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Systematicity and Legislative Drafting in Criminal Law: A Study Based on the Core Offenses under Chile's Traffic Act*

Sistematicidad y técnica legislativa en materia penal: un estudio a partir de los delitos nucleares de la Ley de Tránsito chilena

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Abstract: The objective of this paper is to examine the principle of systematicity as a fundamental component of good legislative drafting in matters of criminal law, specifically in relation to Chile's laws governing the core traffic offenses. Our analysis focuses on the rule stipulating that certain of these offenses carry mandatory minimum prison sentences, which represents a break with the systematic approach to criminal offenses in Chilean law, which generally seeks to impose punishments other than incarceration. Our methodology includes an examination of various legal texts, including reference to specific legislation as well as jurisprudence and accepted legal doctrine). In our discussion of the results, we highlight the importance of the principle of systematicity when making criminal laws, both in and of itself and as it relates to other legal principles such as equality before the law, proportionality and certainty. We also conclude that the principle of systematicity is relevant to both formal and substantive conceptions of the law, i.e., the sources of criminal laws and the contents of the laws themselves.

Key words: Zero tolerance, innocuization, custodial sentences, alternative punishments, equality before the law, proportionality, certainty.

Resumen: El objetivo del presente trabajo es examinar el principio de sistematicidad como criterio de una adecuada técnica legislativa en materia penal, en relación con las normas que regulan los delitos nucleares del

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tráfico vehicular en Chile. El análisis se centra en la regla que establece el cumplimiento efectivo de las penas privativas de la libertad impuestas a algunos de esos ilícitos, la cual rompe con la sistemática de los delitos consagrados en Chile, que se sustenta de forma general en otra clase de reacciones penales. El estudio utiliza una metodología fundamentalmente dogmática y un recurso a fuentes legales, jurisprudenciales y doctrinales. Entre sus resultados, destaca la relevancia que el principio de sistematicidad tiene para la creación de leyes penales, ya sea en cuanto tal o en relación con otros principios del derecho, como los de igualdad ante la ley, proporcionalidad o certeza. El artículo concluye, asimismo, que la afectación del principio de sistematicidad incide tanto en aspectos formales como sustantivos; o sea, relativos a los instrumentos que sirven de fuente a las normas penales y al contenido de estas.

Palabras clave: Tolerancia cero, inocuización, penas privativas de la libertad, penas sustitutivas, igualdad ante la ley, proporcionalidad, certeza

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I. PROBLEM STATEMENT

The enactment of criminal laws for purposes other than the protection of legal rights[1] has increased in recent decades in comparison to other areas of criminal law[2]. As society calls for increasingly harsh punishments (Morillas, 2007, pp. 407-408), the reaction of legislatures is often to reflect this social concern by enacting legislation which seeks to define a contingent response to specific emergencies (Baratta, 1994, p. 81), which is the most rapid and effective possible (Vargas, 2016, p. 91).

Many such laws have been enacted in the area of traffic law particularly. In this context, Polaino-Orts (2019) has posited that in the case of road traffic offenses, the driver is perceived as an enemy and the vehicle as a weapon (pp. 64-65); we do not consider this statement an exaggeration.

1 In contrast, for the thesis which holds that the purpose of criminal law is solely to protect legal rights, see Alcácer (1998, p. 367).

2 For traffic offenses, see Montaner (2009, p. 319). For sex crimes, see, e.g., Díez Ripollés (2019, pp. 6-7).

Nor should the large number of legislative reforms which have been enacted in both Europe and Latin America to regulate this specific area of unlawful behavior come as a surprise.

In Spain, for example, legislation has been passed which punishes "wanton or reckless" driving (Spain's Criminal Code, Art. 380) and driving with "wanton disregard for the lives of others" (Art. 381), as well as the more easily definable offense of speeding (Art. 379). The punishment for "underground street racing" provided for in Argentinean criminal law is another example (Argentinean Criminal Code, Art. 193 bis).

Similar laws have been passed in different countries; the tendency reflects, among other things, a rush to criminal law[3], the creation of new offenses and the application of increasingly harsh punishments (Vargas & Castillo, 2014), as if these were the most appropriate solutions to prejudicial behaviors on the roads.

Chile is no exception; in fact, the number of offenses regulated by its Traffic Act (1984) has grown and the punishments for the most typical crimes have become harsher. Examples of the former are the offense of failing to assist victims of traffic accidents (Law No. 18.290, Art. 195), and that of unreasonably refusing tests to detect alcohol or drugs in the body (Art. 195 bis).

However, the most noteworthy example, in both the doctrine and in case law, is the introduction of a more severe punishment for causing a fatality or grave injury while driving under the influence of alcohol or illicit drugs, which are classified as "grave-very grave"[4] offenses in Chilean law (Matus & Ramírez, 2021, p. 133). The reform detailing the punishment for these offenses was passed following the death of an infant named Emilia and is commonly referred to as "Emilia's Law" (Law No. 20,770). If we consider solely the gravity of the conduct in itself, the more severe punishment seems to have been established as a consequence of the social uproar which followed the death of the child, rather than being due to the intrinsic gravity of the offense.

Emilia's death thus led to the passage of two significant amendments to the law which covers causing a fatality or serious injury while driving under the influence of alcohol or illicit drugs. The first concerned the minimum punishment for the offense, which was increased to such a degree that it was necessary to increase the punishment for (simple)

3 For an overview, see Silva (2001, p. 20).

4 The injuries are detailed in Article 397, Paragraph 1 of the Chilean Criminal Code, which contains the following provision:
"Any person who injures, strikes or harms another shall be punished for causing grave injury:
1.) The punishment shall be medium-term imprisonment, if as a result of the injuries the aggrieved person is left mentally impaired, is unable to work, becomes impotent, loses the use of a limb or is left noticeably deformed."

homicide, through the enactment of Law No. 20.779, in order that the punishment for the latter remain greater than that imposed for causing fatality or serious injury caused while driving under the influence of alcohol or illicit drugs (Vargas, 2016, p. 98).

An additional reform—unprecedented until then—was also introduced into Chilean criminal law at this time: a deferral of eligibility for the alternatives to imprisonment which were available to offenders found guilty of crimes such as those under discussion under certain conditions. In the Chilean legal system, a person sentenced to a custodial sentence may request and, in certain circumstances, serve their sentence under an alternative system, to be verified by the social reintegration service. "Emilia's Law" meant that those convicted of causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs would be forced to serve a minimum of one year in prison. This rule is not applied in the case of other more serious intentional crimes regulated in the Chilean Criminal code, such as infanticide (Art. 394), castration (Art. 395), infliction of grave-very grave injuries (Art. 397, No. 1), or arson resulting in fatality, loss of a limb or grave-very grave injuries (Art. 474, Paragraphs 1 and 2), to mention only a few examples.

Doctrinal analysis of regulations such as those mentioned above has focused on criminal policy aspects. As such, it is commonly argued that the provisions stipulating harsher pnishments for road traffic offenses constitute an example of "zero tolerance" regulations (Fernández, 2016, p. 3; Mayer & Vera, 2014, p. 116) or "symbolic criminal law" (García, 2007, pp. 7 and 10; Miró, 2009, pp. 7-11).

This paper aims to examine this particular area of criminal law with a focus on a hitherto little-explored aspect: normative systematicity and its possible impact, through the regulations relating to applicable punishments, on the core traffic offenses in Chile. More specifically, we will argue that systematicity is a fundamental principle of good legislative drafting and that failure to adhere to its principles has an impact both the formal and substantive conceptions of the law.

For these purposes, we focus primarily on legal dogmatics to argue that the regulations introduced in "Emilia's Law" do not respect the principle of systematicity, particularly the rule which defers eligibility for alternatives to imprisonment which applies to certain of the core offenses in the Traffic Act.

The problem we identify in this specific case highlights the need for reflection, not only in Chile but also in other countries, on the importance of good legislative drafting, based around the principle of systematicity and which consequently respects the need for coherence and consistency in criminal law.

II. THE PRINCIPLE OF SYSTEMATICITY IN MATTERS OF CRIMINAL LAW, PARTICULARLY WITH RESPECT TO LEGISLATIVE DRAFTING

The principle of systematicity is based on the idea that the law is organized through a system—called a *legal system*—which Atienza (1997) defines as "a set of rules established legitimately and structured in a system" (p. 32). The fact that the law is configured in this manner is important precisely because a legal framework is required to fulfill a specific function: to ensure the certainty, mobility and efficiency of the regulatory system (Bobbio, 1976, p. 10).

The pursuit of systematicity is fundamental to legislative drafting; it is understood to be a necessary condition for the creation of legal rules which can be classed as rational (García, 2000, p. 317; Navarro, 2010, pp. 244-245). As such, systematicity is not only relevant to the legislative process in itself, but also essential for the development of a homogeneous legal system with no contradictions among the diverse rules which comprise it (García-Escudero, 2010, p. 89). Some authors even consider that the very purpose of legislation is systematicity; that is, that a body of laws should constitute a whole without inconsistencies, gaps or redundancies, so that the law can become a mechanism for anticipating human behavior and its consequences—i.e., a security system (Atienza, 1997, p. 32).

More specifically, the principle of systematicity refers primarily to the logical and formal aspects of the construction of a legal system, which must be organized coherently, thoroughly and independently (Ossandón, 2009, p. 313). Systematicity has instrumental value, in the sense that a properly systematized legal order facilitates both the distribution and comprehension of legal discourse, as well as its internal and external references (Marchili, 2009, p. 359).

Notwithstanding its instrumental value, the systematic construction of criminal laws, including rules relating to the establishment of punishments, must also be teleological in nature, since this is the only way to legitimize the encroachment on fundamental rights involved in this sector of the legal system (Freund, 2004, p. 95). This means, among other things, that the very idea of systematicity in criminal law functions as a guarantee, "since the establishment of a coherent and rational system allows for the creation of more logical, just and predictable means of applying the law" (Ossandón, 2009, p. 316), including the imposition of punishment.

As mentioned above, among the requirements which the principle of systematicity demands of criminal law is that of coherence. The clearest and most basic definition of the term *coherence* is a "connection, relationship or union between certain things and others" and a "logical

approach which is consistent with certain stated principles" (RAE, 2020a). It is precisely this connectedness among the rules which make up a system of criminal law which means the descriptions in one section have an impact on others; the first rules must be considered when interpreting the last.

From a formal perspective, a legal system is "coherent" if there are "no conflicts among the rules and no legal contradictions" (Bulygin, 1991, p. 258). Ossandón (2009) includes another element, related to evaluation: that of "axiological harmony" among the laws, as evidenced in the evaluations underlying legislative decisions. This means, for example, that "given the same foundation, the same remedies must be offered", and that "the degree of liability must be determined according to the gravity of the conduct" (p. 324)[5].

The coherence of a certain description with respect to the rest of the criminal legal system, from both a formal and evaluative perspective, is what allows the description to be correctly integrated into the system (Navarro, 2010, pp. 244-245). However, if a law is worded in a manner which does not meet this standard it will disrupt the system; the interpretation and practical application of said law will be complicated, and the disruption may have unwanted consequences in other sectors of the legal system (Díez Ripollés, 2005, p. 61). In contrast, formally and evaluatively coherent laws result in legal systems which are characterized by their "consistency" and, therefore, by their "duration, stability and solidity" (RAE, 2020b).

Criminal legislation which is drafted in accordance with the requirements of systematicity discussed above facilitates the development of a series of fundamental guarantees and rights which are directly or indirectly enshrined in the Constitution.

Indeed, criminal laws which are coherent in their evaluations minimize the likelihood—while not eliminating the possibility entirely—that the determination of a punishment will involve arbitrary discrimination. Such a situation may arise if significantly different punishments are imposed for transgressions of a similar nature without any rational justification. In this regard we agree with Schünemann (2012), who points out that, as a legal system is not detached from the various legal evaluations behind it—these are what provide it with a logical order—any contradiction which cannot be resolved through a correction to the system causes an evaluative aporia, incompatible with a framework designed to uphold the constitutional guarantee of equality before the law (p. 19).

5 For an overview of the notion of axiological harmony see Karpen (1986, p. 31).

Similarly, an arbitrarily established punishment may violate the principle of proportionality since it necessarily implies a disregard for the requirements of weighting or reasonableness; offenses of supposedly equal gravity receive clearly different punishments. Notwithstanding the debate on the foundations of criminal law principles in general[6] and the principle of proportionality in particular[7], there seems to be a general consensus at the doctrinal level that avoiding such conflicts is important in legislative drafting[8]. As such, it seems worthwhile to examine the issue as it relates to the punishment in Chilean criminal law for causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs.

Finally, a lack of evaluative systematicity can lead to less legal certainty, in the sense that incoherent laws are detrimental to the structural uniformity of a criminal justice system. In relation to this point, it is important to again stress the need for legal systems to be consistent (Díez Ripollés, 2005, p. 61), i.e., for the set of laws to provide stability for those it applies to. But they must also represent a set of precepts which will be predictably applied. This is difficult—sometimes impossible—when laws are passed which undermine the harmony of the system they become part of.

III. THE PROBLEM OF THE LACK OF SYSTEMATICITY IN THE REGULATIONS GOVERNING THE CORE OFFENSES UNDER CHILE'S TRAFFIC ACT, IN PARTICULAR THE RULE WHICH STIPULATES MANDATORY MINUMIUM PRISON SENTENCES

Law No. 18.290 includes a "special rule regarding deferral of eligibility for alternatives to imprisonment" for the offense of causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs[9]. According to Article 196 ter, Paragraph 1 of said law, the provisions of Law No. 18.216 (which specifies the alternatives to custodial sentences) apply to this offense; however, "eligibility for the corresponding alternative punishment will be deferred for one year, during which time the convicted person must serve the prison sentence determined by the court."

The severity of the punishment specified under "Emilia's Law"—which differs on several points from similar regulations in force in other countries—reflects a problem underlying the gravest traffic offenses;

6 See Mañalich (2018, pp. 61-64).
7 See Guzmán (2017, pp. 1239 et seq.).
8 More broadly, in reference to the importance of discourse regarding these principles of criminal/legal dogmatics as they relate to criminal policy, see Amelung (1980, p. 36). In addition, for an overview, see Navarro (2010, pp. 252 et passim).
9 As denominated by Rojas (2020).

namely, that low degrees of mental culpability can nevertheless result in devastating effects on the lives or health of others (Van Dijk & Wolswijk, 2015, p. 3; Goeckenjan, 2015, p. 91). Specifically, this implies that, as regards imputing subjective intent (the *disvalue of the action*) we are forced to grapple with the scenario of negligent or reckless conduct leading to death or grave-very grave injuries (the *disvalue of the result*)[10].

As was to be expected, the application of the rule in Article 196 ter, Paragraph 1 of the Traffic Act has encountered significant practical difficulties, resulting in a number of challenges to the constitutionality of the law being filed with the Constitutional Court of Chile. In contrast to its rulings with respect to the constitutionality of other rules concerning the core offenses under the Traffic Act[11], the Court has tended to rule in favor of the plaintiffs who filed the challenges to the constitutionality of Article 196 ter, Paragraph 1 of said law, considering that the principles of equality before the law and proportionality, among others, have been violated[12]. In justifying its decisions, the Court has made special mention of the fact that no rule such as the one contained in Article 196 ter, Paragraph 1 of the Traffic Act applies to more grave intentional offenses regulated by the Chilean Criminal Code. The above shows how unsystematic and unjustified this rule is both from the point of view of the *disvalue of the action* and from the perspective of the *disvalue of the result*.

In more recent decisions, the Court has begun to systematize and supplement the arguments underpinning its rulings in favor of the plaintiffs who filed the challenges to the constitutionality of Article 196 ter of the Traffic Act. To justify its decisions in this regard, the Constitutional Court of Chile has made special mention of the purpose of the state-imposed punishment, stating that:

1. This rule in question is not compatible with the "nature and purpose of alternative punishments", which aim to avoid the "known evils and unsatisfactory consequences of short-term prison sentences" (Challenge to the *constitutionality [Marcela Dayana Lienlaf Lienlaf] of Article 196 ter of Law No. 18.290*, Whereas clause No. 20[13]).

10 Translator's note: The concepts of "the disvalue of the action" (*desvalor de la acción*) and "the disvalue of the result" (*desvalor del resultado*) are commonly referenced in the legal doctrine of the Spanish-speaking world. The "disvalue" refers to that which is considered undesirable or harmful, thus "the disvalue of the action" refers to the mental state of the actor and the gravity of the conduct in itself, while "the disvalue of the result" refers to the inherent gravity of the harm caused, independently of the conduct.

11 E.g., *challenge to the constitutionality (María Fabiola Aragón López) of Articles 195, 196 bis and 196 ter of Law No. 18.290*, 2017.

12 See, for instance, the *challenge to the constitutionality (Miguel Ángel Inostroza Uribe) of Articles 195 and 196 ter of Law No. 18.290*, 2018, Whereas clauses No. 43 et seq. and 70 et seq.

13 This Whereas clause was based on a report issued by the Supreme Court of Chile in Official Letter No. 23-2015, dated March 5, 2015, available at https://www.senado.cl/appsenado/templates/tramitacion/index.php?boletin_ini=9885-07.

2. Although the legislature has absolute sovereignty, it cannot "simply amend laws which have been passed after careful reflection and been implemented on the basis of long legal experience" (Whereas clause No. 21).
3. Alternative punishments are punishments in themselves and do not constitute simply "benefits", given the deprivation or restriction (to a greater or lesser degree) of personal liberty which they entail, meaning their application cannot be understood as "synonymous with impunity", in accordance with the tendency in international human rights law (Whereas clauses No. 22 and 23).
4. Alternative punishments are essential for the fulfilment of the purpose of social reintegration, bearing in mind that "no study has been undertaken which proves that custodial sentences are more effective than alternative punishments as regards reintegrating offenders into society and preventing them from committing crimes in the future" (Whereas clause No. 28)[14].

It should be noted that the Constitutional Court's rulings on the challenges to constitutionality have meant that, in practice, persons convicted of causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs have been able to serve their sentences outside prison, provided that they meet the necessary requirements. Thus, despite the existence of the rule which defers eligibility for alternatives to imprisonment, it is not applied in practice in a considerable number of cases. This contradicts a number of the principles we have discussed, such as equality before the law and proportionality, to which can be added the principle of security or certainty.

III.1. Violation of the principle of systematicity in the rule in Chile's Traffic Act which defers eligibility for alternatives to imprisonment

For a number of reasons, the rule specified in Article 196 ter, Paragraph 1 of the Chile's Traffic Act represents a deviation from the system of custodial sentences for offenses in the Special Part.

Notwithstanding the reforms it has undergone in recent years[15], the Chilean system of alternative sentences—as regulated by the current text of Law No. 18.216 (1983)—is based on certain specific ideas

14 By way of example only, the Constitutional Court handed down a similar ruling in response to the *challenge to the constitutionality (Pablo Andrés Blanco Yánez) of Articles 195 and 196 ter of Law No. 18.290, 2021; challenge to the constitutionality (David Ignacio Ortega Toledo) of Article 196 ter of Law No. 18.290, 2020; and challenge to the constitutionality (Javier Antonio Méndez Muñoz) of Article 196 ter of Law No. 18.290,* 2020.

15 See, for example, Murillo (2017, pp. 109 et seq.).

concerning the method of imposition of the various punishments in relation to the different offenses referred to in the Special Part. From our analysis of the conditions which must be met under this law in order for an offender to be eligible for alternatives to custodial sentences—which include conditional remission, partial confinement and probation[16]—two principal requirements can be observed.

The first is objective and concerns the gravity of the act the offender is found guilty of; to be eligible for these alternative forms of punishment the prison sentence imposed must not exceed—precisely[17]—five years. In addition, the law states that alternative punishments are not an option in the case of certain crimes, due to their gravity (e.g., patricide), nature (e.g., torture) or means of execution (e.g., use of weapons).

The second is subjective and concerns the particular characteristics of the offenders the rules may apply to. They must have no prior criminal record and have been sentenced to short prison terms. For this condition to be met it is necessary that the criminal history of the offender who may be eligible for alternative punishment suggest that he/she will not reoffend and that completing a prison term is not necessary for his/her reintegration into society.

If the aforementioned requirements are met, the judge has the option of imposing a sentence involving an alternative to imprisonment for any of the offenses set forth in the Special Part, with the exception of those expressly excluded or to which certain other details apply, e.g., relating to the length of the sentence imposed. As such, the general rule regarding custodial sentences for offenses covered by the Chilean legal system is that these may be served outside prison in the circumstances discussed above.

Based on these observations, it can be argued that Chilean legislation encourages the social reintegration of convicted offenders in cases where short or medium custodial sentences have been imposed, provided the personal background of the offender makes this advisable (for details see Matus, 2011, pp. 243-244). From the foregoing, it is clear that this is one of the areas in which the Chilean penal system focuses on the special prevention element of punishment.

This notwithstanding, as mentioned above, it is noteworthy that the regulations related to alternative sentences exclude, based on objective

16 For more detail see the provisions of Law No. 18.216, and Morales and Salinero (2020, pp. 324 et passim).

17 This means that the stipulated maximum sentence may be more than five years. However, due to the rules regarding individualized sentencing, which among other things require judges to consider a series of factors which may affect the severity of the sentence (e.g., the presence of mitigating factors which reduce criminal liability), the final punishment may be equal to or less than the limit established in Law No. 18.216.

criteria (the gravity, nature or means of execution), offenses such as aggravated kidnapping, child abduction, rape, patricide, femicide, aggravated homicide, simple homicide, etc., as well as crimes related to torture[18] or where firearms, ammunition, explosives or other similar means are used (Law No. 18.216, Art. 1, Paragraph 1).

In contrast, the rule detailed in Article 196 ter, Paragraph 1 of Chile's Traffic Act means that, even if the court considers it prudent that an offender serves their sentence for causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs outside prison, this alternative is expressly prohibited under the law.

The rule represents a break with the rest of the Chilean system of imposing custodial sentences for crimes in the Special Part, and disregards various principles of legislative drafting which, in turn, are connected to different principles of criminal law.

First of all, the rule violates the principle of systematicity, particularly the substantive or material aspect of this principle, since it is not evaluatively coherent, to an extent that is very difficult to understand and justify. This incoherence lies in the fact that an offense of equal or lesser gravity (causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs) than certain others (e.g., intentional infliction of grave-very grave injuries) is subject to a one-year deferral of eligibility for alternatives to imprisonment, ensuring that a person convicted for this violation of the Traffic Act will serve at least one year in prison[19]. However, if the same subject deliberately inflicts—that is, with intent—grave-very grave injuries and a judge imposes an alternative sentence to incarceration, no such deferral applies, and they can begin to serve their sentence outside prison immediately.

This problem is related to the limitations which may be faced by the legislature when specifying exceptions to a general rule, such as eligibility

18 Despite the fact that the crimes involving torture covered by Article 150 A, Paragraph 4 of the Chilean Criminal Code carry a lower penalty than that for causing a fatality while driving under the influence of alcohol or illicit drugs, that crimes involving torture are excluded from alternative sentencing options can be explained by the violation of human rights such crimes entail. For further information see, for example, Jiménez (2014, pp. 103 et seq.).

19 Two years after the enactment of "Emilia's Law", Law No. 20.945 (2016) was passed in Chile, which "improved the regulations for the defense of free competition." This law included a reform of Decree Law No. 211 (1973), Article 62 of which covered the offense of collusion, and its final paragraph specified a rule equivalent to that contained in "Emilia's Law": the deferral for one year of eligibility for alternatives to imprisonment, meaning offenders would be forced to spend a minimum of one year in prison. In our opinion, the creation of a new exception to the general rules governing the system of alternative sentences, rather than reflecting a criminal policy which considers the gravity of the conducts it applies to, seems to be a reaction to somewhat confused notions regarding the purpose of such punishments in this case. For further information on this see the Library of the National Congress (2016, pp. 236, 246, 480 et passim). Furthermore, it remains to be seen whether such a rule is necessary in the context of collusion, especially given that, to the best of our knowledge, it has not been applied since its creation, unlike what has happened in the case of the core offenses under the Traffic Act. This means that the existence of this rule with respect to collusion has so far been merely symbolic.

for alternatives to prison sentences on the condition that certain requirements are met. In our opinion, the principle of democracy means that robust restrictions do not exist in this regard, as the legislature has the capacity to enact legislation which modifies sentencing requirements in order to reflect a change in prevailing evaluations (Vargas, 2016, p. 95).

However, this does not mean that the legislature should not base its decisions—as faithfully as possible[20]—related to criminal policy on certain minimum standards designed to make legal reforms understandable and, where necessary, predictable. In the specific case of causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs the legislature should act rationally so that the emotions of the victims become a sort of "catalyst" for change and not, in contrast, simply fulfil the role of "spokesperson" for the outcry among the population. Such a foundation is what makes it possible to introduce coherent and consistent modifications to laws which will be lasting, stable and solid. In this regard, it would be advisable in the future for the legislature to base decisions involving the creation of regulatory exceptions on objective parameters such as the seriousness of the wrongdoing, including the importance of the legal right involved and the gravity of the harm caused.

In addition to violating the principle of systematicity, the rule under discussion also violates other principles of legislative drafting, which in turn are connected to various guiding principles both of law in general and of criminal law in particular; the principles of equality before the law, proportionality and certainty. These, in our opinion, are closely related to the substantive or material aspect of the principle of systematicity. More precisely, the violation of the principle of systematicity entailed in the rule in the Chilean Traffic Act which defers eligibility for alternatives to imprisonment also represents an attack on the principles of equality before the law, proportionality and certainty. For this reason, we will focus our attention from here on exclusively on the aspects of these principles which are intertwined with the principle of systematicity as a component of good legislative drafting.

III.2. Violation of the principles of equality before the law, proportionality and certainty in the rule in Chile's Traffic Act which defers eligibility for alternatives to imprisonment

As mentioned above, in addition to the violation of the principle of systematicity, the rule under discussion violates the principle of equality before the law, a fact which has been affirmed by the Constitutional

20 In contrast, "unfaithful" decisions in criminal matters result in the use of criminal punishment in election campaigns; such penal populism is a blight on current criminal policy. See Wilenmann (2017, p. 432).

Court of Chile, as we previously discussed. According to the text of one of its rulings, the aforementioned principle means

> that the rules must be the same for all persons in the same circumstances and, consequently, different for those in different situations. It is not, therefore, a matter of absolute equality, but rather that the law must be applied in each case in accordance with how it differs from others. Equality, therefore, means reasonably distinguishing between people who are in different circumstances (*Challenge to the constitutionality [Miguel Ángel Inostroza Uribe] of Articles 195 and 196 ter of Law No. 18.290*, 2018, Whereas clause No. 43).

In order to come to conclusions regarding potential violations of this principle, we need to develop criteria for establishing whether two situations are equivalent or different in a criminal sense. One possible method would be to consider, for example, the concepts of *the disvalue of the result* and *the disvalue of the action*. The former involves determining the category of legally protected right which is affected, and the manner in which it is affected; the latter, in contrast, is associated with the gravity of the criminal conduct in itself, which is greater or lesser depending, among other things, on whether it is carried out with intent or out of negligence (Mir, 2016, p. 171)[21].

In our opinion, two or more situations involving equal *disvalue of the result* (i.e., involving the same legally protected right affected in the same manner) and equal *disvalue of the action* (e.g., the same mental culpability) deserve to be treated equally in legislation, in accordance with the principle of equality under the law. Take, for example, the cases of intentional homicide or intentionally inflicting injury; for offenses which fall under each of these categories the punishment imposed should be analogous. On the other hand, if such legally protected rights (to life and to health) are merely endangered, albeit with the same intent, the punishment stipulated by law should be different and, in principle, less than that stipulated for cases of inflicting injury.

If we apply this reasoning to the offense of causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs, and compare it with the rules concerning offenses of causing grave-very grave injuries with intent and through negligence, respectively, it can be argued that Chilean legislature does indeed treat the two unequally; the rule in Art. 196 ter, Paragraph 1 of the Traffic Act which defers eligibility for alternatives to imprisonment does not exist in the latter two cases. In other words, two offenses which are similar with respect to the *disvalue of the result*, and which may be viewed as similar with respect

21 With reference to Mir (2016, pp. 177-178).

to the *disvalue of the action*[22], are nonetheless treated very differently under the law in terms of eligibility for alternatives to imprisonment.

However, although we use these as examples of similar cases, it could be argued that the *disvalue of the result* involved in the traffic offenses under discussion is more serious than, for example, that involved in offenses resulting in death or grave-very grave injuries—whether intentional or negligent—in other contexts. This is due to the fact that the traffic offenses may be considered multifarious, since they infringe both upon the functionality—or "safety"[23]—of road traffic and on the right to life or health, respectively. If we take this to be the case, then the violation of the principle of equality is not as conspicuous as it might seem at first glance, since the rule which defers eligibility for alternatives to imprisonment would not involve different treatment for cases that are (obviously) similar.

Nevertheless, the potentially multifarious nature of the conducts under discussion is not clear cut, nor is it central to the provisions relating to causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs. As such, the rule in Article 196 ter which defers eligibility for alternatives to imprisonment seems to focus on the fatality or the injuries caused to third parties without taking into account the effect on the functionality (or other analogous term) of road traffic. In contrast, this multifarious nature may well have been considered when the sentencing range for the driving offense was established, which is higher than that for negligent homicide and for causing grave-very grave injuries (Chilean Criminal Code, Articles 490 et seq.) in other contexts. If, for example, a doctor causes death or grave-very grave injuries to a patient through negligence, he or she could—provided the case meets the requirements established in Law No. 18.216—be eligible for an alternative punishment, with no deferral such as that stipulated in the law under discussion. The same is true for injuries due to negligent product liability.

22 We say that they may be viewed as similar, since it can be argued that causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs involves a combination of mental states, in the sense that the driving is intentional, but causing the injuries is negligent (for further discussion of this point see Bascur [2020, pp. 120-121], on what he calls "qualified variants"). However, even if we interpret the offense under discussion as involving mixed mental states (intentional and negligent), it is still possible to argue that two situations which could be equivalent are not treated equally.

23 The idea of "traffic safety", "road safety" and other similar terms, as they are used in the Spanish legal doctrine (Montaner, 2009, pp. 307-308; Polaino-Orts, 2019, p. 28), focus on the risks that certain offenses entail in this context. However, we prefer to refer to traffic (or road or any other similar term) "functionality" as this is a broader concept which encompasses two elements: firstly, the fact that those who interact with road traffic are necessarily exposed to a tolerable margin of risk; and, secondly, that such interaction takes place within a traffic system which functions properly, that is, efficiently and effectively. For an analogous discussion, regarding the legally protected right which is affected by computer crimes, see Mayer (2017, pp. 251-252).

However, even if it were the case that the multifarious nature of the offense was considered during the drafting of the relevant provisions of the Traffic Act, we could still question whether such a radical difference in the punishment parameters in comparison to other similar cases (medical negligence, negligent product liability, etc.) is justified. In our opinion, even if it is assumed that the functionality (or other analogous term) of road traffic is a collective legally protected right, in addition to being instrumental to others of greater importance (e.g., the rights to life and to health), the disparity in treatment under the law is not sufficiently justified. As such, we reiterate our conclusion—qualified by the nuances discussed above—that the legislature violated the principle of equality when establishing the rule which defers eligibility for alternatives to imprisonment for the offense of causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs.

A question worth exploring in future research—if possible empirical—is whether the offense of causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs involves greater *disvalue* given the particular means involved in its commission. In line with what we discussed earlier, it could be argued that driving involves the use of an instrument—the vehicle—which, although it cannot be equated to a weapon[24], does have a huge potential to cause injury. If we take this to be the case, it could be concluded that drunk driving is indeed, from a criminology and criminal policy perspective, different from other offenses such as medical negligence or negligent product liability; furthermore, the distinguishing factor would be objective—the disvalue of the conduct (the instrument used to carry out the act)—rather than subjective—i.e., related to mental states such as culpability and intent. However, it remains to be clarified whether the use of this particular instrument in perpetrating the offense justifies such a radical difference in punishment in comparison with other cases (such as medical negligence, negligent product liability, etc.), given the many other similarities they share. This notwithstanding, the consumption of alcohol or drugs in certain quantities likely exacerbates the risks already implicit in the driving of motor vehicles[25], which could be taken to justify at least a somewhat different punishment for causing a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs.

With regard to a possible violation of the principle of proportionality, we argued above that the rule in question specifically involves a disregard

24 For one thing, they differ in their intrinsic purpose; a motor vehicle is a means of transporting people or things, while a weapon is intended for attack or defense.

25 With regard to the “fatal combination” of driving and alcohol or drug consumption, see Medina (2020, p. 218).

for the requirements of weighting or reasonableness, since offenses of supposedly equal gravity receive clearly different punishments. However, we consider that there is no clear violation of the requirements of appropriateness and necessity of said principle.

Regarding the former, we begin from the premise that to be *appropriate* the restriction of a fundamental right must be imposed for a particular purpose (Alexy, 2011, p. 13; Fernández, 2010, p. 52). In the case we are analyzing it is possible to identify, at least formally, a criminal policy purpose underlying the ideas which have given rise to the harsher punishments for traffic offenses. These include the aforementioned zero tolerance, coupled with a growing demand for a "crackdown" (Wilenmann, 2017, p. 433) on certain crimes, and the desire to "innocuize" the offender, that is, to separate them from society by means of imprisonment (Mir, 2016, p. 92) so that they are not in a position to continue committing crimes[26].

As can be seen, such an analysis of appropriateness is only concerned with the existence of a purpose, not its legitimacy. This issue is primarily related to evaluation and, therefore, it departs from the type of reasoning we have employed up to this point. Furthermore, according to Lopera (2006),

> the principle of democracy holds that, at this point in the debate, any concerns regarding the legitimacy of the purpose of the bill under discussion must be analyzed and deemed invalid[27], in order to avoid the law being declared unconstitutional *ab initio* due to lack of a proper legal basis; however, arguments against the legitimacy of the purpose must not simply be excluded, but considered as part of the weighting which is a necessary component of the debate regarding proportionality in the strict sense of the term (p. 366).

These are precisely the steps we follow in this paper.

Regarding *necessity*, in relation to the idea of proportionality we take this to mean that no method less harmful than the restriction of the fundamental right could achieve the intended purpose (Alexy, 2011, p. 14; Fernández, 2010, p. 52). In the case of the rule under discussion, it could be argued that the Chilean legislature considered that the most practical means of achieving the underlying criminal policy purpose of the rule is to imprison those who cause a fatality or grave-

26 Such criminal policy purposes are clearly evident in the *Historia de la Ley N° 20.770 [History of Law No. 20,770]*. See, by way of example only, the objectives stated in the presidential message regarding the bill as sent to the Chilean Parliament for debate (Biblioteca del Congreso Nacional [Library of the National Congress], 2014, pp. 3-4).

27 Along the same lines, Bernal (2003, p. 700) argues that the Constitutional Court must apply the "presumption of legitimacy of purpose" of a law, which can be derived from the "presumption of constitutionality."

very grave injuries while driving under the influence of alcohol or illicit drugs. Regardless of the correctness of this reasoning, the evidence suggests that the Chilean legislature considers those who drive while under the influence of alcohol or drugs to be so dangerous as to justify imprisonment, and that no method less harmful (e.g., fines) would remove these drivers from the roads[28]. Otherwise, it is difficult to explain why the rule which defers eligibility for alternatives to imprisonment was established for this case and does not apply, for example, to the offense of intentionally inflicting grave-very grave injuries on another person, or why the legislature ruled out the option of imposing other punishments exclusively, more in line with the purpose of social reintegration of the offender, such as a driving ban.

With regard to the aspect of the principle of proportionality which we consider the rule in question violates (weighting, reasonableness or proportionality in the strict sense of the term), the Constitutional Court of Chile has ruled that it is indeed disproportionate and inequitable, especially when compared to the treatment of persons convicted of more grave offenses (*Challenge to the constitutionality [Aldo Javier Rojas Hernández] of Articles 195, 195 bis and 196 ter of Law No. 18.290*, Whereas clause No. 26). As such, the Court's analysis establishes a practically absolute link between equality (before the law) and proportionality in the strict sense, since, in essence, it condemns the notion of offenders in the same circumstances being nonetheless subjected to different penalties.

One possible explanation for the lack of proportionality could be that the legislature the created rule which defers eligibility for alternatives to imprisonment with the purpose of prevention in mind. However, if this were the case, there is a risk of confusing two aspects of the principle of proportionality which should be considered separately, namely appropriateness and weighting.

This distinction is relevant, since an analysis centered on appropriateness lends itself to the development of approaches to criminal policy which adhere to legal doctrine and also lead to the establishment of diverse punishments by the legislature, while legislative debates which focus primarily on evaluative considerations may lead to a criminal policy which favors harsher punishments and ends up justifying legal reforms such as the one contained in "Emilia's Law" (Cardozo, 2011, pp. 3 et seq.; Matus, 2014, pp. 101 et seq.; Mayer & Vera, 2014, pp. 116-117). It seems likely that this ambiguity in the Chilean legislature's views on

28 For the same reason, we do not believe that in this case the legislature considered the social reintegration and victim protection purposes of punishment as argued for by some scholars; a restriction on the use of the driver's license would suffice to fulfil these. See the *challenge to the constitutionality [Aldo Javier Rojas Hernández] of Articles 195, 195 bis and 196 ter of Law No. 18.290* (Whereas clause No. 26).

the purposes of punishment has contributed to the emergence of both favorable and critical opinions on the ideas of zero tolerance and the "innocuization" of those who cause fatalities or grave-very grave injuries while driving under the influence of alcohol or illicit drugs. Given these considerations, it can be seen that an analysis focused on weighting has the advantage of facilitating legal reasoning based on more objective variables, such as the gravity of the wrongdoing or the degree of culpability of the offender, which are the gradable components of the concept of crime.

In our opinion, although the weighting or reasonableness of the rule which defers eligibility for alternatives to imprisonment is related to the principle of equality before the law, as emphasized by the Constitutional Court of Chile, it is also possible to describe this element of the principle of proportionality independently. As mentioned previously, in order to assess the (dis)proportionality of the rule, it is necessary to compare the gravity of the wrongdoing and the degree of culpability of a person who causes a fatality or grave-very grave injuries while driving under the influence of alcohol or illicit drugs, with those same factors (wrongdoing and culpability) as they relate to other offenses in the Special Part. Such a comparison leads to the conclusion that the rule which defers eligibility for alternatives to imprisonment is both disproportionate and unjustified within the framework of the range of offenses defined in Chilean criminal law.

Finally, with regard to a potential violation of the principle of certainty, although this is usually linked to other principles which impose limitations on *ius puniendi* (the right to punish), such as the principle of specificity—which is also related to the idea of *lex certa* (Eser, 2006, p. 29)—it can likewise be linked it to the criterion of systematicity, at least from the following two points of view.

Firstly, when regulating criminal conduct, it is reasonable to expect that the legislature will make consistent decisions, primarily in relation to the laws which are already part of the legal system. This may extend only to other laws regulating certain conducts, or also involve international treaties which impose obligations on their States Parties regarding adapting their domestic legislation to those treaties. Such consistency is necessary to uphold the structural order of the legal system and guarantees a certain degree of stability[29], meaning that potential offenders can predict when and how significant an amendment to a law may be implemented, as sufficient precedents exist to support it.

29 For a discussion of the links between the ideas of legal certainty, the regularity of the legal system and stability, see Oliver (2009, p. 184), who includes further references.

Secondly, when applying criminal law, it is reasonable to expect that the courts will make consistent decisions, either by following the precedents related to the matter in hand—that is, judicial decisions (Núñez & Fernández, 2021, p. 295) which become established rules and are applied to subsequent cases (Taruffo, 2018, p. 9)—or, at the least, that they will adhere to a coherent line of legal reasoning in the regulations they apply. Such consistency means that potential offenders can predict how the law will be interpreted and applied in a given scenario[30], since the courts have already issued rulings on similar matters.

This is not to say that changes to the law, or to interpretations of case law, cannot happen relatively abruptly. However, in order for these to maintain coherence with the legal system they will become part of, they must be justified using solid formal or material reasoning[31]. In this way, potential offenders will be able to understand the changes, as they will be based on reasoned arguments and not on whimsical or arbitrary decisions on the part of the authorities.

In our opinion, the rule which defers eligibility for alternatives to imprisonment violates both of these elements of the principle of certainty. Regarding the first, it involves an insufficiently justified break with the consistency of the Special Part by the legislature, which makes it both unpredictable and incomprehensible to potential offenders; and regarding the second, the Constitutional Court of Chile has declared it unconstitutional in several rulings. The issue has negatively criminal trials for causing fatality or serious injury caused while driving under the influence of alcohol or illicit drugs, as many have concluded without the laws which govern the offense being applied (Rojas, 2020, pp. 32 et seq.)[32].

IV. CONCLUSIONS

Systematicity is a key principal of legislative drafting and is viewed as fundamental to the process of establishing rational legal rules. The process of enacting legislation is not only concerned with the laws in themselves, but also with the creation of a homogeneous legal system without contradictions, gaps or redundancies, so that the law can become a mechanism for anticipating human behavior and its consequences—i.e., a security system.

30 For the same reason, we agree with the link that Celis et al. (2016, p. 396) make between "precedent" and "legal certainty."

31 For more on the subject of judicial precedent, see Dworkin (1986, p. 245) and Iturralde (2013, pp. 195 et seq.).

32 The uncertainty in the case of the Chilean law is twofold since the Court has not ruled in favor of the plaintiff in all of the challenges to the constitutionality of the rule under discussion. An examination of this problem, however, is beyond the scope of this paper.

The principle of systematicity refers to the logical/formal dimension of the structure of a legal system and also to its teleological nature, and both should be characterized by their coherence and consistency. In addition, legislation which is drafted with respect for these two dimensions of the principle of systematicity will as a consequence respect several other rights and principles, including those of equality before the law, proportionality and certainty.

In contrast, the existence of rules which disrupt the system can affect both the formal and material aspects of the principle of systematicity and as a consequence violate the rights and principles which are associated with it. This is precisely what has occurred in the case of the "Emilia's Law" amendment to Chile's Traffic Act, specifically the rule deferring eligibility for alternatives to imprisonment for the offense of causing fatality or serious injury while driving under the influence of alcohol or illicit drugs.

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