitation period is paralyzed but without losing the time that has already elapsed before its verification. In other words, once the "obstacle" set by the law has been overcome, the prescription continues to run as if it had never been suspended"[47]. In Chile, it is not suspended because there is an obstacle to the process, but

[39] A. Etcheverry, *Derecho Penal*, cit., p. 259. By all, J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 476. On the same subject, highlighting the different effects of interruption and suspension, cfr. SCR, 08/05/2008, Rol Nº 6930-2007.
[40] A. Etcheverry, *Derecho Penal*, cit., p. 258. See CAR Concepción 20/05/2016, Rol N° 342-2016; CAR San Miguel 04/11/2020, Rol N°3492-2020.
[41] V. Bullemore and J. Mackinnon, *Curso de Derecho Penal*, cit., p. 171.
[42] A. Etcheverry, *Derecho Penal*, cit., p. 258.
[43] For Garrido Montt, the temporary dismissal would have the same effects as an acquittal or a definitive dismissal for the calculation of the statute of limitations, in accordance with the principle of innocence enshrined in Art. 4° CPP, Garrido Montt, *Derecho penal*, cit., p. 394 s.
[44] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 729. On this subject: E. Cury, *Derecho Penal*, cit., p. 802; M. Garrido Montt, *Derecho penal*, cit., p. 394; J.E. Vargas, *La extinción de la responsabilidad penal*, cit., p. 155; G. Yuseff, *La prescripción penal*, cit., p. 86.
[45] E. Cury, *Derecho Penal*, cit., p. 802.
[46] C. Cabezas, *Prescripción de los delitos contra la indemnidad y libertad sexual de los menores de edad: problemas aplicativos del artículo 369 quáter del Código penal*, on *Política Criminal*, Vol. 8, Nº 16 (December, 2013), Art. 12, p. 390.
[47] C. Cabezas, *Prescripción de los delitos contra la indemnidad y libertad sexual de los menores de edad: problemas aplicativos del artículo 369 quater del Código penal*, on *Política Criminal*, Vol. 8, Nº 16 (December, 2013), Art. 12, p. 388.

because the process hinders the prescription[48]. Thus, with regard to suspension, the debate has focused on determining the moment when it is understood that the process is directed against the subject.

As Gandulfo explains[49], with the criminal procedural reform, the legislator changed the model on the initiation of suspension of the prescription of the criminal action: it went from the model of prosecution management, relatively dominant in earlier times, to that of information on the persecution; both with incompatible assumptions in an abstract and *a priori* manner. In the first model, the acts of the instruction or investigation are the relevant criteria that constitute the operative hypothesis of open type. Indeed, any act that involves the imputation of a person or his treatment as the defendant meets the requirement of direction to suspend the prescription can be done. This was the model followed under the old Chilean criminal process, where the majority of the doctrine estimated that the circumstance of "directing the judicial proceedings against the wrongdoer", was satisfied whenever the process began in any of the ways indicated in Art. 81 of the Code of Criminal Procedure[50]. Etcheberry, on the other hand, held that although a simple ex officio investigation was not enough nor was it required that the defendant be brought to trial, the existence of a complaint against him was necessary[51].

In the model of the formal information of the persecution, on the other hand, the operative hypothesis is constituted copulatively because an investigation has been initiated; that this is against a specific person; and that the person has been officially informed of the charges. In this context, the meaning of this circumstance in the current criminal process has been specified by art. 233 letter a) of the Criminal Procedure Code. According to this provision, it is only the formalization of the investigation that causes the suspension of the course of the prescription of the criminal action in accordance with the provisions of art. 96 PC[52].

Formalization is the communication that the prosecutor makes to the defendant, in the presence of the judge of guarantee, that he is currently developing an investigation against him with respect to one or more certain

[48] C. Cabezas, *Prescripción de la acción penal. Herencia y desafíos político-criminales*, Santiago, 2021, p. 25.
[49] E. Gandulfo, *El inicio de la suspensión de la prescripción de la acción penal en el nuevo ordenamiento para el proceso penal*, cit., p. 3 ss.
[50] G. Labatut, *Derecho penal*, cit., p. 298; E. Novoa, *Curso de derecho penal chileno. Parte general*, 3er edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, p. 406; E. Cury, *Derecho Penal*, cit., p. 802.
[51] A. Etcheverry, *Derecho Penal*, cit., p. 259.
[52] CAR Concepción 15/10/2010, Rol N°490-2010; CAR Talca 09/01/2012, Rol N°473-2011; CAR Rancagua 08/07/2015, Rol N° 362-2015; CAR San Miguel 07/08/2017, Rol N°1708-2017.

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offenses (*rectius*: facts) (art. 229 CPP). However, the formalization is only foreseen for the ordinary procedure, so there is the problem of determining when the procedure is directed against the defendant in the simplified and monitoring procedure as special procedures. Thus, recognizing that the formalization does not proceed in all cases, the jurisprudence has estimated that, in them, the prosecution activity is given by the requirement (accusation), which constitutes the genuine manifestation of the claim sustained by the public ministry[53]. Notwithstanding, it is necessary to point out the existence of certain jurisprudence that has held that even before the formalization of the investigation, the prescription can be interrupted, setting this moment from the "first action of the procedure", in the terms of Article 7° of the Criminal Procedure Code[54]. In this way, for some jurisprudence, it is perfectly possible to anticipate its initiation by other equally suspensive activities, such as a judicialized investigative action or previous acts such as a report or complaint, among others that are prior to the formalization, a character that in any case would not have the internal administrative actions of the Public Ministry[55].

Regarding the suspension of the course of the procedure, according to the prevailing jurisprudence, it is understood by such an effective suspension on the march of the process, whatever its cause: among others, negligence of the intervening parties or the court and delays caused by the course of jurisdictional acts[56].

Finally, it is much debated when it should be understood that the process has ended without convicting the accused since a useful interpretation prevents us from considering that the norm is referring to the most obvious cases of acquittal and final dismissal. Thus, for Novoa[57], in the context of the old criminal process, such circumstance should be understood as referring to the temporary dismissal, which technically was not a way to terminate the process, but only to suspend it while better investigation data appeared or the legal inconvenience preventing the prosecution of the trial ceased. Currently, such a hypothesis can be traced in cases in which the public prosecutor communicates its decision not to persevere in the investigation, since in this case, the criminal procedure ends without convicting the accused. This explains why -when the

[53] CAR Concepción, 25/04/2008, Rol Nº 156-2008; CAR Concepción 05/03/2010, Rol N°39-2010; CAR San Miguel 09/06/2016, Rol N° 983-2016.
[54] SCR 04/01/2010, Rol Nº 5511-2009; 13/06/2006, Rol Nº 2693-2006; 19/02/2004, Rol Nº 5362-2003.
[55] CAR Concepción 12/10/2012, Rol N° 512-2012; CAR Santiago 15/04/2016, Rol N° 1015-2016; CAR Talca 08-01/2019, Rol N° 1059-2018.
[56] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 729.
[57] E. Novoa, *Curso de derecho penal chileno. Parte general*, 3rd edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, p. 408.

formalization is rendered ineffective- the defendant recovers all the time that the statute of limitations was suspended with the formalization[58].

In turn, it has been said, regarding its scope of application, that "the legislator, in relation to the suspension of the statute of limitations of the criminal action, in contrast with the interruption, makes no differentiation between crimes, felony, and misdemeanors, so it must be concluded that, in order for the prescription of the action to be declared in a misdemeanor act constituting misconduct, in which the action has already been directed against the defendant, the case process it requires, obligatorily, a stoppage for at least three years"[59].

A last interesting aspect refers to whether or not the suspension hypotheses are exhaustive. Cabezas addresses the determination of the legal nature of the regulation of article 369 quater PC. For the aforementioned author, it is a suspensive circumstance that is based on special and reinforced protection for minors who are victims of sexual offenses. In fact, proposes the existence of an open catalog, on the ground of the suspension is usually defined on theory as a circumstance that not only stalls an already started term but can also delay the start of another one. In addition, this special regulation responds to the classic grounds for the suspension of the prescription, as a general term, the principle descended from the Latin adage *contra non valentem agere non currit praescriptio*. It is intended that due to their puerility they are unable to comprehend the unlawful content of the behaviors whereof they are victims, or they may be restricted from reporting due to the fact that many times these crimes are committed by members of their own family or close to them, whom can exert pressure, deceit, or other ruses to prevent the crime from transpiring, thus ensuring their impunity[60]. On the other hand, for Peña and Santibáñez, the regulation in question "does not constitute a suspension of the prescription in a technical sense, as defined in art. 96 of the Penal Code, since it is not necessary that the criminal action has been directed against the perpetrator, but that the calculation of the limitation period begins only when the victim has reached 18 years of age, but only in favor of the latter"[61].

In the same line as above, it is also possible to consider as grounds for suspension of the statute of limitations of criminal action, the cases of self-

[58] S. Politoff; J.P. Matus; M.C. Ramírez, *Lecciones de derecho penal chileno*, cit., p. 583.
[59] CAR of Concepción, 04/01/2007, Rol N°1953-2004.
[60] C. Cabezas, *Prescripción de los delitos contra la indemnidad y libertad sexual de los menores de edad: problemas aplicativos del artículo 369 quater del Código penal*, en *Política Criminal*, Vol. 8, N° 16 (December, 2013), Art. 12, p. 391 s.
[61] S. Peña and M.E. Santibáñez, *La prescripción de delitos sexuales contra menores de edad. Modificaciones introducidas por la ley 20.207*, en *Microjuris*, 2, January, 2008, p. 3.

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interested denial of justice with systematic effect, when it has been formalized and accepted before the organizations of the Inter-American system[62].

3. Imprescriptible offenses

"In accordance with the provisions at the end of Article 250 CPP, the definitive dismissal does not proceed when the crimes investigated are "imprescriptible", as stated by the international treaties ratified by Chile and that is in force. Such is the case of crimes against humanity, including war crimes, genocide, enforced disappearance and torture"[63].

As Matus and Ramírez explain, it is a limitation derived from international law. Thus, "our jurisprudence affirms that if the facts judged capable of being classified as crimes against humanity (forced disappearances and torture) or war crimes (illegal execution of prisoners), the ordinary statutes of limitation in force at the time of its commission, which must be considered imprescriptible (Supreme Court Ruling, hereinafter SCR 18.6.2012. ROL 12566-2011), and the Inter-American Court of Justice also ruled in relation to the executions of political prisoners (CIDH 26.9.2006, *Caso Almonacid Arellano and others vs. Chile*, Series C, N° 154)"[64].

III. Prescription of the penalty

Article 97 of the Penal Code establishes a system of prescription periods similar to those established for the prescription of criminal action, based on the seriousness of the crime. Thus, the term of prescription of the penalty will be fifteen years for crimes punishable by imprisonment, imprisonment, or perpetual relegation; ten years for other crimes; five years for a felony; and six months for misdemeanors.

In this case, there is no doubt that the basis for calculating the statute of limitations is the specific penalty imposed by the judgment[65]; However, this similarity in terms of timelines with those established for the prescription of criminal action is criticized for submitting two matters of different entities into the same regulation.

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[62] J. Wilenmann, *Denegación interesada de justicia y prescripción de la acción penal*, on *Revista Ius et Praxis*, Año 26, No 3, 2020, pp. 195-210.
[63] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 725.
[64] J.P. Matus and M.C. Ramírez, *Manual de Derecho Penal Chileno*, cit., p. 92. For a detailed review, see: G. Aguilar, *Crímenes internacionales y la imprescriptibilidad de la acción penal y civil: referencia al caso chileno*, on *Revista Ius et Praxis*, Año 14, N° 2, 2008, pp. 147-207 and M.I. Horvitz, *Amnistía y Prescripción en Causas sobre Violación de Derechos Humanos en Chile*, on *Anuario de Derechos Humanos*, N°2, 2006, pp. 217-225.
[65] E. Cury, *Derecho Penal*, cit., p. 803; J.E. Vargas, *La extinción de la responsabilidad penal*, cit., p. 185; J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 478.

In fact, it is considered that this hypothesis, by assuming a criminal responsibility already determined by means of a conviction, is much more serious in relation to that in which the respondent has not been the subject of criminal prosecution. On the other hand, it is also criticized that may lead to a preposterous situation that a penalty imposed on a participant in the crime may prescribe before the criminal action in relation to another; and vice versa: that the criminal action prescribes before the effective fulfillment of a sentence imposed[66] (thus, the so-called "clumsy penalty", that can lead to a more benign treatment for the prescriber concerning who should have served it, because it will prescribe before the sentence[67]).

In contrast, for Garrido Montt, the sameness of the deadlines is explained inasmuch as the prescription actually puts an end to the criminal responsibility that derives from the crime, which in turn causes that it cannot be investigated (prescription of the criminal action) or that the penalty cannot be served (prescription of the penalty)[68].

According to art. 98 of the Penal Code, the time limit of the penalty begins to run, "from the date of the final judgment or the breach of the conviction if it has begun to be fulfilled".

The final judgment is defined as one that cannot be subject to ordinary or extraordinary appeals. However, the point is complex if it is considered that the heading of article 97 of the Penal Code refers to the prescription of the penalties imposed by final judgment. However, the doubt arises as to whether it is necessary a valid notification of it since in the Chilean system, resolutions are effective only once they have been legally notified (Article 38 and 174 of the Code of Civil Procedure, applicable in the criminal process by remission of article 52 of the Code of Criminal Procedure)[69].

Meanwhile, for Etcheberry, the determining issue is the date on which the final judgment became so, and therefore it is required that the resolution that ordered it be complied with being notified. This circumstance would mark the end of the prescription of the criminal action and the beginning of the prescription of the penalty[70]. In the case of the breach of conviction, "the date is

[66] J.P. Matus and M.C. Ramírez, *Manual de Derecho Penal Chileno*, cit., p. 160.
[67] For an analysis of these criticism, cfr., J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 479 s.
[68] M. Garrido Montt, *Derecho penal*, cit., p. 372.
[69] From the notification: M. Garrido Montt, *Derecho penal*, cit., p. 393; G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 120. From the issuing of the ruling: E. Novoa, *Curso de derecho penal chileno. Parte general*, 3rd edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, p. 411; S. Politoff; J.P. Matus; M.C. Ramírez, *Lecciones de derecho penal chileno*, cit., p. 586; J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 479; G. Yuseff, *La prescripción penal*, cit., p. 115; E. Cury, *Derecho Penal*, cit., p. 803. Also see CAR Concepción 06/03/2009, Rol N°85-2009.
[70] A. Etcheverry, *Derecho Penal*, cit., p. 260. See CAR Talca 08/05/2018, Rol N° 310-2018.

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counted from the day it occurs, but in order to determine the time of prescription, the time served before the breach must be deducted from the sentence imposed"[71].

"Given its nature, the prescription of the penalty has no suspension, but only interruption, for the commission of a new crime or felony, notwithstanding of starting to run again from the date of the commission of the latter crime (Art. 99)"[72].

IV. Common rules for both types of prescription

1. Cases of absence from the national territory

Regarding the subjects who are outside the national territory, article 100 of the PC provides that when "the person responsible is absent from the territory of the Republic, the criminal action or the penalty only extinguishes by counting by one every two days of absence, in the computing the years ". From this last point, it has been unanimously stated that misdemeanors should be excluded from this provision, because when referring to the "computation of years", it cannot be extended to misdemeanors, whose statute of limitations is less than one year (six months)[73].

The rationale behind this rule is that the timelines run to the extent that the State *wants* and *can* prosecute the crime and impose the penalty, a possibility that decreases when the subject is not within the national territory. For this reason, it is also understood that the cases in which the subjects are absent from the national territory in service of the country are excluded[74] since there is no will to escape prosecution. The same ratio is evidenced in paragraph 2° of the provision under analysis, by virtue of which those who are outside the national territory are excluded from this detrimental effect under a prohibition or impediment of entering the country by decision of the political or administrative authority, for the time that such prohibition or impediment has affected them. As Guzmán Dálbora explains "duplication does not apply when and while the absent person had to remain abroad by the will of the holder of the punitive claim"[75].

[71] S. Politoff; J.P. Matus; M.C. Ramírez, *Lecciones de derecho penal chileno*, cit., p. 586.
[72] A. Etcheverry, *Derecho Penal*, cit., p. 260.
[73] For all, M. Garrido Montt, *Derecho penal*, cit., p. 397; G. Labatut, *Derecho penal*, cit., p. 300; A. Etcheverry, *Derecho Penal*, cit., p. 260; E. Cury, *Derecho Penal*, cit., p. 804.
[74] E. Cury, *Derecho Penal*, cit., p. 804.
[75] J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 481.

2. Egalitarian and public nature of the rules on prescription

Article 101 of the PC states that "both the prescription of the criminal action and the penalty are for and against all kinds of people." Interpreting this norm, Novoa considers that the calculation of the term, as well as the verification of the cases of interruption and suspension, are configured individually for each of the various subjects who have intervened in the same punishable act and, that they do not have exceptions of a personal nature, as occurs in civil matters (art. 2509 N° 1 of the Civil Code)[76]. However, according to Mera, "recently, in the area of sexual crimes, Article 369 quater introduced by statute N° 20.207 of August 31, 2007, has come to make an exception to this rule: in the two previous paragraphs, the statute of limitations for the criminal action will begin to run for the minor who has been a victim, upon reaching 18 years of age"[77].

Then, in accordance with article 102 of the Penal Code, "the prescription will be declared ex officio by the court even when the accused or accused does not allege it, as long as he is present at the trial". Therefore is the legal and not the material presence of the accused that is required, being sufficient for his adequate representation: the trial must not be followed in his absentia[78].

It has been pointed out that this provision reaffirmed the public order nature of the prescriptions in criminal matters, so they are declared ex officio and cannot be resigned by the affected subject[79]. Balmaceda, on the other hand, following Guzmán Dálbora, believes that it is necessary to clarify this statement with regard to the statute of limitations of the criminal action, to enable the subject to judicially prove his innocence, as a right expressly recognized in article 4° of the Procedural Code Criminal[80].

In fact, about its judicial declaration, as it appears within the grounds for dismissal contained in article 250 of the Criminal Procedure Code, it has been estimated - rightly - that there is a prelation order amongst them, so that the prescription will apply only when the grounds for dismissal established in the

[76] E. Novoa, *Curso de derecho penal chileno. Parte general*, 3rd edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, p. 412. Also E. Cury, *Derecho Penal*, cit., p. 804.
[77] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 733.
[78] A. Etcheverry, *Derecho Penal*, cit., p. 261; M. Garrido Montt, *Derecho penal*, cit., p. 398; E. Cury, *Derecho Penal*, cit., p. 804. See CAR Concepción 01/03/2012, Rol N° 91-2012 "the physical appearance of the defendant is not required"; CAR San Miguel 13/10/2014, Rol N°1609-2014.
[79] A. Etcheverry, *Derecho Penal*, cit., p. 261. On the same subject, E. Cury, *Derecho Penal*, cit., p. 804; J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 710; J.E. Vargas, *La extinción de la responsabilidad penal*, cit., p. 193 s.
[80] G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 122 and J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 481 s.

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letters prior to it (namely, letters a), b) and c) of the article 250)[81] are not verified.

3. The half prescription

The so-called "half prescription", is recognized by article 103 of the PC, according to which "if the person responsible appears or is found before completing the time of prescription of the criminal action or sentence, but having already passed half of the required time, in their respective cases, for such prescriptions, the court must consider the fact as covered by two or more highly qualified mitigating circumstances and no aggravation and apply the rules of articles 65, 66, 67 and 68 either in the imposition of the penalty, or to reduce the one already imposed ". "In the latter case, it will be necessary to go through res judicata and modify a final judgment, which must be done through a supplementary judgment"[82].

This rule does neither apply to the prescriptions of misdemeanors or to short-term specials, according to subsection 2° of Art. 103 mentioned above.

As Mera notes, "the mandatory or optional character has been discussed in our doctrine of the penalty reductions that the application of Article 103 could give rise to, the latter opinion being the majority"[83]. However, following Garrido Montt[84], he believes in its imperative nature, for the court, so it must necessarily reduce the penalty provided that at least half of the respective statute of limitations has elapsed. In his opinion, this position would be more in accordance with the meaning of Art. 103, which precisely resorts to imperative terms: the court "must" consider the fact as covered and apply the rules of the articles it mentions, whether in the imposition of the penalty, or to "reduce" the already imposed. In addition, the application of the rule of Art. 103 must translate into an important benefit for the accused or, where appropriate, for the

[81] G. Oliver, *¿Constituye un orden de prelación el listado de causas de sobreseimiento definitivo del artículo 250 del Código Procesal Penal?*, on *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, No 31-2, 2008, pp. 357-366.
[82] A. Etcheverry, *Derecho Penal*, cit., p. 261. Also: M. Garrido Montt, *Derecho penal*, cit., p. 399.
[83] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 735. Thus: A. Etcheverry, *Derecho Penal*, cit., p. 263 (except when the mitigating circumstances make imperative to reduce the penalty); E. Novoa, *Curso de derecho penal chileno. Parte general*, 3rd edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, P. 414; J.E. Vargas, *La extinción de la responsabilidad penal*, cit., p. 198 ss.; G. Yuseff, *La prescripción penal*, cit., p. 131 s. and S. Politoff; J.P. Matus; M.C. Ramírez, *Lecciones de derecho penal chileno*, cit., p. 528 (it only imposes the exclusión of the máximum degree in the cases of the Arts. 67 and 68, respectively).
[84] M. Garrido Montt, *Derecho penal*, cit., p. 398. Likewise, J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 484.

convicted person. Otherwise, such an exceptional rule would not make any sense. All the said, is reinforced by the fact that, in the event of gradual prescription, the fact is covered by *two or more* highly qualified mitigating circumstances and no aggravation circumstances. In fact, if there is only one highly qualified mitigating factor, its effect, according to Art. 68, is that the court *may* impose a reduced penalty in a degree less than the one indicated for the offense. Therefore, it is not reasonable to hold that in the event of two or more highly qualified mitigating and no aggravating circumstances, the effect is the same as when there is only one mitigating circumstance, namely, that the reduction of the sentence is still optional[85].

There is abundant and recent jurisprudence that has applied half prescription in cases of human rights violations. Thus, judgments of the Supreme Court - widely criticized by the doctrine[86] - have declared that half prescription "constitutes a qualified mitigating factor of criminal responsibility, with corollaries that affect the determination of the quantum of the sanction, which subsists and is, therefore, independent of the prescription, whose foundations and consequences are diverse, although both institutions are regulated in the same title of the Penal Code"[87].

4. The prescription of recidivism

Article 104 of the Penal Code provides that "the aggravating circumstances included in numbers 15 and 16 of article 12 shall not be taken into account in the case of crimes, after ten years, counting from the date when the act took place, or after five, in the cases of felonies".

It has been criticized that the term is counted from the commission of the criminal act and not from the completion of the conviction derived from the previous crime[88]. In addition, for Guzmán Dálbora, the denomination

[85] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 735 s.
[86] K. Fernández and P. Sferrazza, *La aplicación de la prescripción gradual en casos de violaciones de derechos humanos*, en *Estudios constitucionales*, Nº 1, (2009), pp. 299-330; H. Nogueira, *Informe en Derecho sobre precedentes jurisdiccionales en materia de media prescripción*, en *Ius et Praxis*, Nº 2, (2008), pp. 561-589;
I. González et al., *La media prescripción frente al delito de desaparición forzada de personas ¿incumplimiento de la normativa internacional en materia de crímenes de lesa humanidad?*, on *Revista Direito GV, São Paulo*, 10(1), June, 2014, pp. 321-346.
[87] See SCR, 30/07/2007, Rol Nº 3808-2006; 05/09/2007, Rol Nº 6525-2006; 13/11/2007, Rol Nº 6188-2006; 03/05/2010, Rol Nº 6855-2008.
[88] Thus, G. Labatut, *Derecho penal*, cit., p. 233, who also points out the difficulties that arise when the exact date of the perpetration of the crime of unknown; E. Novoa, *Curso de derecho penal Chileno. Parte general*, 3rd edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, p. 88 s.; E. Cury, *Derecho Penal*, cit., p. 514, who points out that it may happen that

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"prescription of recidivism" is improper, because as long as it is not sentenced again, it cannot be said that there is recidivism or that it has extinguished or survived. What occurs, is that once the deadlines indicated in article 104 have been met, the judge who tries a new offense committed by the subject will not be able to apply in the new case the aggravating factors of generic proper recidivism (art. 12 N° 15) or the specific one (art. 12 N° 16). In the case of improper or false recidivism, the provided in articles 97 and 98 of the Penal Code[89].

Furthermore, Mera, following an analogy *in bonam partem*, states that the prescription of recidivism not only produces the effect that it cannot operate as an aggravating circumstance, but the broader effect that it cannot be considered to the detriment of the affected person in all the cases in which said aggravating factor limits his rights. Thus, extinguished recidivism must not obstruct the recognition of the mitigation of the previous irreproachable conduct, nor impede the granting of the conditional remission of the sentence and the probation; it must not authorize the imposition of the penalty of subjection to the supervision of the authority in the case referred to in Art. 452, nor produce the effects provided for in N ° s. 2, 5, and 6 of Art. 90, relating to the breaching of conviction: nor restrict the granting of provisional liberty, among others[90].

As Mera explains, Art. 104 does not refer to misdemeanors, because the aggravating factor of recidivism applies only to crimes and felonies. In fact, according to Etcheberry, if the aggravating circumstance of recidivism were applied to misdemeanors (interpreting the expression "offense" used in N° 15 and 16 of Art. 12, in a broad way), it would produce the absurd consequence that recidivism in a misdemeanor would never be extinguished and would continue to aggravate the criminal responsibility of the agent forever, while a conviction for a crime would no longer be taken into account after ten years[91].

5. The prescription of disqualifications

According to article 105 of the Penal Code, "legal disqualifications arising from crime or felony will only last for the time required to extinguish the penalty, computed in the manner provided in articles 98, 99, and 100. This rule does not apply to the disfranchisement of political rights".

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whoever commits a new offense when he has just completed the sentence imposed by the previous crime, is no longer possible to be considered as a repeat offender; J.E. Vargas, *La extinción de la responsabilidad penal*, cit., p. 201 s.; G. Yuseff, *La prescripción penal*, cit., p. 172 s.

[89] J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 485.

[90] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 737.

[91] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 737.

Part of the doctrine considers that this rule refers to disqualification penalties since it should be understood that it only "reiterates the applicability of the statute of limitations to disqualification penalties, expressly making the exception regarding those that affect said political rights"[92].

Another position considers that it refers to disqualifications of extra-criminal origin that arise by virtue of the criminal sanction, while the penalties of disqualification are, in fact, penalties, "and should be governed in terms of their prescription by the general prescription rules of penalties"[93]. It would be the case of deprivation of parental authority, or the prohibition to be appointed guardian or curator or to depose as a witness in court, etc.

An all-encompassing thesis, supported by Guzmán Dálbora, understands that this provision refers both to the penalties of disqualification, as well as to extra-criminal disqualifications, except for the one referring to political rights[94]. Mera as referred in the same sense, for whom, according to this interpretation, extra-criminal disqualifications, not constituting penalties, would not last forever but would be subject to prescription[95].

6. Prescription of the civil action derived from the offense

According to article 105, subsection 2° of the Penal Code, "the prescription of civil liability arising from crime is governed by the Civil Code." As Balmaceda summarizes[96], jurisprudence is hesitant on its application in the matter of imprescriptible crimes (cases of human rights violations). For some jurisprudence, the criminal imprescriptibility is a quality that extends to the reparatory actions that arise from such illicit; while, according to another position, since it is an action with patrimonial content, it is subject to prescription in the absence of a special rule on the contrary[97].

[92] E. Cury, *Derecho Penal*, cit., p. 805. On the same subject, G. Labatut, *Derecho penal*, cit., p. 301, A. Etcheverry, *Derecho Penal*, cit., p. 261 s.

[93] E. Novoa, *Curso de derecho penal chileno. Parte general*, 3rd edition, Santiago, Editorial Jurídica de Chile, Santiago 2005, t. II, p. 415. Also G. Yuseff, *La prescripción penal*, cit., p. 174 s.

[94] J.L. Guzmán Dálbora, *Arts. 93 a 105*, cit., p. 486. Sahe this view G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 122.

[95] J. Mera, *Título V De la extinción de la responsabilidad penal*, cit., p. 739.

[96] G. Balmaceda, *La prescripción en el Derecho penal chileno*, cit., p. 125.

[97] Both positions can be reviewed in SCR, 08/13/2009, Rol No. 4087-2008 and SCR 04/05/2010, 3078-2008, both with a minority vote in favor of the imprescriptibility of the civil action. In this sense, also SCR 10/15/2008, Rol No. 4723-2007; CAR of Santiago, 06/01/2010, Rol No. 282-2009, CAR of Santiago, 08/03/2009, Rol No. 7985-2007. For a detailed examination, see: M. Campos, *La prescripción de las acciones reparatorias civiles emanadas de los crímenes de lesa humanidad*, on *Revista Derecho y Humanidades*, Universidad de Chile, N°18, 2011, pp. 145-162.

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V. Conclusions

In Chile, the criminal prescription constitutes a causal of expiration of the criminal responsibility, as much when it terminates the criminal action as the punishment. The expression "prescription of the offense" is discarded because it does not recognize the fact that without the exercise of the criminal activity it is not possible to declare the legal existence of an offense (as a contrary matter to the principle of presumption of innocence) and for not considering that, as a material reality, it constitutes an indelible phenomenon of the external world.

Despite the many approaches to its legal grounds and nature, it seems appropriate to consider its justification in the so-called principle of humanity as a substrate of the foundation based on the purposes of criminal law. On the other hand, these goals allow the remaining considerations regarding its foundations to fit perfectly, as aspects derived from the latter. In addition, this could better explain the existence of imprescriptible crimes.

Therefore, regarding its legal nature, it seems correct to advocate its substantive character, delivered to the frontiers of criminal law, as this harmonizes with the basis on which we have opted. However, it is noteworthy that the Chilean legal system has settled critical points on the problem of its substantive or procedural legal nature. As a matter of fact, the retroactivity of the most favorable law in terms of prescription regarding the defendant is expressly enshrined in the rule of art. 11 of the Criminal Procedure Code.

Regarding the legal regime of prescription, it would be desirable that the diverse aspects that nowadays favor lively doctrinal debates, such as the consideration of the abstract or concrete penalty to determine the applicable limitation period according to the seriousness of the crime; or the time when the calculation of the term must begin in complex cases such as in cases of result crimes or continuous crimes or imperfect degrees of development, be the subject to legislative discussion to define these knots directly in the law. An express statement in this matter would be particularly relevant to define the exact moment from when the prescription term should be regarded as suspended.