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NEW ROAD SAFETY OFFENCES

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Analysis of the latest case law on the matter.

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1. Introduction

Offences against road safety have undergone a legal remodelling, substantially through Organic Law 15/2007, of 30 November[133], which objectified the offence of typical speed, as well as the levels of alcohol intake, designing different degrees of unjust conduct, tracing an arc that passes from abstract danger to perceptible disregard for the lives of others. Similarly, the penalties and accessory consequences have been significantly increased, as well as the possibility of considering motor vehicles or mopeds themselves to be an instrument of the offence, in order for their confiscation to be ordered.

Organic Law 5/2010 of 22 June 2010 also has an impact on this matter[134]. Precisely this last law[135] seeks greater proportionality in the criminal law response to certain conducts of

[133] Amending Organic Law 10/1995, of 23 November 1995, on the Criminal Code in matters of road safety, which came into force on 2 December 2007, with the exception of the second paragraph of Article 384 of the Criminal Code, which came into force on 1 May 2008.
[134] Effective from 23-12-2010.
[135] Its Preamble tells us.

abstract danger, meaning that it has been considered appropriate for Articles 379 and 384 to be amended in a threefold sense:

Firstly, the prison sentence for both offences is to be put on an equal footing, as it is understood that there is no substantive reason to justify the difference in the punitive response. On the other hand, the current disjunctive between imprisonment and fines and community service has been eliminated, with the three types of penalties being established as alternatives. In this way, a greater degree of discretion is granted to the judge when deciding on the imposition of any of the three penalties provided for, allowing the prison sentence, as the most serious one, to be reserved for exceptional cases. And finally, going beyond the system in which it is only foreseen in the case of the offence of Article 381, a new Article 385 bis is introduced in which it is established that motor vehicles or mopeds used in the acts foreseen in the Chapter will be considered as instruments of the offence for the purposes of Articles 127 and 128.

The latest legal amendment corresponds to Organic Law 2/2019, of 1 March[136], the main lines of amendment of which are as follows: 1. the introduction of three cases which are to be considered as serious negligence by law, as well as an authentic interpretation of less serious negligence. 2. the increase in the punishment for this type of conduct. And 3. the introduction of the offence of leaving the scene of the accident.

However, in order to objectify the concept of serious negligence, Organic Law 11/2022, of 13 September[137], has established that imprudence at the wheel that causes death or relevant injuries should give rise to criminal proceedings, and not simply be settled through civil proceedings.

Crimes against road safety are all crimes that prevent traffic accidents, given that when such a result occurs, the consequences are regulated in another section of the Criminal Code, such as in the crimes of negligence, with different legal modulations, which are not dealt with in this work, which is exclusively dedicated to crimes against road safety.

In fact, these offences are types of danger, whether abstract or concrete, but of danger, not causing a result.

2. Study of each of the criminal offences

Offences against road safety are found in Chapter IV of Title XVII of Book II of the Criminal Code, in Articles 379 to 385.3 thereof.

3. The offence of excessive speed

Excessive speed is a new criminal offence affecting road safety, of a new kind, introduced by the legislator, by means of which it is intended to objectify the dynamic development of driving between different stretches of speed, so that, on the basis of certain typically described parameters, driving in such a way constitutes a criminal offence.

[136] Amendment of Organic Law 10/1995, of 23 November 1995, of the Criminal Code, regarding imprudence in the driving of motor vehicles or mopeds and the punishment of leaving the scene of an accident.
[137] On the amendment of the Criminal Code in the area of imprudence in the driving of motor vehicles or mopeds.

Specifically, Article 379(1) of the Criminal Code provides:

"1. Anyone who drives a motor vehicle or moped at a speed in excess of sixty kilometres per hour on urban roads or eighty kilometres per hour on interurban roads in excess of that permitted by law, shall be punished with a prison sentence of three to six months or with a fine of six to twelve months or with community service of thirty-one to ninety days, and, in any case, with the deprivation of the right to drive motor vehicles and mopeds for a period of more than one and up to four years."

For its correct interpretation, we must follow the steps of Royal Decree 970/2020, of 10 November, which amends the General Traffic Regulations, approved by Royal Decree 1428/2003, of 21 November, and the General Vehicle Regulations, approved by Royal Decree 2822/1998, of 23 December, on urban traffic measures.

In short, the aim of the legislator is to objectify this behaviour, which has the nature of a (relatively) blank criminal offence, as it has to be complemented by administrative regulations on different speed limits. Therefore, in order not to be outdated in this matter, the additional provision of the Organic Law 15/2007, which is entitled "review of road signs and regulations governing speed limits", determined that the Government will promote, in agreement with the competent administrations, a review of road signs and regulations governing speed limits, in order to adapt them to the requirements derived from greater road safety.

3.1 Protected legal interest

Thus, the protected legal right is road safety, and within this, what is penalised is the risk caused by excessive speed, effectively disproportionate to the stretch of road on which it is travelled and causing an unusual risk for other road users.

3.2 What is a motor vehicle or moped?

According to Royal Decree 2822/1998 of 23 December 1998, which approves the General Vehicle Regulations, a motor vehicle is a vehicle with an engine for propulsion, excluding mopeds, trams and vehicles for persons with reduced mobility.

3.3 What is the maximum speed allowed on each road?

Royal Decree 970/2020, of 10 November, amending the General Traffic Regulations, approved by Royal Decree 1428/2003, of 21 November, and the General Vehicle Regulations, approved by Royal Decree 2822/1998, of 23 December, on urban traffic measures, has modified Art. 50, which sets speed limits on urban roads and crossings.

This means that the generic speed limit on urban roads will be:

a) 20 km/hr on roads with a single carriageway and pavement.

b) 30 km/hr on single lane roads in each direction.

c) 50 km/hr on roads with two or more lanes in each direction.

For these purposes, lanes reserved for the circulation of certain users or the exclusive use of public transport will not be counted.

It also stipulates that the established generic speeds may be lowered, subject to specific signage, by the municipal authority, and that, exceptionally, this authority may increase the speed on single-lane roads in each direction up to a maximum speed of 50 km/hr, subject to specific signage.

On the urban roads referred to in Section 1c) and on crossings, vehicles carrying dangerous goods shall travel at a maximum speed of 40 km/hr.

The generic speed limit on crossings is 50 km/hr for all types of vehicles. This limit may be lowered by agreement between the municipal authority and the road owner, subject to specific signage. However, the generic speed limit on motorways and dual carriageways within populated areas is 80 km/hr, although this may be increased by agreement between the municipal authority and the owner of the road, subject to specific signage, without exceeding the generic limits established for these roads outside populated areas.

The legislator has therefore opted to objectify this matter, especially in view of a certain dispersion of interpretation in the courts which has arisen with some drivers accused of the crime of reckless driving.

3.4 Case law

With regard to the margins of error, the Supreme Court maintains that if a speed camera is used from a fixed location, i.e. without movement, whether fixed or static, the margin of error is 5%.

Indeed, Supreme Court Judgement 184/2018, of 17 April (Plenary), states that the Ministerial Orders distinguish between fixed and mobile speed camera, and the latter between static and moving ones. Fixed speed cameras have a margin of action of 5%, and mobile speed cameras have a margin of action of 7%. Up to this point, the standard is clear in indicating a margin of error according to the type of instrument. It then equates measurement in the static mode, i.e. when a mobile system does not measure in motion, with the fixed mode.

4. Driving under the influence of alcoholic beverages, intoxicating drugs, psychotropic substances and narcotics.

Section 2 of Art. 379 of the Criminal Code states that “Anyone who drives a motor vehicle or moped under the influence of intoxicants, narcotic drugs, psychotropic substances or alcoholic beverages shall be liable to the same penalties. In any case, the said penalties shall be imposed on anyone who drives with a breath alcohol level of more than 0.60 milligrams per litre or with a blood alcohol level of more than 1.2 grams per litre.”

This offence is committed with the production of a state of risk or probability of damage to that legally protected good, which is none other than traffic safety or, in the words of the legislator, road safety.

4.1 Case law

a) Concept of driving: putting on a helmet, and getting ready to drive without yet doing so.

In Supreme Court Judgement 48/2020, of 11 February, it was held that, in the case analysed, the conduct described in the factual account is atypical, without there being any room for punishing the "risk of risk", such as entering a vehicle or getting on a moped, without actually driving it, without carrying out any conduct relating to the typical verb "to drive", cannot be considered as an attempt to commit the offence of driving under the influence of alcoholic beverages, intoxicating drugs or narcotics, no matter how high the blood alcohol level of the subject may be, since the decisive factor in this imperfect form is the performance of driving acts, not the fact that the subject is under the influence of these substances.

It does not matter if the journey is minimal. Supreme Court Judgement 15-06-2017 ruled that driving a motor vehicle with a speed limit higher than that contemplated in Art. 379.2 Criminal Code by moving it two metres in an interrupted gear in the presence of the police is conduct that can be included in the aforementioned criminal precept.

b) Concept and scope of the concept "driver", for the purposes of Art. 379.2 of the Criminal Code

Supreme Court Judgement 794/2017, of 11 December. Article 379.2 of the Criminal Code. In this decision, the Court analyses the concept and scope of the concept of "driver", for the purposes of Art. 379.2 of the Criminal Code, in a case in which the driver had been caught asleep in a vehicle stopped at a traffic light in the middle of the traffic lane. The Supreme Court applies the doctrine contained in Supreme Court Judgement (Plenary) 436/2017 of 15 June, and concludes that even if the accused, when caught, was stopped in the middle of the traffic lane, at the immediately preceding moment, he was driving the vehicle with his driving ability impaired by the effect of the alcohol previously ingested, this behaviour falling under Article 379.2 of the Criminal Code for which he had been convicted.

5. Driving with manifest recklessness

Art. 380 of the Criminal Code penalises:

"1. Anyone who drives a motor vehicle or a moped with manifest recklessness and specifically endangers the life or integrity of persons shall be punished by imprisonment for a term of six months to two years and deprivation of the right to drive motor vehicles and mopeds for a period of more than one and up to six years.

2. For the purposes of this provision, driving in which the circumstances provided for in the first section and the second subsection of the second section of the previous subsection are present shall be considered to be manifestly reckless."

Doctrinally, the following elements are required for the concurrence of this offence:

a) an act of driving, to be classified as reckless;

b) endangerment of specific legal assets, i.e. the life and integrity of persons, not any other (e.g. property); and

c) subjective element, intent to endanger, to which we will refer later.

5.1 What is manifest recklessness?

Supreme Court Judgement 2251/2001, of 29 November 2001, tells us that it is a notorious disregard for traffic regulations, in a way that can be clearly assessed by an average citizen, and also that such conduct entails a concrete danger to the life or integrity of persons; therefore, simple reckless driving, which in itself creates an abstract danger, would not be sufficient, and the existence of a concrete danger must be accredited, which, moreover, must be derived from the facts declared proven by the Court of First Instance.

However, this typical behaviour is considered to be a purely interpretative precept, which does not prevent the assessment of recklessness, even if such normative assumptions are not met. This is stated in case law.

In this sense, Supreme Court Judgement 744/2018, of 7 February, tells us that the crime of reckless driving in Article 380 of the Criminal Code does not require exceeding a certain blood alcohol level, without prejudice to the fact that the legislator considers reckless driving to be that which is carried out with a level that exceeds the limit of 0.60 milligrams per litre of exhaled air (380.2 of the Criminal Code in relation to 379.2, second section); and which exceeds the regulatory speed limit by 60 or 80 km/hour, depending on whether it is an urban or interurban road (Article 380.2 in relation to 379.1).

6. Driving with blatant disregard for the lives of others

The history of this offence, which is now included in Article 381 of the Criminal Code, dates back to the 1980s, when races were organised to see who could drive the longest in the wrong direction on a motorway[138]. Since then, there has been a lot of behaviour like this in many places in Spain, which is why, today, Art. 381 provides as follows:

"1. Anyone who, with manifest disregard for the lives of others, engages in the conduct described in the previous article, shall be punished by a prison sentence of two to five years, a fine of twelve to twenty-four months and deprivation of the right to drive motor vehicles and mopeds for a period of six to ten years.

2. When the life or integrity of persons has not been specifically endangered, the penalties shall be imprisonment of one to two years, a fine of six to twelve months and deprivation of the right to drive motor vehicles and mopeds for the period provided for in the previous paragraph.

Certainly, the distinction between this offence and the offence of reckless driving with specific danger is not easy dogmatically. The case law interpreting this offence against road safety in Article 381 of the Penal Code indicates that it covers an offence under Article 379.2 in conjunction with a homicide offence under Article 138, both of the Criminal Code, with the analogue extenuating circumstance of drunkenness.

[138] Specifically, on the A-6, the motorway to La Coruña.

This is the case of Supreme Court Judgement 4/2019, of 14 January. In this case, the elements assessed in the judgement of the court of first instance, to which we have already referred, easily point to the existence of malice. The appellant was aware that he was using the vehicle after having consumed significant doses of alcohol; he was aware that he was travelling in the wrong direction on the motorway, having been warned on successive occasions by other road users; he therefore knew that there was a high probability of a head-on collision with another road user who was travelling correctly; and he knew that, given the speed of the lorry, between 70 km/hr and 90 km/hr, and the speed at which it normally travels on motorways, and given the weight and characteristics of the lorry, if such a head-on collision were to occur, there was an equally high or very high probability that it would cause the death of the users of the other vehicle.

7. Simultaneity clause

It is covered by Art. 382 of the Criminal Code. It reads as follows: when the acts punished in Articles 379, 380 and 381 cause, in addition to the risk foreseen, a harmful result constituting an offence, regardless of its seriousness, the Judges or Courts shall only assess the most serious offence, applying the penalty in its upper half and sentencing, in any case, to compensation for the civil liability that may have arisen.

When the harmful result coincides with an offence under Article 381, the penalty of deprivation of the right to drive motor vehicles and mopeds provided for in the upper half of this provision shall be imposed in all cases[139].

7.1 Case law interpretation of the simultaneity clause

Supreme Court Judgement 64/2018, of 6 February, declares that Art. 382 of the Criminal Code is an exception to the general criterion in the case of the concurrence of a crime of danger and another of result, by virtue of which the crime of result covers the crime of danger (Supreme Court Judgement 122/2002, of 1 February); a criterion that is replaced by the punishment of the more serious crime in its upper half, combining the rules of ideal competition and the principle of alternativity in the imposition of the sentence. This is a penological rule which does not exclude the consideration of a plurality of offences to which the cumulative penalty can be applied according to the criterion set out in Article 382 of the Criminal Code.

Consequently, as stated in this judicial decision, we unify the interpretation in the following terms: the provision of Article 382 of the Criminal Code contemplates a concurrence of crimes for which the legislator provides a singular penal rule, similar to that of concurrence of crimes, that corresponding to the most serious crime (alternativity), plus the provision of the ideal concurrence, in its upper half.

In fact, as this judgment points out, the nature of the competition is precisely that of offences and not of rules, insofar as the provision interpreted expresses that “when with the acts punished in Arts. 379, 380 and 381”, i.e., it uses the preposition “with”, which indicates the way or manner in which an action is carried out or the instrument with which it is executed, so that with such an action, in addition to the risk foreseen, a harmful result is caused which constitutes an offence, whatever its seriousness.

[139] Article 382 was amended by Organic Law 2/2019, of 1 March, with entry into force on 3-3-2019.

7.2 Distinction between single-subject and road safety impacts

Supreme Court Judgement 350/2020, of 25 June: the simultaneity rule provided for in Art. 382 of the Criminal Code is designed to provide an appropriate penal response to those criminal acts that cause, in addition to danger, an injurious result. The legislator does not want the offence of endangerment to be covered by the offence of result, but rather a concurrence of offences, so that the penalty for the more serious offence is imposed in the upper half of the sentence.

But this simultaneity rule cannot be applied irrespective of the offence of injury caused. Certainly, the wording of the rule does not prevent it, because it only refers to "an injurious result constituting an offence, whatever its seriousness". But the person whose action is aimed at individually causing a malicious result against a particular person uses the car as an instrument, and the risk caused to the traffic to that particular person is not affected, because the perpetrator wants to injure or kill them.

However, if with such an action other individual legal assets are specifically endangered, such action cannot go unpunished, but the corresponding penalty for the commission of a dangerous road safety offence will be applied to them (...) So the simultaneity clause will undoubtedly be applied to the harmful result, in the case of reckless offences, and the actual concurrence will be applied when there are other legal assets at stake, such as the life or physical integrity of third parties, and the action is intentional.

In other words, when the perpetrator intends with their (intentional) conduct to use the vehicle as an instrument of the offence to cause death or injury to the passive subject of the offence against the life or integrity of persons, as there is no real risk to road safety, since the action is concentrated on the passive subject, such action will be punishable in the corresponding offence committed with direct malice towards the victim.

However, when in addition to the damage caused with direct malice, an offence of endangering the safety of the road is committed, a danger which affects third parties, the corresponding real concurrence of offences will be applied, and they will be punished separately.

8. Offence of leaving the scene of an accident

This new offence is incorporated in Art. 382 bis of the Criminal Code.

Section 1 provides that the driver of a motor vehicle or moped who, outside the cases contemplated in Article 195, voluntarily and without risk to themselves or others, leave the scene of the accident after causing an accident in which one or more persons are killed or in which any of the injuries referred to in Articles 147.1, 149 and 150 are caused, shall be written-off as the perpetrator of the crime of leaving the scene of the accident.

The doctrinal positions on this issue revolve around the following propositions: a) it is a special offence of omission of the duty to provide assistance; b) it is an offence that penalises the infraction of not taking responsibility for the liabilities derived from an accident; and c) it is a mixed type: the safety of life and physical integrity and solidarity.

This precept has recently been modified by Organic Law 11/2022, of 13 September, on the reform of the Criminal Code in matters of imprudence in the driving of motor vehicles or mopeds, which has redrafted Section 1 of the precept we are referring to, exclusively in the specific aspect of rewording the mention of the accident causing "injury constituting an offence under Article 152. 2", now providing for "any of the injuries referred to in Articles 147.1, 149 and 150", which is a consequence of the modification of Article 152.2 of the Criminal Code, which now incriminates anyone who, through less serious negligence, causes any of the injuries referred to in Articles 147.1, 149 and 150.

The most interesting case law in the interpretation of this article has been the analysis of cases where instantaneous death of the victim has occurred as a result of the impact.

In view of the conviction at first instance as an attempt to commit the crime of omission of the duty to assist, Supreme Court Judgement 284/2021, of 30 March, upheld the appeal and acquitted the accused. This judicial decision declares that there was absolute unfitness to act.

In the case, the driver of a van, driving without paying due attention and without adjusting his speed to the circumstances of the traffic, rammed a pedestrian from behind, throwing her against the hard shoulder where she violently hit her head. As a result, she suffered injuries which caused her immediate death. However, the defendant continued to drive without checking the victim's condition and without informing anyone of what had happened.

The Supreme Court states the following: "The criminalisation of an offence on the basis of the mere formal breach of an ethical duty places criminal law on a borderline with the legal principles that legitimise its application. The Criminal Code cannot aspire to become a simple instrument of social pedagogy that turns its back on the axiological reference of the legal goods that it is intended to protect."

Excluding the possibility of imperfect forms of execution, the Judgment focuses on the legal interests protected by Art. 195 of the criminal code—safety of life and physical integrity and solidarity—and denies that these were undermined by the omission with which the accused was charged. This is because "the instantaneous death suffered by the victim and described as such in the proven facts, is absolutely inappropriate.

In short, it upholds that "it is not possible to help someone who is no longer susceptible to being helped. And it is precisely for this reason that the omission of an expected action cannot be written-off when, had that action been carried out, it would not have affected the indemnity of the protected legal interest in any way, be it the safety of life and physical integrity, or solidarity."

8.1 Inidoneous attempt: the accused leaves the scene of the hit-and-run, but the victim had died immediately after his action

This is the case dealt with in the recent Supreme Court Judgement 167/2022, of 24 February. This judicial decision analyses Art. 382 bis of the Criminal Code, included within the crimes against collective safety, and more specifically against road safety, a precept which includes the so-called "crime of fleeing" which is described as the attitude of the driver who, without any risk to themselves or others, leaves the scene of the accident

resulting in the death of one or more people or injuries of Art. 152.2 of the Criminal Code. Different penalties are foreseen depending on whether the accident was caused by the driver's negligence or by an act of God. For the offence of leaving the scene of an accident to be committed, it is not necessary that the requirements of the offence of omission of the duty to render assistance are met. Thus, in this way, the crime of fleeing is subsidiary to the crime of omission of the duty to provide assistance, as it refers to persons who have suffered serious injuries, but the characteristics of the situation that require a duty to provide assistance are not present.

9. Refusal to submit to testing

Article 383 stipulates that any driver who, when summoned by an officer of the authorities, refuses to submit to the legally established tests to check blood alcohol levels and the presence of the toxic drugs, narcotics and psychotropic substances referred to in the previous articles, will be punished with prison sentences of six months to one year and deprivation of the right to drive motor vehicles and mopeds for a period of more than one and up to four years.

Following the constitutionality of the precept, which was resolved by STC 161/1997, of 2 October, the interpretation of this offence has recently been dealt with:

Supreme Court Judgement 652/2019, of 8 January, which deals with the application of the exonerating or extenuating circumstance of drunkenness within this crime. Thus, this judicial decision maintains that the analogue mitigating circumstance of drunkenness is not applicable, given the appeal for infringement of the law, without prejudice to the fact that given the nature and the legal right protected in the crime of Art. 383 of the Criminal Code, nothing prevents the application of the incomplete defence or mitigating circumstance of drunkenness, unlike the crime of Art. 379.2 of the of the Criminal Code, as drunkenness is inherent to the crime (Art. 67 of the Criminal Code).

Supreme Court Judgement 652/2019, of 8 January, which refers to the problems derived from the real concurrence with a crime of driving under the influence of alcoholic beverages, with the appropriate analysis of the *non bis in idem*. It also stresses the postulates of Supreme Court Judgement 419/2017, which supports the real concurrence of offences, rules out the infringement of the principle of proportionality, and affirms that the legal good protected by both criminal precepts is not the same, citing STC 161/1997, of 2 October. Finally, from another perspective, and leaving aside the legal good protected by the criminal offences of disobedience, the aforementioned judgement states that "it must be understood that even if road safety and, indirectly, the life and physical integrity or health of persons were considered to be the only legal good protected, the truth is that it would not necessarily be necessary to speak of a *bis in idem*. For it can be considered that the same legal right is being attacked in two different ways and with different facts: one in a more direct way through drink-driving, and the other by preventing a police investigation from being carried out with guarantees of effectiveness so that the impairment of road safety is ultimately protected by a penalty. After all, this is what is done in law when aggravated subtypes are established to protect the same legal right."

Particularly interesting was the failure to carry out the second breathalyser test, a case resolved by the Supreme Court Judgement, Plenary, 210/2017, of 28 March, which was the first to be handed down in relation to the new type of cassation appeal established by Law

41/2015, of 5 October. The conclusion set out in that ruling was that the refusal to carry out the second test fell under Art. 383 of the criminal code, meaning that the factual account of the ruling of the lower court was part of the aforementioned criminal offence. This was repeated in Supreme Court Judgement 495/2017, of 29 June, and most recently in Supreme Court Judgement 475/2021, of 2 June.

10. Driving without a licence or permit.

Article 384.1 of the Criminal Code establishes that anyone who drives a motor vehicle or moped in cases of loss of validity of the licence or permit due to total loss of the legally assigned points, shall be punished with a prison sentence of three to six months or with a fine of twelve to twenty-four months or with community service of thirty-one to ninety days.

The same penalty shall be imposed on anyone who drives a motor vehicle or moped after having been temporarily or definitively deprived of a licence or permit by a court decision, and on anyone who drives a motor vehicle or moped without ever having obtained a driving licence or permit.

This restores an offence that has disappeared, such as driving without a driving licence, which the legislator had relegated to a strictly administrative provision in order to reintroduce it into the Criminal Code, as a consequence of the design of this new offence of driving with an expired licence due to the loss of points, which was the essential solution to close the new points-based licence system, to which driving with a withdrawn licence was added, either temporarily or definitively by final judgement, and as could not be otherwise, if these behaviours were an offence, driving without ever having obtained a licence or permit to drive motor vehicles or mopeds had to be an offence as well. It could not be otherwise.

The Supreme Court settled the question of whether the lack of a driving licence was sufficient to commit this offence, or whether something more was necessary, in the Plenary Ruling, 369/2017, 22-05-2017, in which it declared that driving a motor vehicle or moped, without ever having obtained a licence or permit to do so, constituted the offence set out in Article 384.2 of the Criminal Code, regardless of whether a traffic regulation was infringed or whether an abstract or specific risk was generated. The offence is perpetrated by the mere carrying out of the conduct referred to, as doing so without such aptitude necessarily affects the legal right protected by this offence.

10.1 Definition of a moped or Personal Mobility Vehicle (PMV).

In this respect, we cite Supreme Court Judgement, Plenary, 120/2022, of 10 February, which affects PMVs (electric scooters), and which upholds the incidence of driving them without a licence or permit under Art. 384.2 of the Criminal Code. In the case, a judgement of acquittal was handed down on the grounds that the vehicle was not a moped. This court decision is of interest in that it analyses two-wheeled vehicles with an electric motor in accordance with the postulates of the Road Safety Act and its Regulation (RGVM).

In Supreme Court Judgement 120/2022, it is concluded that, in this case, there is a lack of data for its classification as a moped, such as the speed that the vehicle in question is capable of travelling at, and whether or not it has a self-balancing system.

Thus, it is not possible, at present, to incriminate the driving of PMVs in the criminal offences of Chapter IV of Title XVII of the Criminal Code, as they are not included in the correlative typical formulas. Of course, unless fraudulent use is made of these categories in order to disguise, behind an apparent PMV classification, what is, at the very least, a genuine moped (or even a motorbike), thereby attempting to circumvent the regulations concerning the requirement for a licence, which would give rise to the offence which is the subject of this action, and other rules, such as the obligation to wear a helmet or insurance, of an administrative nature, thus affecting—and this is the worst aspect—road safety, by putting the personal safety of other road users at real risk.

With regard to this offence of driving without a driving licence or permit administratively necessary for driving, we cite Supreme Court Judgement 27/2017, of 25 January, where the extraordinary appeal for review was upheld and the appellant's conviction as perpetrator of an offence against road safety of driving with a driving licence not in force due to the loss of the legally assigned points (Art. 384 of the Criminal Code) was annulled. The review was upheld on the grounds that the administrative decision to cancel the loss of points leading to the loss of the driving licence was annulled after the criminal conviction by a judgement of the Administrative Court of Albacete.

The analysis of a case, in which the accused authorises his child under the age of eight to drive his own vehicle, is also very interesting. The Supreme Court in Plenary Session (Supreme Court Judgement 314/2021, of 15 April), convicted a father as a necessary co-operator ex Art. 28 b) Criminal Code for the offence of Art. 384.2 Criminal Code for aiding and abetting the conduct of his eight year old son in driving a motor vehicle while filming him. Concurrence of the necessary cooperation in the criminal type of Art. 384.2 of the Criminal Code in driving without a driving licence, with the father's conduct being criminally reproached.

Other judgements of interest in this area are the following:

Supreme Court Judgement 32/2018, 22 January: driving without a licence. It is not possible to hold two driving licences, an expired Spanish licence and an unexpired foreign licence, and to use whichever is appropriate.

Supreme Court Judgement 612/2017, 13 September: The Spanish authorities had invalidated the driving licence of the driver, a Spanish national, due to the loss of points, notifying him accordingly, and he could not rely on the possession of another Portuguese driving licence, under penalty of fraudulent evasion of the law.

11. Other behaviour affecting road safety

This is provided for in Art. 385 of the Criminal Code, including causing a serious risk to traffic in any of the following ways: 1. Placing unforeseeable obstacles on the road, spilling slippery or flammable substances or by tampering with, removing or invalidating signs or by any other means. 2. Not restoring road safety, when there is an obligation to do so.

12. Confiscation of the vehicle

Article 385 bis of the Criminal Code provides that the motor vehicle or moped used in the acts provided for in this Chapter shall be considered an instrument of the offence for the purposes of Articles 127 and 128.

13. Proportionality clause of the custodial sentence

Finally, Article 385.3 of the Criminal Code provides that in the crimes defined in Articles 379, 383, 384 and 385, the judge or court, reasoning in the sentence, may reduce the prison sentence by one degree, taking into account the lower level of risk caused and the other circumstances of the act.

The Supreme Court has declared in Supreme Court Judgement 38/2020, of 6 February, that a first approach to the precept leads us, in a literal interpretation of it, to consider that it refers only to the reduction of the prison sentence, as this is expressly provided for. The literal wording of Article 385 ter does not seem to be different.

The same conclusion is reached on the basis of logical or systematic criteria. Examining other precepts of the Criminal Code in which the legislator has provided similar attenuation clauses to the one contemplated in the precept under examination with the aim of relaxing to some extent the punitive exacerbation of certain crimes, it is observed that when the legislator authorises the possible attenuation of various penalties which jointly or alternatively are foreseen for the same act, this is expressed, using open formulas for this purpose.

On the other hand, the doctrine of the Provincial Courts has understood that it cannot be applied in the case of habitual offenders. Thus, the SAP A Coruña, Section 1, 31/2020, of 23 January, states that one of its valuation guidelines must be "the other circumstances of the act". The assessment of the appellant's personal circumstances, as a habitual offender against road safety (Article 94 of the Criminal Code), is objectively adverse to this claim for a reduction in the punitive response.

14. Enforcement of driving disqualification penalties

We end this study with Supreme Court Judgement 914/2022, of 23 November, which dictates doctrine on the dates of compliance with driving licence deprivation sentences, or driving away sentences, or prohibition of communication, among others, with the following clarifications:

a. That careless or contemptuous conduct on the part of the addressee in disregarding the right or the mandate is not admitted as an error ex Art. 14 of the Criminal Code.

b. You cannot go to drive a vehicle without being in possession of the required driving licence and then claim that you thought you were able to do so. This lack of action in not having the licence and not knowing that they could not drive until the end of the day is not in keeping with the diligence of an average citizen, which is a fact that reinforces the rationality of the inference of precise intent in this type of offence.

c. As long as you are not in possession of your driving licence because you have returned it on the last day of compliance, you may not drive. Even less so if the breach of sentence takes place on the last day that is included in the settlement.

d. There is no need for technical "know-how" in these cases, but to be aware of the logic to be applied and the clarity that if the date-to-date extension of the driving disqualification is verified, both are included. The "erroneous interpretation" that it may be believed that the last day is not included in the serving of these non-custodial sentences is not an error of type or prohibition ex Art. 14 Criminal Code, but an "excuse", and this is not valid for legal purposes.

e. An express requirement to serve the non-custodial sentence is not necessary, and notification of the sentence with the deprivation or prohibition that specifically applies to them is sufficient.

f. The rules of logic, human reason and daily experience lead us to consider that anyone can come to understand that if the need to serve a sentence is transferred from date to date, the latter is included in the scope of prohibition. The same applies when a restraining order or prohibition of communication is imposed in cases of domestic or gender-based violence, insofar as the first and last day of the sentence are included in the prohibition, and the "interested error" that one or both of them are excluded from the calculation cannot be invoked. When a sentence is handed down for domestic and gender violence, the last day fixed in the settlement must also be observed for the purpose of understanding that if the offender approaches their victim on the last day, or calls them on the last day if there is a prohibition of communication, they will be in breach of the sentence or precautionary measure. It cannot be interpreted or misinterpreted that the first and/or the last day are excluded from the computation of the extension of performance.

g. The error of Art. 14 of the Criminal Code cannot be confused with the "failure in the calculation" of the subject to serve the sentence in its temporal determination. If this were the case, errors of Art. 14 of the Criminal Code could easily be invoked for this type of case with repetition, when it is not possible to do so.

h. Furthermore, the error of prohibition cannot be confused with the situation of doubt, as the latter is not compatible with the essence of the error, which is erroneous belief, meaning that there is no situation of error of prohibition when there is doubt about the lawfulness of the act and the decision to act in a criminal manner, in these cases there is guilt in the same way as the eventual fraudulent intent supposes the wilful action (Supreme Court Judgement 1141/1997, of 14-11).

i. In order to punish a criminal act, knowledge of the unlawfulness of the act does not have to be precise in the sense of being aware of the seriousness with which the conduct is punishable by law. Citizens are not ordinarily experts in legal norms but lay persons in this area, meaning that what is required for the punishment of unlawful conduct is what has been doctrinally called parallel knowledge in the layman's sphere of the unlawfulness of the conduct that is being carried out.

j. It is not possible to appeal to the conscience of each individual with regard to the calculation of the length and serving of non-custodial sentences and the last day of serving them.

k. It is not possible to drive without a licence expressly returned by the court and allege that, despite this, it was considered that they were already able to do so when it is alleged that there is doubt as to whether or not the last day was included in the calculation of compliance.

l. It seems reasonable to consider that any person who does not have a driving licence, because it has not been returned to them and they do not carry it with them, is aware that they cannot drive a motor vehicle for even a few metres.

ll. This is not a case of a citizen who did not know that there was a court order prohibiting them from driving, i.e. that they had not been notified, which could have an impact on the "unawareness of the prohibition" determining the error of Art. 14 of the Criminal Code, but rather a citizen who knew and was aware of it from when it was and until when. And it was on this last day that they were caught driving when it was obvious that they could not.

m. The error in the fulfilment and calculation of the terms of non-custodial sentences cannot be invoked to the benefit of the person committing the error of computation or calculation.

n. If the start and end date of the non-custodial sentence is fixed, no specific legal or mathematical knowledge is required in order to understand that the last day is included in the serving of the sentence.