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PROTECTED LEGAL RIGHTS IN OFFENCES AGAINST ROAD SAFETY: TOWARDS A MODEL OF SYSTEMIC FUNCTIONALISM

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Resumen: En el presente trabajo se examina el significado tradicional de lo que se conoce en la doctrina como «bien jurídico protegido», con especial referencia a los de carácter colectivo. A tal fin, se analiza la función que este tipo de bienes vienen desarrollando históricamente para el Derecho penal, así como los criterios que legitiman su selección. Por otro lado, se discute la naturaleza de la «seguridad vial» como bien jurídico colectivo y se analizan las herramientas legislativas que el sistema penal ofrece para su protección. De igual forma, se exponen las diferentes posturas dogmáticas que la doctrina propone para la protección de bienes colectivos. Finalmente, se discute si la redacción típica de determinados delitos contra la 'seguridad vial' permite asumir que sea realmente ésta el objeto de tutela penal. A tal fin, se evalúan las diferentes propuestas doctrinales y jurisprudenciales sobre el eventual bien jurídico tutelado en cada uno de esos tipos penales. Como conclusión, consideramos que, en tales delitos, por su configuración típica, no se protege realmente la seguridad vial, sino otros bienes jurídicos más difusos o de muy difícil justificación; o que, directamente, se prescinde de la figura del bien jurídico como criterio principal de punición.

Abstract: In the present work, we examine the traditional meaning of what is known in legal doctrine as the "protected legal interest," with a special focus on those of a collective nature. To this end, we analyse the historical role that such interests have played in criminal law, as well as the criteria that legitimize their selection. Additionally, we discuss the nature of "road safety" as a collective legal interest and analyse the legislative tools provided by the criminal justice system for its protection. Likewise, we present various doctrinal perspectives on the protection of collective interests. Finally, we explore whether the typical structure of certain offenses related to 'road safety' genuinely serves as the object of criminal protection. To this end, we examine different doctrinal proposals and jurisprudential decisions regarding the legal interest safeguarded in each of these criminal types. As a conclusion, we argue that in these offenses, due to their typical configuration, road safety is not genuinely protected. Instead, reference is made to diffuse legal interests that are challenging to justify, or, directly, the concept of the legal interest is effectively set aside as the primary criterion for punishment.

Palabras clave: Bien jurídico protegido, bienes colectivos, seguridad vial, delitos de peligro.

Keywords: Legally protected interest, collective interests, road safety, offenses of endangerment

1. INTRODUCTION

1.1. The concept of a legal right

The concept of legal right, as we know it today, does not appear in dogmatic history until the beginning of the 19th century (García Arroyo, 2022, pp. 5-6). According to this author, since then, the doctrine has been delimiting the content and concept of legal right to the sociological, philosophical and legal context in force at each specific time. Throughout this delimiting process, we have moved from a scientific and technical configuration (Birnbaum, 1834) to a legal conception that is configured as an evaluative creation of the legislator (Binding). In this way, the legislator determines the object of protection through the norm, and the legal right is therefore established in the norm. However, other currents point out that the legally protected interest is not created by the legal system, but is prior to the law, has its origin in social reality, and, in this sense, the legislator is limited to guaranteeing its protection (Von Liszt, 1925). In other words, the legal right has an extra-legal origin that the State protects through criminal law (García Arroyo, 2022). This debate is of great practical importance, since, if we place the legal right at the centre of the theory of crime, it will be the clearest limit to the *ius puniendi* of the State with transcendence to the moment prior to the creation of a criminal offence. However, from this point onwards, other positions have emerged that give the legal right a more spiritual character (Hegel, 1999). For these positions, which conceive the legal right as a value of culture, the crime will constitute an infringement of cultural values, and this automatically incapacitates the concept of legal right to comply with the limit to *ius puniendi* to which we referred (García Arroyo, 2022).

A legal right is what is considered at any given moment an "ideal value of the social order" (Jescheck, 1981, p. 351). That is to say, a value that transcends the concrete object in which it is embodied (Lacruz, 2015, p. 9). The identification of the (legal right) to be protected in each offence will be absolutely necessary for, among other things, the correct understanding and interpretation of that offence. For this reason, most doctrine places the protection of legal rights at the centre of the criminal justice system's mission (Maldonado, 2006, p. 25). In this work, we assume that the main function of the criminal law is to protect those legal rights that allow social coexistence. In other words, rights that, in the words of Abanto Vásquez (2006, p. 2) express the "most transcendent values for human coexistence in society". In this sense, the intervention of criminal law is only legitimised insofar as it fulfils such an important function (García Arroyo, 2022, p. 5). For this reason, we can only start from a material conception of the legal right.

1.2. Criteria for the selection of legal rights

According to Maldonado (2006, pp. 26-27), the option to criminally protect a legal right, and thus transform it into a criminal legal right, is based on a double consideration: merit and necessity. Deservingness has to do with the social significance or importance of the right insofar as it makes community living possible. The need, for its part, derives from the fact that the means of social control (formal or informal) to obtain the due respect and protection of this right are insufficient.

Two doctrinal perspectives have been used for the selection of the legal rights that, according to the above, should deserve and/or need criminal protection: sociological functionalist theories and constitutionalist theories (García Arroyo, 2022, p. 14). According to the former, the legal right is found in the sphere of social reality, and,

consequently, the delimiting criterion for the configuration of criminal offences is that of social harmfulness (Silva Sánchez, 2012, pp. 426 et seq.). This means that the commission of a criminal act would imply damage to the social system (García Arroyo, 2022, p. 18).

In contrast to the previous approaches, the majority of criminal doctrine considers that the safest source from which to extract or derive the legal rights is the Constitution (Álvarez García, 1991, pp. 20 et seq.; Bricola, 1963, pp. 15 et seq.; Escribá Gregori, 1980, pp. 157 et seq.; González Rus, 1983, p. 25; Roxin, 2008, p. 25). According to the more orthodox approaches (strict constitutionalist theories), the values enshrined in the Constitution must be reflected in parallel or coincidentally in criminal law. However, a sector of the doctrine considers that this orthodox position is insufficient to protect relevant legal rights (deservedness and necessity) in a social and democratic state governed by the rule of law. Such an approach, for example, would be insufficient for the protection afforded to road safety, as this is a right that is not explicitly enshrined in the Spanish Constitution. For this reason, doctrinal currents (broad constitutionalist theories) have emerged which maintain that the only way to legitimise penal intervention in certain sectors of social activity (such as road safety) is "by resorting to the implicit valuations that support life or psycho-physical integrity" (Caro Coria, 1997, p. 157). As we can see, strict constitutionalist theories propose a direct link between legal right and constitutional precept (Alvarez García, 1991, pp. 20 ff.; González Rus, 1983, pp. 23 ff.), while broad constitutionalist theories propose a programmatic link between the legal right and the Constitution (Berdugo Gomez de la Torre, 1991). However, while the first criterion is not acceptable by default, the present one is also criticised for its inadequacy, but for excess, since, in today's (risk) society, practically everything is related to or affects in one way or another the individual legal rights enshrined in the Constitution (life, health, freedom, etc.). Such reasoning, therefore, as Caro Coria (1997, p. 157) points out, can lead to extremes of uncertainty in the limits of criminal protection (which is precisely one of the distinctive features of criminal policy and criminal law in recent decades).

In this paper, we consider the Constitution to be the ideal frame of reference for the selection of criminally relevant legal rights, given that its validity constitutes the maximum exponent of social interest or consensus. However, seeking an eclectic thesis to the constitutional theses mentioned above (broad and restrictive), we agree with Hefendehl (2016, pp. 173 et seq.) that the Constitution will allow establishing the minimum requirements for the legitimacy of criminal offences. In other words, the interests directly enshrined in the Constitution must constitute the minimum content (or negative limit) that any penal system, at all times, must protect. However, more must be demanded of the broad constitutionalist thesis. For this reason, we consider that the programmatic link between the legal right and the Constitution should constitute the maximum content (or positive limit) of protection (Octavio de Toledo and Ubieto, 1990, p. 10 et seq.), but only if this legal right meets the aforementioned criteria of merit and necessity (Maldonado, 2006). In this sense, we agree with Berdugo (1990) insofar as it is necessary to link the criminal legal right to the social goals imposed by Article 9.2 EC, which includes the need to criminally protect certain elementary collective legal rights, such as, for example, road safety (Cerezo Mir, 2002, p. 56). Not only that, but following the more personalist thesis, the legal right must also be linked to Art. 10 EC, which, as is well known, refers to the dignity of the person, to the inviolable rights inherent to them and to the free development of the personality (as the basis of political order and social peace). The core idea of personalist approaches lies in "considering as legal rights those objects that human beings need for their free self-realisation", insofar as they "are

endowed with a content of value for the personal development of man in society" (see García Arroyo, 2022, p. 23). Therefore, the maximum content or positive limit of the object of criminal law protection is thus situated in "the conditions that make possible the free development of the individual through their participation in social life" (Silva Sánchez, 2012, p. 431).

1.3. Road safety as an intermediate legal right

The doctrine generally distinguishes between individual, supra-individual and collective legal rights, establishing a clear separation between the three categories (Lacruz López, 2017, pp. 9 et seq.). However, there is sometimes some confusion over the latter two. Some authors use both concepts interchangeably (Cabezas Cabezas, 2013, p. 254; Terradillos Basoco, 2001, p. 84). Others use different terminology to refer to rights that transcend the individual. These are universal (Hassemer and Muñoz, 2012, p. 108), state-controlled (Pérez-Sauquillo Muñoz, 2019, p. 52), institutionalised or immaterial (Rodríguez Montañés, 1994, pp. 297 ff.), macro-social (Terradillos Basoco, 2001, p. 78), diffuse (Doval Pais, 1994, pp. 42 ff.) or vague (Cerezo Mir, 2002, pp. 54-55). Finally, for other authors, supra-individual legal rights constitute the genus, while all of the above are the species (Pérez-Sauquillo Muñoz, 2019, p. 52). In our opinion, there is a difference between the two, which is based on the fact that supra-individual legal rights are based on the protection of the conditions necessary for the functioning of the system, while collective rights, as we will see, are based on their direct link with individual rights (Lacruz López, 2017, p. 14). In the first case, therefore, the legal right transcends the purely individual sphere and covers situations, interests or relations pertaining to the State or the Community. Collective legal rights, on the other hand, constitute a kind of servitude for the protection of individual legal rights. In other words, they will always be a function of the existence of the "individual *prius*" (Lacruz López, 2017, p. 13).

The doctrine usually defines road safety as a collective legal right (Alastuey Dobón, 2004, p. 88; Cerezo Mir, 2002, p. 58; Feijóo, 2005, p. 308). However, within collective legal rights, different approaches are usually identified, depending on the different forms of specific and specific disruption of these legal rights. The impairment of a legal right of a collective nature can be defined: a) as an actual impairment or injury to the legal right itself (i.e. road safety); b) as a state prior to the impairment of an individual legal right (i.e. life, physical integrity, etc.); or c) as a guarantee for a safe environment or for the peaceful disposal of property (i.e. traffic). In this sense, from a dogmatic point of view, the doctrine is not entirely clear as to what is really intended to be protected in offences against road safety. This will depend on how this legal right to be protected is defined or conceived. In reality, as Feijóo (2000, pp. 156-158) points out, the object of protection is always the same (individual legal rights), what varies is the technique of protection. According to this author, the same protection is always sought for legal rights of a personal nature, but by means of offences that have a different typical structure.

1.4. Crimes of endangerment as an emerging tool for the protection of collective legal rights

As is well known, the main technique of protection for legal rights of a collective nature is the creation of criminal offences with the structure of a dangerous offence*. Within this type of crime, a distinction is generally made between crimes of abstract danger and crimes of concrete danger (see Bacigalupo, 1999, pp. 101-102; Terradillos Basoco, 2001,

pp. 62-77), although in recent years the doctrine has been incorporating other intermediate dogmatic categories (Terradillos Basoco, 2001, pp. 78-79). In this type of crime, the danger is stated in reference to a legal right, which according to the doctrine, as we have seen, can have an individual (or individualisable), supra-individual or collective nature (Lacruz López, 2017, pp. 11-14; Terradillos Basoco, 2001, p. 78). Kindhäuser (2009) distinguishes between three forms of impairment of legal rights: injury, concrete danger and disturbance of the "conditions of safety that are indispensable for the carefree enjoyment of the rights" (p. 15). Other authors argue that crimes of abstract danger protect collective legal rights, while crimes of concrete danger preferentially protect individual legal rights (Cabezas Cabezas, 2013, pp. 103-104). Schmidt (1999), quoted by Feijóo (2005, p. 328), for his part, considers that the function of criminal offences with the structure of crimes of abstract danger is to create a system of safety for the enjoyment of individual legal rights. In similar terms, Mendoza Buergo (2002), following Kindhäuser (2009, p. 14), considers that, through crimes of abstract danger, what is being protected are "*sui generis* damages" with their own independent harmfulness. In other words, a *sui generis* damage is protected that consists of the impairment of the possibility of disposing of the legal rights in a safe way (Cerezo Mir, 2002). Jakobs (2006), in the context of functionalist theory, considers that it is necessary to resort to crimes of abstract danger in order to organise a certain area of social activity (such as traffic) through the standardisation of conduct. Therefore, these types of offences operate simply as offences of mere disobedience to the norm. In this sense, crimes of injury involve the arrogation of other people's areas of organisation (individual or supra-individual); those of concrete danger, the illegitimate lack of protection of these areas; while those of abstract danger, the improper organisation of one's own area of organisation.

With regard to the link between crimes of distress and the legal right protected, the adoption of one or other position on the latter (the legal right protected) has important implications in terms of the configuration and interpretation of the former (the crimes of distress), particularly with regard to the moment and requirements for their commission. Thus, it is possible to identify up to five ways in which crimes of endangerment can protect legal rights to which the doctrine grants a collective character: i) the direct protection of individual legal rights directly affected; ii) the direct protection of the collective legal right (as an autonomous right); iii) the instrumental protection of the collective legal right (as a prelude to the protection of other individual legal rights); iv) the protection (also instrumental) of the collective legal right (but) as a guarantee of a safe environment and; v) the mere protection of the norm. In the latter case, as is well known, no reference to the legal right is made, attributing the need for criminal punishment to the very reaffirmation of the validity of the norm. All of this, as we have already pointed out, in relation to the different forms of protection that our current criminal law, through the use of the offence of endangerment, grants to road safety.

2. CRIMINAL LAW PROTECTION OF ROAD SAFETY

2.1. The protection of individual legal rights

Individual legal rights, as is well known, are those whose bearer is the individual (life, health, honour, honour, freedom, physical integrity, etc.). These are rights whose protection belongs to the historical core of liberal criminal law. As we have already mentioned, there are authors who consider that road safety would fall within this historical core insofar as what is being directly protected by this type of crime is the integrity of all road users. Hefendehl (2001, p. 155), for example, considers traffic safety to be simply

the protection of the individual legal rights (such as life or health) of those involved in motor vehicle traffic. For this author, road safety is not a collective legal right, but rather an apparent legal right, since the ultimate protection of individual legal rights is what is sought through the exemption of this type of offence (Hefendehl, 2001, p. 155). Mañalich (2021, p. 81), on the other hand, distinguishes between two criminal typologies through which the protection of an individual legal right can be assumed: crimes of abstract-special danger and crimes of abstract-general danger. In what is of interest here, Mañalich (2021, p. 92) considers that the protection of an individual legal right against abstract danger is special when what is protected is the property as the object of a "disposition or non-dangerous use by a singularised owner of that same property". On the other hand, Mañalich (2021, p. 92) maintains that its protection is general when it is a matter of "ensuring the possibility of the generality of its holders to dispose of or take advantage of the (individual) legal right in a non-dangerous way".

In reality, as the offences against road safety are drafted and configured in our current Criminal Code, it is difficult to sustain some of the positions mentioned. Perhaps the first approach of Mañalich (2021), insofar as it refers to the non-dangerous disposition of individual rights, is the only possible way to consider that individual legal rights are directly protected in road safety offences. However, in these cases, in our opinion, we are dealing with a variant of what we have been calling here the enjoyment or provision of a safe environment, since Mañalich (2021) refers to a type of (special) protection of individual legal rights that is not based on their injury, but on the safe enjoyment by a holder.

2.2. Road safety as an autonomous collective legal right

As mentioned above, there are those who believe that (road) safety is in itself a legal right that must be protected by criminal law. For this reason, some authors consider that, in reality, criminal offences that protect a right of this nature are not really offences of danger, but of result, given that any activity that is dangerous in this way will involve a breach of safety and, in this sense, damage to the right. In this way, road safety becomes a right in its own right. In this sense, the mere commission of the dangerous behaviour implies *per se* the infringement of the protected right (e.g. road safety). In the words of Rodríguez Mourullo (1966, p. 148), "by configuring a specific crime of danger, the law converts the safety of another right into a legal right. Thus, the breach of the safety of this right already entails the infringement of the legal right specifically protected in the offence of endangerment, even if it does not yet entail more than a risk to another right. The safety of certain rights may already be a legal right in itself." According to this approach, collective safety constitutes a legal right of an autonomous nature, which justifies the raising of the barriers of punishment to conducts that are considered merely dangerous for individual legal rights, but which, in this way, constitute in themselves, the 'injury' of a collective legal right such as, for example, road safety (Corcoy Bidasolo, 1999, pp. 34-37). Therefore, if we understand road safety as an autonomous legal right, it no longer makes sense to speak of offences of danger, but of crimes of result, since any conduct considered dangerous would in itself imply a harm to the legal right of road safety.

However, we consider that this approach is not consistent with the theory of the legal right as a criterion for criminalisation, as this could lead to punishing conduct that would not be serious enough to constitute a criminal offence (Cerezo Mir, 2002).

2.3. Road safety as an intermediate legal right

According to Alastuey Dobon (2004, p. 88), the configuration of traffic safety as a legal right to be protected is due to the need to protect individual legal rights in advance. In similar terms, Lacruz López (2017, p. 12) considers that the recognition of collective legal rights is a necessary anticipation (in a social state) of the traditional protection granted to individual legal rights (typical of the liberal state). In the words of Feijóo (2005, p. 308), "the legal right of safety is thus dogmatically configured as a collective legal right with an individual referent". In this sense, we are dealing with (collective) legal rights that are subordinate or complementary to those of an individual nature. In other words, they protect interests or situations whose defence is considered necessary for the protection of "genuine individual or individualisable legal rights" (Terradillo Basoco, 2001, p. 89).

In contrast to the position taken in the previous section, the existence of a collective right is not understood now in an autonomous, independent way, but always as an expression of the presence of a series of individual legal rights whose barriers to protection are thus advanced. Here it is the endangering of individual legal rights that is punishable. In road safety offences, there is no doubt that the ultimate aim is to protect the life, physical integrity, health and even property of individuals (Feijóo, 2005). Feijóo (2000, pp. 156-158), in the terms already indicated, states that "traffic safety is an intermediate collective legal right with a clear individual referent". Therefore, in crimes of concrete danger, safety is thus constituted as an intermediate legal right whose political-criminal legitimacy lies precisely in the individual referent (Doval País, 1994, pp. 42 et seq.). For all these reasons, a broad sector of the doctrine rules out the possibility of giving collective legal rights an autonomous character, so that they can be the object of criminal protection without reference to individual legal rights (Cerezo Mir, 2002).

In the case of offences against road safety, as we have been maintaining, only the ultimate reference to individual legal rights (life, physical integrity, etc.) whose projection is served by collective legal rights (road safety) "gives the infringement of traffic regulations a sufficiently serious material content of wrongdoing to constitute a criminal offence" (Feijóo, 2000, p. 158).

2.4. Road safety as a guarantee of a safe environment

Schmidt (1999), quoted by Feijóo (2005, p. 328), rejects the dogmatic concept of legal right and uses instead a political-criminal concept prior to criminal law that limits the options of the criminal legislator. In this way, Schmidt (1999) introduces the term "safe environment" of the rights as an object of protection to refer to the conditions that guarantee the safe disposal of individual legal rights. According to this author, in line with Kindhäuser's theory, the function of criminal offences structured as crimes of abstract danger is to create a system of safety for the enjoyment of individual legal rights. In this way, the infringement of such norms leads to a situation of insecurity for all those (individual) legal rights that are to be provided with safety. This approach is in line with the position of Jakobs (2000, p. 163), insofar as he considers that "sufficient cognitive safety is a necessary condition for the enjoyment of the rights. Without such safety, the rights are not "good", and that is why it has been formulated that safety is itself a legal right. Therefore, there is no logical or evaluative difference between the existence of safety and the existence of the right". Therefore, as Mañalich (2021, p. 89) maintains, here the legal good receives direct protection against a form of impairment specifically

referring to the "conditions of its availability or rationally controllable use". In this sense, Mendoza Buergo (2002, p. 49) considers that the harmfulness of the conduct is projected in these cases in the affectation "to the possibility of disposing of the rights in a safe way". This author assumes that criminal law must not only protect the integrity of legal rights, but also "guarantee the possibility of a safe disposal of these rights". For this reason, he maintains that the criminalisation of conducts with the structure of crimes of abstract danger is intended to prevent "the impairment of the heteronomous conditions of safety necessary to enable the safe and carefree disposal of rights", while ensuring the peaceful enjoyment of rights is also the purpose of the punitive norm (p. 50). Feijóo (2005), for his part, in line with Mendoza Buergo (2002), states that, given that in certain areas, such as the one we are dealing with here, dangerous activities are permitted, the normative reference of Kindhäuser's theory is introduced to the "legally guaranteed conditions for the safe disposal of rights in each area or social subsystem" (p. 331).

Thus, as we can see, crimes of danger are also configured here as crimes of result, since the mere endangering of a legal right (in the terms indicated) already implies a crime of result (Mendoza Buergo, 2002). In this sense, the specific harmfulness of the behaviour typified in this type of crime is based on "the undermining of a conception of protection typified through the establishment of safety standards, the existence of which is necessary for a rational disposition of the rights" (Mendoza Buergo, 2002, p. 50). In other words, as this same author clearly indicates, "the abstract danger does not affect the integrity of the right, but rather the possibility of its use without concern". In this way, this relevant author continues: "whenever the typical behaviour is carried out, the legally guaranteed conditions for the safe disposal of rights are disturbed or undermined" (Mendoza Buergo, 2002, p. 51). Thus, the wrongfulness is exhausted in the mere realisation of the typical elements insofar as, according to Mendoza Buergo (2002, p. 51), they entail a "contradiction with previously established safety patterns of a general nature". Safety (as a protected legal right) is understood to be automatically harmed by the commission of conduct belonging to a certain class of behaviour previously defined as disruptive (or dangerous) *per se*. Professor Mendoza Buergo (2002) considers that confidence in safety is breached even if "no one is making use of the power to dispose of the legal right in question and even if it does not present characteristics that make it possible to affirm its capacity to effectively affect the safety of a right" (p. 51).

As we can see, Mendoza Buergo (2002, p. 50) attributes to safety a practical nature that materialises in "the objectively founded expectation of a subject, who judges rationally, of being able to use rights in a carefree manner, based on the absence of relevant conditions for injury". However, the problem is that (in the risk society) expectations of safety never tend to be objective, but rather the opposite (Del Rosal Blasco, 2009). This is perhaps why Professor Mendoza hastens to affirm that "behaviour that is totally devoid of danger is not supported by this idea because it does not affect safety" (p. 52). For this reason, this conception, as Mendoza Buergo (2002, p. 52) also states, "is not in a position to dispense with the concept of dangerousness or harmful relevance of the conduct if it is based on a notion of safety that is not conceived in a formal and subjective way".

Seen in this other way, this approach presents features that are consistent with the conception of the legal right that we will see below (Jakobs' systemic functionalism) insofar as, as Mendoza Buergo (2002, p. 51) also indicates here, it has a formal and

circular foundation. Ultimately, a breach of safety is identified with the mere non-compliance with the norm.

2.5. The validity of the norm as a right to be protected

In recent years, as some authors point out, the theory of the legal right to criminal prosecution has faced a major crisis, since with the criminal reforms undertaken in recent years, as we shall see, it is no longer easy to identify a relevant legal right (García Arroyo, 2022). This was denounced by Rodríguez Devesa (1971, p. 341) more than half a century ago, when he said that "the theory that every crime is the injury or endangerment of a legal right is untenable in the light of positive law, since it is unquestionable that there are numerous types of crime in which the concurrence, and therefore the demonstration, that such injury or endangerment has occurred is not required for the action to be considered punishable". As a result, the material concept of the legal right gives way to a formal conception based on a radically functionalist perspective. The theory of systemic functionalism, as is well known, holds that the real object of protection is the very validity of the penal norm itself (Jakobs, 1995, p. 56). The function of criminal law, therefore, is to guarantee what Jakobs (1996, p. 15) calls "normative identity". In other words, according to this thesis, the function of the penal norm is to protect the validity of the norm and not to protect legal rights. In this way, Jakobs replaces the traditional concept of protected legal right with that of *criminal-legal right*, which he defines as "the factual validity of norms, which guarantee that respect for rights, roles and legal peace can be expected". Therefore, for this author, any harmful result, such as, for example, the causing of a death, does not in itself constitute an injury to a criminal legal right (it is simply an injury to a right), but the opposition to the underlying norm that prohibits or punishes (avoidable) homicide.

In Spain, it seems that this position has not been accepted by the majority of the doctrine, which criticises this functionalist conception under the main argument that it leads to the loss of the material content of the criminal offence in crimes of abstract danger (Mendoza Buergo, 2001; Silva Sánchez, 2001). The clearest example is found, as we will have the opportunity to see, in the offence of leaving the scene of an accident, but also in the offence of refusal or even in the offence of driving without a licence. In this sense, two possibilities are offered for the justification and legitimisation of this type of offence (it is no longer possible to even allude to the theory of presumed danger or danger as a *ratio legis*). The first option leads us to adopt the formalism of Jakobs, for whom, as we already know, the only object of protection to which criminal law aspires is that of the validity of the norm itself. However, the (majority) doctrine considers this position to be unacceptable insofar as it affects the principles and guarantees of a penal system proper to a social state, eliminates the possibility of criticism of criminal law, limits the interpretative and systematising function and implies an unlimited expansion of criminal law (García Arroyo, 2022, pp. 3 et seq.). The other option is to understand that, as we will see below, despite all the above, what is actually protected in these offences are legal rights that have nothing to do with road safety.

3. OTHER LEGAL RIGHTS PROTECTED IN ROAD OFFENCES

In this section we will include a brief analysis of recent doctrinal and jurisprudential positions on whether road safety is the legal right (principal or exclusive) in some of the offences that fall under its heading.

3.1. Leaving the scene of the accident (Art. 382 bis CC).

The doctrine agrees that it is not at all easy to identify the legal right protected in this offence (Lanzarote Martínez, 2019, p. 6; Sánchez Benítez, 2020; Trapero Barreales, 2019). To this end, we can open up two possible interpretative avenues (or paths).

Firstly, the systematic location of this offence could lead one to think that the legal right is road safety, something that the doctrine, however, categorically denies (Orts Berenguer, 2019, p. 621; Lanzarote Martínez, 2019, p. 9; Sánchez Benítez, 2020). The only possible way to assume that road safety is the object of protection in this offence is that, to the extent that the driver who has caused an accident (and flees) leaves obstacles on the road, such conduct could pose a risk to traffic (Trapero Barreales, 2019, p. 41). However, the effort to classify this offence as a road safety offence is futile, as there is no dogmatic way of accepting such a conjecture. In no case does the criminal type (neither explicitly nor implicitly) demand such a requirement (Lanzarote Martínez, 2019, p. 7). Moreover, as stated in the very preamble of Organic Law 2/2019 of 1 March, we are dealing with a conduct that is "wilful and independent of previous reckless or fortuitous conduct". In other words, the typical (wilful) conduct is to leave the scene of the accident, and the involvement (reckless or fortuitous) in the accident constitutes an objective element of the type (Trapero Barreales, 2019). Therefore, such a bizarre interpretation would lead us to assume that we are dealing with the conduct foreseen in Art. 385 CC, but in a reckless or even fortuitous modality.

Secondly, we can turn to the reasons that the legislator alludes to in the preamble of the aforementioned law, where he refers to: i) "the intrinsic evil" of those who know that they are leaving behind someone who could be injured or even dead; ii) "the lack of solidarity with the victims"; and iii) "the legitimate expectations" of other road users (pedestrians, cyclists or drivers). In this sense, the legal interests that the legislator suggests protecting, according to different doctrinal positions, are, respectively, a certain morality, the principle of solidarity and, to a greater extent, the administration of justice.

In the first case, as we can see, allusion is made to ethical, moral and even religious or spiritual elements to justify the *ratio legis* of this crime, which, in the words of Lanzarote Martínez (2019, p. 8), would be assuming "a terminology more typical of a judgement of censure from Ethics or Morals than from Law". And in this sense, what better than to refer to Roxin himself (2006, p. 63) to denounce that, as practically all doctrine also maintains, the criminal protection of moral, religious or ideological norms is incompatible with the conception of a democratic State under the rule of law. De Vicente Martínez (2019) states that this crime "expresses a purely ethical devaluation [...] disconnected from the protection of a legal right, which is the essential mission of the law" (p. 130), which would lead "to the already superseded identification between crime and sin" (p. 131).

In the second case, a sector of doctrine and, above all, of jurisprudence, speaks of the violation of a duty of human solidarity that is raised to the rank of a legal duty (Supreme Court Ruling 167/2022, 24 February). The SC recognises that this offence punishes "indifference to the situation created, failing to comply with the duties imposed by Article 51 of RDL 6/2015". However, to the extent that solidarity is imposed by law, we can no longer speak of solidarity, but of duty (Bustos Rubio, 2019, p. 6). As Carbonell Mateu (2019, p. 273) points out, "the idea of solidarity is an evanescent concept and cannot be

conceived as a legal obligation, because if a duty of solidarity is imposed, one is acting not out of solidarity but out of submission to the norm". Moreover, it is not really possible to speak of solidarity (according to the meaning of the term itself), since the criminal offence in no case requires that the victims (or the rest of the road users) are in need of help (Sánchez Benítez, 2020).

Finally, a sector of doctrine, in the light of comparative law, has connected this offence with crimes against the Administration of Justice, or more broadly, with the powers of the Administration and the police to control and investigate traffic accidents (Benítez Ortúzar, 2018, p. 67; De Vicente Martínez, 2019, p. 135; Castro Moreno, 2019, pp.14-1; Sánchez Benítez, 2020; Trapero Barreales, 2019, p. 41). The typical structure of this offence only allows us to assume that the real legal right is the exercise of the powers of the public administration, which translates into ensuring the identification of the driver and clarifying the facts (Sánchez Benítez, 2020). Therefore, we would really be dealing with a crime against the Administration of Justice whose correct location would have been Title XIX of Book II of the Criminal Code (Castro Moreno, 2019, p. 20). However, if the legal right of this offence is configured in this way, it means that such a duty (to remain at the scene of the crime) - which is imposed on a person who could have committed a crime (e.g. against road safety or against the life or physical integrity of persons) - is an exception to the general rule of impunity for self-hiding (Lanzarote Martínez, 2019, p. 7), which, in this sense, may affect relevant constitutional principles (Sánchez Benítez, 2020). In fact, some authors maintain that the systematic placement of this crime among crimes against road safety is intentional, and its aim is precisely to try to overcome the serious problems of unconstitutionality that its placement among crimes against the administration of justice could entail (Sánchez Benítez, 2020).

In short, it is clear that, in this offence, due to its typical configuration, road safety is not protected, nor are other individual legal rights that could be affected. Nor is it possible to assume that wickedness or lack of solidarity is punished. Here, what is punished is mere disobedience to an administrative norm (De Vicente Martínez, 2019). The truth is that, in our opinion, we are dealing with a crime that lacks any protected legal right (beyond the mere infringement of the norm), which is consistent with systemic functionalism which, as we have seen, dispenses with any reference to the legal right and places the legitimacy of the criminal system in the defence of the norm itself.

3.2. Refusal (Art. 383 CC)

In this case, part of the doctrine and case law make it clear that the main legal right protected in this offence is not road safety, but the principle of authority (Teijón Alcalá and Cámara Arroyo, 2022). The SC affirms that the legal right directly protected is the principle of authority, as in the offences of disobedience. Road safety is only indirectly protected. For the SC, the substantive content of this infringement does not lie primarily in the protection of road traffic, but in the principle of authority. The SC maintains that the attack on road safety is not a determining factor and, therefore, the refusal of a person who does not show symptoms of being under the influence of drugs or alcoholic beverages is punishable by application of Art. 383 CC. (Supreme Court Ruling 163/2018 of 6 April).

However, as Teijón Alcalá and Cámara Arroyo (2022) point out, to the extent that the law (nor the Supreme Court) does not require the subject who refuses the tests to show

any kind of influence, it cannot be assumed that road safety is being protected, even indirectly or indirectly. The refusal (e.g. in a routine check) of a driver who has not consumed a single gram of alcohol (or of certain substances), according to the high court's own interpretation, already fulfils the requirements of the criminal offence. In these cases, as can easily be seen, there is not the slightest danger to road safety, since the driver who refuses (due to stubbornness or obstinacy) maintains their psychophysical driving abilities intact. Here, the only legal right protected is the principle of authority, which makes this criminal offence a crime of disobedience. In other words, in a formal offence where mere disobedience of the norm is equally punishable.

3.3. Driving without a licence (Art. 384 CC)

As is well known, this offence covers three typical forms of driving without a licence: 1. After loss of validity due to total loss of points; 2. After being preventively or definitively deprived by a court decision; 3. Without ever having obtained it. In general, despite the differences that exist in each of these modalities, the typical configuration of each of them leaves serious doubts as to whether the legal right protected is road safety. However, the SC does consider that the legal right protected here is road safety "as an intermediate right directly affected" as well as the life and physical integrity of the subjects "as indirectly or mediately protectable rights that could be harmed by dangerous driving" (Supreme Court Ruling 480/2012, 28 June). However, as in the previous cases, the criminal offence does not require either explicitly or implicitly that road safety - or the individual legal rights referred to by the SC - be affected. Here, the legislator (supported a posteriori by the SC) simply assumes that such conduct, on the basis of its standardisation, is dangerous to the legal right. However, as we have just mentioned, the dangerousness of the behaviour does not play any role in the type of wrongfulness, but is presumed from the action itself because it belongs to a class of conduct considered dangerous in itself. Here, as we see, the presumption is twofold: it is presumed that driving without a licence (in its different typical modalities) affects (or determines) the (in)ability or (in)capacity of the subject to drive (endogenous effect); and that this, in turn, represents, in any case, a danger to road safety (exogenous effect). And all this, despite the fact that in the specific case the driver's conduct is completely without danger to the object of protection, in this case road safety (Mendoza Buergo, 2001).

In cases where the driver drives a vehicle without ever having obtained a driving licence, it is argued that, as they have not (formally) accredited their psychophysical conditions and ability to drive, they would not be able to do so, which could pose a risk to road safety (making the maximum abstraction). However, as Feijóo (2005 p. 320) states, a "driver may be unlicensed, but have experience behind the wheel of a car that makes their driving no more dangerous than that of a licensed driver". In cases of licence withdrawal (by court sentence or administrative decision), the legislator considers that the offences that have led to the withdrawal of the licence themselves prove the loss of the ability to drive safely, which consequently poses a risk to road safety. This is how the SC understands it when it states that in these cases there is "evidence of dangerous behaviour for road traffic as evidenced by the infringements committed" by the driver (Supreme Court Ruling 480/2012, of 28 June). This is irrespective of whether or not the withdrawal of the licence is actually related to behaviour that is indicative of a lack of skill. Therefore, we cannot assume that the legal right protected in these offences is road safety, since, as Maldonado (2006, p. 30) indicates, the different conducts described in Art. 384 CC include (formally) both cases in which their execution constitutes a real risk

to the legal right - because the driver lacks the skills required for driving - and those cases in which, depending on the specific case (e.g., a driver who maintains his psychophysical capacities and skills intact) this does not happen.

For this reason, the majority doctrine classifies the different typical modalities of driving without a licence as mere offences of disobedience. And this despite the fact that the SC insists that "the wording of the norm does not allow us to speak of a crime of disobedience but of a crime against road safety" (Supreme Court Ruling 480/2012, 28 June). In similar terms, Supreme Court Ruling 803/2013 of 31 October states that "we are not dealing with a crime of disobedience or defiance of an administrative decision, but with a crime against road safety". In reality, as has already been mentioned *ut supra*, insofar as risk does not constitute a normative element of the offence that needs to be proven in the specific case - as evidenced by the fact that cases in which the driver de facto maintains all the necessary skills to drive are punished - we cannot speak of a crime of endangerment or that the legal right that is the object of protection is road safety.

Therefore, we can conclude this chapter by stating that what the three offences analysed here really have in common is that they are purely formal offences in which the mere disobedience of an administrative norm is punished.

4. CONCLUSIONS

The protection of relevant legal rights is not only historically established as the main and essential mission of criminal law (De Vicente Martínez, 2019, p. 130), thus legitimising criminal intervention in areas such as trafficking, but has also allowed the doctrine to develop its critical work and has been one of the main criteria for the interpretation of the different types of criminal offences (Hefendehl, 2016, pp. 173 et seq.). In this sense, Galán Muñoz (2005, p. 185), considers that only by establishing the concept of the legal right as the basic fundamental reference point for the creation and interpretation of criminal law can we sustain a critical and dynamic conception of criminal law as an instrument of social control, which is what, ultimately, will allow us to speak of a legal system that guarantees in accordance with fundamental principles and rights. For Hefendehl (2007, pp. 173 et seq.) the legal right is the indispensable basis of any rational legal-criminal system, since it allows both the interpretation of the criminal type (intrasystemic function) and the critical function.

However, in recent years, as some authors have warned, the field of road safety has become one of those "sensitive areas" in which, technically speaking, the risk paradigm is penetrating, with the consequent proliferation of criminal offences under the guise of dangerous crimes (Del Rosal Blasco, 2009, p. 33). In the latest legislative reforms (and judicial interpretations) on the matter, especially in the last decade, it has been observed how the legislator has incorporated formal abstract 'danger' crimes into the Criminal Code in which, as Del Rosal Blasco (2009) points out, it is extremely "difficult to justify the elementary content of harm, even if presumed, of the behaviour that serves as the basis for the offence" (p. 33). These offences are dominated by the total absence of a material content of wrongdoing. This implies a breach of the traditional principle of exclusive protection of legal rights or the principle of offensiveness (*nullum crimen sine iniuria*) which, as mentioned above, is a requirement for criminal law in a social and democratic state governed by the rule of law (García Arroyo, 2021, p. 3). And it is precisely the condition of social state enshrined in our Constitution that allows us to

advance the barriers of punishment for the protection of collective legal rights, such as road safety, in order to ensure the early protection of individual legal rights that are normally affected in this particular sphere of social activity (Lacruz López, 2017). Consequently, behaviour that is not in any way capable of damaging or endangering relevant legal rights (refusal to drive or driving without a licence) is not justified in this sense because, as we have said, it lacks this element of material wrongdoing. Let alone those other conducts in which moral aspects are punished, or where, directly, a specific legal right does not exist or cannot be defined (crime of escape), which leads us (irremediably) to a criminal model more typical of systemic functionalism. That is to say, a penal system in which the figure of the legal right (as such) is totally dispensed with or where it is drawn with such ambiguous, imprecise and inconsistent contours that it loses all its feature to exercise the aforementioned functions. The criminal offences that we have analysed here, in the sense indicated by Torío López (1981, p. 837), can only be doctrinally configured as crimes of disobedience or, in Binding's sense, as criminalised administrative injustices, or administrative offences subject to criminal law, which implies the administrativisation of criminal law, the loss of its status as an ultima ratio and the breakdown of the principles of proportionality and harmfulness that inspire this branch of law (Lanzarote Martínez, 2019, p. 6; Sánchez Benítez, 2020, p. 28; Trapero Barreales, 2019, p. 49).

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